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UNITED STATES – DEFINITIVE SAFEGUARD MEASURES ON IMPORTS OF CIRCULAR WELDED CARBON QUALITY LINE PIPE FROM KOREA

AB-2001-9

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

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

United States, *Appellant/Appellee*
Korea, *Appellant/Appellee*

Australia, *Third Participant*
Canada, *Third Participant*
European Communities, *Third Participant*
Japan, *Third Participant*
Mexico, *Third Participant*

AB-2001-9

Present:

Lacarte-Muró, Presiding Member
Bacchus, Member
Abi-Saab, Member

I. Introduction and Factual Background

1. The United States and Korea appeal from certain issues of law and legal interpretations in the Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* (the "Panel Report").[1]

2. The dispute concerns the imposition of a definitive safeguard measure by the United States on imports of circular welded carbon quality line pipe ("line pipe"). This measure was imposed following an investigation conducted by the United States International Trade Commission (the "USITC"), a body comprised of six Commissioners that is charged with conducting such investigations under United States law. On 29 July 1999, the USITC initiated the safeguard investigation into imports of line pipe.[2] The USITC finally determined that "circular welded carbon quality line pipe … is being imported into the United States in such increased quantities as to be a substantial cause of serious injury or the threat of serious injury".[3] Three Commissioners made a finding of serious injury. Two Commissioners made a finding of threat of serious injury.[4] The affirmative vote of these five Commissioners constituted the majority supporting the "affirmative determination"[5] of the USITC. A single Commissioner made a negative determination that there was

[1]WT/DS202/R, 29 October 2001.

[2]G/SG/N/6/USA/7, 6 August 1999.

[3]Exhibit USA-17 submitted by the United States to the Panel, *Circular Welded Carbon Quality Line Pipe*, Investigation No. TA-201-70, USITC Publication 3261 (December 1999) (the "USITC Report"), p. I-3.

[4]USITC Report, p. I-3, footnote 2.

[5]Under Section 202 of the United States Trade Act of 1974, as amended, the USITC can make an affirmative or a negative determination of serious injury or the threat thereof.

neither serious injury nor threat of serious injury. The views of that Commissioner are not part of the USITC determination. In the light of these findings, the USITC determined that "line pipe … is … a substantial cause of serious injury or the threat of serious injury". [6]

3. In its investigation, the USITC identified a number of factors, apart from increased imports, which had caused serious injury or threat of serious injury to the domestic line pipe industry. [7] However, the USITC concluded that increased imports were "a cause which is important and not less than any other cause" and that, therefore, the statutory requirement of "substantial cause" [8] was met. [9] On 8 November 1999, the United States notified the Committee on Safeguards, pursuant to Article 12.1(b) of the *Agreement on Safeguards*, that the USITC had reached an affirmative finding of serious injury or threat thereof caused by increased imports. [10]

4. On 8 December 1999, the USITC announced its remedy recommendation. The two Commissioners who concluded that the industry was suffering threat of serious injury recommended a different measure from that recommended by the three Commissioners who concluded that the industry was suffering serious injury. [11] On 24 January 2000, the United States made a supplemental notification under Article 12.1(b), which essentially summarized the Report of the USITC investigation dated 22 December 1999, *Circular Welded Carbon Quality Line Pipe* [12] (the "USITC Report"). This supplemental notification contained detailed information on the measures recommended by the USITC to the President of the United States. [13] Also on 24 January 2000, the United States and Korea held consultations in Washington, D.C., on the USITC Report. [14]

5. On 11 February 2000, the President of the United States issued a press release announcing the application of a safeguard measure on imports of line pipe. The press release contained details of the measure announced by the President, which was different from the measures proposed by the USITC. Korea learned of the measure announced by the President through this press release. [15]

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[6]USITC Report, p. I-3. The United States has confirmed that this is the determination made by the USITC. (United States' appellant's submission, para. 20)

[7]USITC Report, pp. I-27–I-32, and pp. I-49 and I-50, respectively.

[8]Section 202(b)(1)(B) of the United States Trade Act of 1974, as amended, provides: "For purposes of this section, the term 'substantial cause' means a cause which is important and not less than any other cause."

[9]USITC Report, pp. I-20, I-22 and I-44.

[10]G/SG/N/8/USA/7, 11 November 1999.

[11]USITC Report, pp. I-4 and I-5.

[12]*Supra*, footnote 3.

[13]G/SG/N/8/USA/7/Suppl.1, 25 January 2000.

[14]Panel Report, para. 7.310.

[15]*Ibid*., para. 7.307.

6. By Proclamation of the President of the United States, dated 18 February 2000, the United States imposed a definitive safeguard measure on imports of line pipe in the form of a duty increase for three years applicable on imports above 9,000 short tons from each country, effective as of 1 March 2000 (the "line pipe measure").[16] The duty increase was 19 percent *ad valorem* in the first year, and 15 percent in the second year. In the third year, the duty increase will be 11 percent. The line pipe measure applies to imports from all countries, including Members of the World Trade Organization (the "WTO"), but excludes imports from Canada and Mexico.

7. On 22 February 2000, pursuant to Article 12.1(c) of the *Agreement on Safeguards*, the United States notified the Committee on Safeguards of its decision to apply a safeguard measure on imports of line pipe.[17] The line pipe measure applied by the United States as of 1 March 2000 was the same as that set out in the press release of 11 February 2000 and was found by the Panel to "differ[] substantially"[18] from the measures recommended by the USITC.

8. On 13 June 2000, Korea requested consultations with the United States pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") and Article 14 of the *Agreement on Safeguards*, with regard to the line pipe measure.[19] On 28 July 2000, Korea and the United States held the requested consultations, but failed to resolve the dispute. Consequently, on 14 September 2000, Korea requested the establishment of a panel to examine the matter.[20]

9. The Panel was established on 23 October 2000 to consider a complaint by Korea with respect to the line pipe measure.[21] The Panel considered claims by Korea that, in imposing the line pipe measure, the United States acted inconsistently with Articles I, XIII and XIX of the GATT 1994, and with Articles 2, 3.1, 4, 5, 7.1, 8.1, 9.1, 11 and 12.3 of the *Agreement on Safeguards*.[22]

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[16]"Proclamation 7274 of 18 February 2000 – To Facilitate Positive Adjustment to Competition From Imports of Certain Circular Welded Carbon Quality Line Pipe", United States Federal Register, 23 February 2000 (Volume 65, Number 36), pp. 9193–9196; Panel Report, para. 7.176.

[17]G/SG/N/10/USA/5, 23 February 2000; G/SG/N/10/USA/5/Rev.1, G/SG/N/11/USA/4, 28 March 2000.

[18]Panel Report, footnote 243 to para. 7.313.

[19]WT/DS202/1, G/L/388, G/SG/D10/1, 15 June 2000.

[20]WT/DS202/4, 15 September 2000.

[21]WT/DS202/5, 22 January 2001.

[22]Panel Report, para. 3.1.

10. The Panel Report was circulated to Members of the WTO on 29 October 2001. The Panel concluded that the line pipe measure is inconsistent with certain of the provisions of the GATT 1994 and the *Agreement on Safeguards*. Specifically, the Panel found that:

- the line pipe measure is not consistent with the general rule contained in the *chapeau* of Article XIII:2 of the GATT 1994 because it has been applied without respecting traditional trade patterns;

- the line pipe measure is not consistent with Article XIII:2(a) of the GATT 1994 because it has been applied without fixing the total amount of imports permitted at the lower tariff rate;

- the United States acted inconsistently with Articles 3.1 and 4.2(c) of the *Agreement on Safeguards* by failing to include in its published report a finding or reasoned conclusion either (i) that increased imports have caused serious injury, or (ii) that increased imports are threatening to cause serious injury;

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

- the United States did not comply with its obligations under Article 9.1 of the *Agreement on Safeguards* by applying the measure to developing countries whose imports do not exceed the individual and collective thresholds contained in that provision;

- the United States acted inconsistently with its obligations under Article XIX of the GATT 1994 by failing to demonstrate the existence of unforeseen developments prior to the application of the line pipe measure;

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

– the United States acted inconsistently with its obligations under Article 8.1 of the *Agreement on Safeguards* to endeavour to maintain a substantially equivalent level of concessions and other obligations.[23]

11. The Panel rejected Korea's claims that:

– the line pipe measure is inconsistent with the provisions of Article 5 of the *Agreement on Safeguards*;

– the line pipe measure violates Article XIX:1 of the GATT 1994 and Articles 5.1 and 7.1 of the *Agreement on Safeguards* because the measure was not limited to the extent and the time necessary to remedy the injury and allow adjustment;

– the United States' finding of increased imports was inconsistent with Article 2.1 of the *Agreement on Safeguards* and Article XIX of the GATT 1994;

– the United States violated Articles 4.1(c) and 4.2 (a), (b) and (c) of the *Agreement on Safeguards* because the data relied on by the USITC was flawed in that it contained data from other industries;

– the USITC erred in finding serious injury because the downturn in the state of the domestic industry was merely temporary, and the condition of the industry was improving at the end of the period of investigation;

– the United States acted inconsistently with its obligations under Articles 2 and 4.1(b) of the *Agreement on Safeguards* by basing a finding of threat of serious injury on an allegation, conjecture or remote possibility;

– the failure of the United States to include relevant confidential information in a published determination constitutes a violation of Articles 3.1 and 4.2(c) of the *Agreement on Safeguards*;

– the line pipe measure does not satisfy the requirements of emergency action of Article 11 (and the preamble) of the *Agreement on Safeguards* or Article XIX of the GATT 1994;

– the United States violated Articles 2 and 4 of the *Agreement on Safeguards* by exempting Canada and Mexico from the measure; and

[23]Panel Report, para. 8.1.

– the United States violated Articles I, XIII:1 and XIX of the GATT 1994 by exempting Canada and Mexico from the measure. [24]

12. The Panel concluded that, to the extent that the United States has acted inconsistently with the provisions of the *Agreement on Safeguards* and the GATT 1994, the United States has nullified or impaired the benefits accruing to Korea under those two Agreements. [25] The Panel recommended that the Dispute Settlement Body (the "DSB") request the United States to bring the line pipe measure into conformity with the *Agreement on Safeguards* and the GATT 1994. [26] The Panel declined Korea's request, under Article 19.1 of the DSU, that the Panel provide a specific suggestion on ways in which the United States could implement the recommendations made in the Panel Report. [27]

13. On 6 November 2001, the United States notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a notice of appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). [28] For scheduling reasons, on 13 November 2001, the United States notified the Chairman of the Appellate Body and the Chairman of the DSB of its decision to withdraw the notice of appeal filed on 6 November 2001. [29] The withdrawal was made pursuant to Rule 30(1) of the *Working Procedures*, and was conditional on the right to file a new notice of appeal. On 19 November 2001, the United States again notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a new notice of appeal pursuant to Rule 20 of the *Working Procedures*. [30] On 20 November 2001, the United States filed an appellant's submission. [31] On 26 November 2001, Korea filed an other appellant's submission. [32] On 7 December 2001, the United States and Korea each filed an appellee's submission. [33] On 14 December 2001, Australia, Canada, the European Communities, Japan and Mexico each filed a third participant's submission. [34]

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[24]Panel Report, para. 8.2.

[25]*Ibid*., para. 8.3.

[26]*Ibid*., para. 8.4.

[27]*Ibid*., paras. 8.5 and 8.6.

[28]WT/DS202/7, 6 November 2001.

[29]WT/DS202/8, 13 November 2001.

[30]WT/DS202/9, 19 November 2001.

[31]Pursuant to Rule 21(1) of the *Working Procedures*.

[32]Pursuant to Rule 23(1) of the *Working Procedures*.

[33]Pursuant to Rules 22 and 23(3) of the *Working Procedures*.

[34]Pursuant to Rule 24 of the *Working Procedures*.

14. The oral hearing in the appeal was held on 15 January 2002. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

II. Arguments of the Participants and Third Participants

A. *Claims of Error by the United States – Appellant*

1. Necessity of a Discrete Determination Either of Serious Injury or of Threat of Serious Injury

15. The United States recalls that the USITC determined that line pipe is being imported in such increased quantities as to be a substantial cause of serious injury or the threat of serious injury.[35] The Panel found that the United States violated Articles 3.1 and 4.2(c) of the *Agreement on Safeguards* by failing to include in the USITC Report a finding either (i) that increased imports have caused serious injury, or (ii) that increased imports are threatening to cause serious injury.[36] According to the United States, the Panel erred in finding that Articles 3.1 and 4.2(c) require a discrete finding of serious injury or of threat of serious injury.

16. The United States explains that the competent authority conducting safeguards investigations in the United States is the USITC, a body comprised of six Commissioners. By law, the affirmative or negative vote of a majority of the Commissioners constitutes the determination of the USITC. No provision of United States law requires the Commissioners to reach a consensus as the basis for either an affirmative or a negative determination. In the safeguards investigation underlying this appeal, three of the six USITC Commissioners found that the domestic industry was *seriously injured* and two found that the domestic industry was *threatened with serious injury*. On the basis of this vote, the USITC determined that the subject line pipe was "being imported into the United States in such increased quantities as to be a substantial cause of *serious injury or the threat of serious injury*".[37] The United States stresses that this determination, together with in-depth explanations of all of the Commissioners' findings and reasoned conclusions, was published by the USITC in the USITC Report.

17. The United States submits that the USITC Report complies fully with the express requirements of Article 3.1 of the *Agreement on Safeguards*. The Commissioners who made a determination of serious injury and the Commissioners who made a determination of threat of serious

[35]USITC Report, p. I-3.

[36]Panel Report, para. 7.271.

[37]USITC Report, p. I-3. (emphasis added)

injury fully explained their findings and conclusions. Although the Panel framed its analysis in terms of the requirements of Article 3.1, essentially it interpreted one of the basic conditions for the application of a safeguard measure contained in Article 2.1. By requiring a discrete determination either of serious injury or of threat thereof, the Panel essentially read into Article 2.1 a substantive requirement that does not exist in the *Agreement on Safeguards*. The United States argues that the Panel's decision is not supported by an analysis of the ordinary meaning of the *Agreement on Safeguards*, according to which a determination either of serious injury, or of threat of serious injury, *or of both*, satisfies Article 2.1.

18. The United States further submits that the conditions of serious injury and threat of serious injury are closely interrelated, and that neither Article XIX of the GATT 1994 nor the *Agreement on Safeguards*, except for the particular situation contemplated in Article 5.2(b) relating to quota modulations, distinguishes procedural or substantive effects between the two conditions. The *Agreement on Safeguards* certainly does not support the rigid division between the concepts of serious injury and threat of serious injury found by the Panel. The definitions of "*serious injury*" and "*threat of serious injury*" describe two variations of the same basic condition. The *injury* component of the two definitions is the same, and competent authorities are required to evaluate the same enumerated factors set out in Article 4.2(a) in all injury investigations. The definitions of "serious injury" and "threat of serious injury", therefore, do not require that a competent authority composed of multiple decision-makers (such as the USITC) make a discrete finding either of serious injury or of threat thereof. In the view of the United States, the word "or" connecting the two concepts in Article 2.1 is used in the inclusive sense, so that a finding either of serious injury, or of threat of serious injury, or both, would satisfy this basic condition of Article 2.1.

19. The United States also contends that Article 5 of the *Agreement on Safeguards* does not require that Members make a discrete finding of serious injury or of threat of serious injury. The first sentence of Article 5.1 makes clear that the condition of the industry and its need for adjustment, and not the characterization of that condition as serious injury or threat of serious injury, establish the benchmark by which a Member determines the nature of the safeguard measure required. The United States adds that the necessity of a discrete finding also cannot be drawn from Article 5.2(b), the only provision concerning the remedy that does not apply in the case of threat of serious injury.

20. The United States further stresses that the *Agreement on Safeguards* leaves entirely to Members' discretion how they structure their competent authorities and the decision-making process in safeguards investigations. According to the United States, by construing the *Agreement on Safeguards* to require a discrete finding by a competent authority either of serious injury or of threat of serious injury, the Panel disregarded the principle "*in dubio mitius*", an accepted principle of treaty

interpretation, and infringed unnecessarily on the manner in which the United States has internally structured the decision-making process of its competent authority.

2. Non-Attribution of the Injurious Effects of Other Factors to Increased Imports

21. According to the United States, the Panel based its finding of inconsistency with Article 4.2(b) of the *Agreement on Safeguards* upon an incorrect legal interpretation. The United States argues that the Panel simply presumed, without a factual analysis, that the USITC did not comply with Article 4.2(b) in this case. This presumption was based on the Appellate Body's findings in *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* ("*US – Lamb* ")[38], and in *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* ("*US – Wheat Gluten* ")[39], to the effect that the USITC had failed in those cases to ensure that it did not attribute injury caused by other factors to imports. Moreover, the United States contends that the Panel misread these previous Appellate Body Reports. In those Reports, the Appellate Body emphasized that Article 4.2(b) does not prescribe a particular methodology that Members must apply. Rather, the relevant question for determining compliance with the causation requirements of the *Agreement on Safeguards* is whether the Member, under whatever methodology it applies, identifies, distinguishes, and assesses the injurious effects of factors other than the imports.

22. The United States contends that, despite thorough analysis in the USITC Report showing that the United States identified and distinguished the effects of other factors, and that it did not attribute injury caused by other factors to imports, the Panel failed even to acknowledge or review these findings and analyses. Instead, the Panel "rejected offhand"[40] the references the United States made to the USITC findings, based on the Panel's view that the USITC's relative injury causation analysis could not possibly have entailed separation and assessment of the injurious effects of the factors other than imports. Hence, in the view of the United States, the Panel's conclusions are "faulty".[41]

23. For these reasons, the United States requests that the Appellate Body reverse the Panel's finding of a violation of Article 4.2(b). The United States argues, furthermore, that given the Panel's failure to make a sufficient analysis of the USITC's determination, there is an insufficient basis for the Appellate Body to complete the legal analysis. If the Appellate Body nevertheless decides to complete the analysis that the Panel failed to undertake, it should find, as the Panel would have done

[38]Appellate Body Report, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001.

[39]Appellate Body Report, WT/DS166/AB/R, adopted 19 January 2001.

[40]United States' appellant's submission, para. 12.

[41]*Ibid*.

had it conducted a proper analysis, that the findings and reasoned conclusions in the USITC Report demonstrate that the United States did not misattribute injurious effects of other factors to imports.

3. Adequate Opportunity for Prior Consultations and Obligation to Endeavour to Maintain a Substantially Equivalent Level of Concessions

24. The United States maintains that the Panel relied on an incorrect legal interpretation in finding that the United States failed to comply with both Articles 12.3 and 8.1 of the *Agreement on Safeguards*. The Panel concluded that Article 12.3 requires a Member proposing to apply a safeguard measure to "ensure" that exporting Members "obtained" the information that Members must review in consultations pursuant to that Article. The text imposes no such obligation. Article 12.3 requires a Member to provide "adequate opportunity" prior to the application of a safeguard measure for consultations with Members having a substantial export interest in the product in question, with a view to reviewing certain information. In the view of the United States, this standard is met, as the Appellate Body has recognized[42], when the Member with a substantial export interest obtains the relevant information.

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

26. In the view of the United States, the Panel derived its finding of a breach of Article 8.1 exclusively from its invalid conclusion on Article 12.3. Accordingly, the United States argues that the Appellate Body should also reverse the Panel's finding on Article 8.1.

4. Exclusion of "*de minimis*" Developing Country Exporters from the Line Pipe Measure

27. According to the United States, the Panel erred by interpreting Article 9.1 of the *Agreement on Safeguards* as requiring that any safeguard measure specifically list the developing country Members to which the measure is not applied. The text of the article conditionally prohibits application of a measure "as long as" a developing country Member accounts for less than three

[42] Appellate Body Report, *US – Wheat Gluten*, *supra*, footnote 39, para. 137.

percent of total imports. However, it is silent as to *how* a Member may comply with that obligation, and certainly does not require a list of the developing country Members covered by Article 9.1. The United States stresses that the only support cited by the Panel for this proposition was the suggested formats of the Committee on Safeguards, which by their terms carry no interpretative authority. [43]

28. The United States believes that it met the Article 9.1 requirement by establishing a mechanism—a 9,000 ton exemption for each country—under which the 19-percent safeguard duty on imports did not apply to any developing country Member accounting for less than three percent of total imports. The Panel concluded that the fact that developing country Members were subject to the exemption meant that the line pipe measure did, in fact, "apply" to them. This conclusion does not represent a valid interpretation of the requirement that a safeguard measure "not be applied" to a developing country Member accounting for more than three percent of imports. "Application" of the exemption provided for in the line pipe measure certainly cannot breach Article 9.1, as the exemption was the administrative device designed to prevent additional duties from being applied to exports of developing country Members. Nor could it be a breach of Article 9.1 to apply the supplemental duty to developing country Members with more than 9,000 tons in imports, because these Members would exceed the three-percent threshold. Accordingly, the United States believes that the Appellate Body should reverse the Panel's conclusion that the line pipe measure was inconsistent with Article 9.1.

B. *Arguments of Korea – Appellee*

1. Necessity of a Discrete Determination Either of Serious Injury or of Threat of Serious Injury

29. In Korea's view, the United States' appeal on Articles 3.1 and 4.2(c) of the *Agreement on Safeguards* is premised on the argument that there is no distinction in either *procedural* or *substantive* effect between a determination of serious injury and one premised on a threat of serious injury. Korea believes that, contrary to the argument put forward by the United States, the interpretation of Articles 2.1 and 4.2(a) in accordance with the ordinary meaning of the terms of those provisions in their context and in the light of their object and purpose, supports the finding of the Panel. According to Korea, the additional argument of the United States to the effect that the Panel's finding infringes on the United States' sovereignty "is irrelevant" [44] and should be rejected.

[43] G/SG/1, *Formats for Certain Notifications under the Agreement on Safeguards*, 1 July 1996.

[44] Korea's appellee's submission, paras. 15 and 39.

2. Non-Attribution of the Injurious Effects of Other Factors to Increased Imports

30. Korea states that the United States' appeal with respect to the USITC causation determination is based on two arguments. First, the United States argues that the Panel's finding is based on an erroneous interpretation of Article 4.2(b) and an incorrect reading of Appellate Body Reports. Second, the United States argues that the Panel did not provide sufficient basis for a conclusion that the United States failed to comply with Article 4.2(b).

31. According to Korea, the first argument of the United States is based on a selective and distorted reading of the Appellate Body Reports. The second argument of the United States ignores the fact that the Panel fully assessed the causation analysis of the USITC and concluded that it failed to meet the requirements of Article 4.2(b). The assertion of the United States that the USITC distinguished the serious injury attributable to increased imports and that attributable to other factors is, according to Korea, an unsubstantiated *ex post* effort at "curing the flaws"[45] of the USITC investigation.

32. Korea also does not agree with the United States that the Appellate Body should refrain from completing the analysis if it were to find that the Panel erred in its finding on the USITC causation determination.

3. Adequate Opportunity for Prior Consultations and Obligation to Endeavour to Maintain a Substantially Equivalent Level of Concessions

33. With respect to the alleged violation of Articles 12.3 and 8.1, Korea notes that the United States announced the safeguard measure through a press release of the White House on 11 February 2000. The contents of the measure had never been communicated to Korea before that date. A purpose of consultations under Article 12.3 is to reach an understanding on ways to achieve the objective set out in Article 8.1. After the press release, which was the "announcement of a *fait accompli*"[46], there was thus no practical possibility to have consultations to achieve that objective. Hence, Korea submits that it was deprived of an "adequate opportunity" under Article 12.3.

4. Exclusion of "*de minimis*" Developing Country Exporters from the Line Pipe Measure

34. With respect to the issue of the exclusion of "*de minimis*" developing country exporters under Article 9.1 of the *Agreement on Safeguards*, Korea contends that the United States makes an

[45]Korea's appellee's submission, para. 48.

[46]*Ibid*., para. 80.

artificial distinction between "non-application" and "not be applied". The United States' argument that the line pipe measure failed to meet the first test but somehow met the second is misconceived.

35. Korea states that, irrespective of such an artificial distinction, the United States' safeguard measure applies to imports from developing country Members. The United States' measure violates the legal right of developing country Members arising from Article 9.1 because it fails to ensure that the measure does not apply to imports from developing countries whose share of imports of line pipe does not exceed three percent.

36. Korea argues that the Appellate Body should uphold the Panel's findings on Article 9.1. If the Appellate Body reverses any finding of the Panel, Korea requests the Appellate Body to complete the analysis on any such issues.

C. *Claims of Error by Korea – Appellant*

1. Article XXIV of the GATT 1994

37. Korea requests the Appellate Body to reverse the Panel's finding that the United States is entitled to rely on Article XXIV of the GATT 1994 to justify the violation of the obligation contained in Article 2.2 of the *Agreement on Safeguards*.

38. Korea submits that the Panel erred in finding that the United States met the conditions governing the application of Article XXIV of the GATT 1994. As stipulated in Article XXIV:4, the purpose of a free-trade area is, on the one hand, to "facilitate trade" between constituent members. On the other hand, this should be done in a manner "not to raise barriers to the trade" with third countries. The Panel totally ignored this balance in its application of Article XXIV as it did not take into consideration the second part of the purpose of a free-trade area. In its Report in *Turkey – Restrictions on Imports of Textile and Clothing Products* ("*Turkey – Textiles*"), the Appellate Body found that 'the purpose set forth in paragraph 4 [not to raise barriers to the trade of other Members] informs the other relevant paragraphs of Article XXIV".[47]

39. Korea argues that, on the basis of its analysis of the balance between different purposes of a free-trade area, the Appellate Body also provided in *Turkey – Textiles* a clear guideline for the application of Article XXIV as an exception to other obligations under the GATT 1994: 'First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union" (a free-trade area in the present case) "that *fully* meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV" (sub-paragraphs 8(b) and 5(b) in the

[47] Appellate Body Report, WT/DS34/AB/R, adopted 19 November 1999, para. 57.

present case). And, "second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue."[48] Korea argues that the Panel ignored this clear guideline and proceeded to a "perfunctory or totally flawed"[49] analysis exempting the line pipe measure from the "necessity test" instead of assessing whether the requirements of sub-paragraphs 8(b) and 5(b) were *fully* met.

40. Korea further submits that the Panel erred in finding that a defence based on Article XXIV of the GATT 1994 "cures" a violation of Article 2.2 of the *Agreement on Safeguards*. The Panel ignored the fact that the *Agreement on Safeguards* constitutes a *lex specialis vis-à-vis* the general obligations arising from the GATT 1994. The obligations arising under the *Agreement on Safeguards* may go beyond the obligations arising from the GATT 1994. In the event of conflict, Korea argues, the provisions of the *Agreement on Safeguards* prevail pursuant to the General interpretative note to Annex 1A of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*").

41. Korea further contends that footnote 1 to the *Agreement on Safeguards* does not apply to Article 2.2 and that, therefore, the basic prerequisites for an Article XXIV defence are not satisfied. The Panel ignored the fact that both the location of footnote 1 and the Appellate Body jurisprudence support Korea's argument that footnote 1 does not extend to Article 2.2 of the *Agreement on Safeguards*. It is clear that, in its Report in *Argentina – Safeguard Measures on Imports of Footwear* ("*Argentina – Footwear (EC)*"), the Appellate Body found that the first sentence of footnote 1 establishes the scope of the *entire* footnote.[50] Korea argues that if footnote 1 does not apply to measures taken by individual members of customs unions, *a fortiori* it cannot be relevant to actions taken by individual members of free-trade areas, which are not even mentioned in the footnote.

2. "Parallelism" Between the Investigation and the Application of the Line Pipe Measure

42. Korea submits that its parallelism claim before the Panel was relatively simple. Essentially, in Korea's view, there was a gap between the scope of the injury investigation by the United States and the scope of its safeguard measure. Korea's claim that the measure was in violation of parallelism was *never* challenged by the United States before the Panel. Nevertheless, the Panel (i) imposed a "flawed standard" for the establishment of a *prima facie* case[51]; (ii) committed a serious error in

[48]Appellate Body Report, *Turkey – Textiles*, *supra*, footnote 47, para. 58. (emphasis added)

[49]Korea's other appellant's submission, para. 18.

[50]WT/DS121/AB/R, adopted 12 January 2000, para. 106 and footnote 95 thereto.

[51]Korea's other appellant's submission, paras. 65, 69, 100 and 106.

treating arguments and evidence submitted by the parties; and (iii) introduced an arbitrary and flawed *minimum condition* for Korea to establish a *prima facie* case.

3. The Requirement to Demonstrate *a priori* the Necessity of the Line Pipe Measure

43. Korea submits that the Panel's finding regarding the requirement to demonstrate *a priori* the necessity of the line pipe measure, if sustained, would seriously undermine the fundamental discipline on the extent of safeguard measures contained in Article 5.1, first sentence, of the *Agreement on Safeguards*. This is particularly worrisome, since the obligation contained in the first sentence of Article 5.1 is the *only* discipline on the extent of safeguard measures other than quantitative restrictions. Such undermining of the discipline would lead to abuse and would prejudice the rights of WTO Members. Furthermore, the Panel itself was conscious of the flaws inherent in its own finding. The Panel, therefore, released the United States from the obligation to make an *ex ante* demonstration that the United States *ensured* compliance with Article 5.1.

4. The Proportionality of the Line Pipe Measure

44. As with the previous issue, Korea submits that the United States should have demonstrated that its measure was consistent with Article 5.1, first sentence, of the *Agreement on Safeguards* at the time it imposed the measure. However, even assuming that the United States could make such a demonstration *ex post facto*, the United States nevertheless failed to demonstrate that it complied with the discipline contained in the first sentence of Article 5.1.

45. Korea submits that, first of all, the United States failed to identify correctly the goal to be met through the imposition of the safeguard measure. The United States did not specify whether the goal was to *prevent* or to *remedy* serious injury. Furthermore, in Korea's view, the United States failed to ensure that the measure addressed only the serious injury attributed to increased imports.

46. *Assuming* that an *ex post facto* demonstration is permitted and that the United States correctly identified the goal of the measure, Korea submits that the United States nevertheless failed to provide sufficient *ex post* arguments. The *ex post* explanation failed to address certain key factors, such as the improving market situation and the effect of "operating leverage". In short, according to Korea, the United States' *ex post* demonstration was far from meeting the standard established in *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea*

– *Dairy*") of "*ensur[ing]* that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment." [52]

47. Korea contends that the Panel made a serious error in ignoring important flaws in the *ex post* demonstration. As a consequence, under the Panel's assessment, the obligation under Article 5.1, first sentence, was reduced to a "theoretical, hollow discipline". [53]

D. *Arguments of the United States – Appellee*

1. Article XXIV of the GATT 1994

48. The United States requests the Appellate Body to uphold the Panel's finding that the United States met the requirements to invoke Article XXIV of the GATT 1994 as a defence against alleged inconsistencies with Articles I, XIII, and XIX of the GATT 1994 and Article 2.2 of the *Agreement on Safeguards*.

49. The United States emphasizes that it established that the North American Free-Trade Agreement ("NAFTA") meets all the requirements for the formation of a free-trade area under Article XXIV. Korea provides no basis to reverse the Panel's conclusions in this regard. Korea's only argument with regard to the requirements of Article XXIV:8(b) is that the Panel was required to consider the preliminary analysis and conclusions in a draft report of the Committee on Regional Trade Agreements. However, the Panel correctly placed no weight on this draft document, which is still subject to change. Korea also argues that the NAFTA safeguard exclusion is inconsistent with the Article XXIV:5(b) requirement not to increase restrictive regulations on trade with Members not party to a free-trade agreement. The United States stresses, however, that the NAFTA did not change the applicability of its parties' safeguards laws as they apply to imports from non-parties.

50. The United States recalls that the NAFTA provides for the exclusion of imports from NAFTA partners from safeguard measures, under certain circumstances. This requirement was one of the measures to eliminate duties and other restrictive regulations of commerce on substantially all trade necessary to form the free-trade area. Korea incorrectly asserts that the Panel misapplied the Appellate Body's reasoning in *Turkey – Textiles* by not evaluating whether the NAFTA safeguards exclusion by itself was "necessary" to the formation of the free-trade area. Article XXIV dictates that trade liberalizing measures be considered in *aggregate* in evaluating whether failure to adopt them would prevent formation of a free-trade area. According to the United States, applying the "necessity

[52] Appellate Body Report, WT/DS98/AB/R, adopted 12 January 2000, para. 96. (emphasis added)

[53] Korea's other appellant's submission, paras. 144 and 175.

test" *separately* to each measure implementing a free-trade area would lead to the absurd result of preventing the liberalization steps envisaged by Article XXIV.

51. The United States further supports the Panel's finding that, in the light of the relationship between Article XIX of the GATT 1994 and the *Agreement on Safeguards*, the Article XXIV defence applies also to Article 2.2 of the *Agreement on Safeguards*. The Panel correctly found confirmation for this conclusion in the text of the last sentence of footnote 1 to the *Agreement on Safeguards*. The text of that last sentence explicitly applies both to the *Agreement on Safeguards* as a whole and to free-trade areas. The United States asserts that this reading is not inconsistent with the Appellate Body Report in *Argentina – Footwear (EC)*, which did not address the last sentence of footnote 1.

2. "Parallelism" Between the Investigation and the Application of the Line Pipe Measure

52. According to the United States, the Panel correctly found that Korea failed to establish a *prima facie* case of inconsistency with the so-called "parallelism" between Articles 2.1 and 2.2 of the *Agreement on Safeguards*. Korea did not demonstrate that the USITC failed to perform an injury analysis specific to imports from non-NAFTA sources. Despite the undisputed existence of an exhaustive discussion of the relevant data on imports from sources other than Canada and Mexico in footnote 168 of the USITC Report, Korea's claim rests on the bare assertion that the USITC non-NAFTA analysis has "no legal significance". The United States contends that the Panel was correct in rejecting this assertion, and in finding that footnote 168 clearly formed part of the USITC's published determination and contained findings by the USITC.

53. The United States submits that Korea attempts to "elaborate" its presentation to the Panel with entirely new arguments.[54] Even if the Appellate Body were to consider these arguments, they are unconvincing. Korea incorrectly characterizes the USITC's analysis of imports from sources other than Canada and Mexico as merely a "conditional statement". The Panel's finding that the content of footnote 168 formed the basis for a finding that non-NAFTA imports caused serious injury to the domestic industry contradicts this view. The introductory statement to footnote 168 merely explained that, in conjunction with the analysis of all imports, the USITC conducted an analysis of imports from non-NAFTA sources, and that both analyses led to an affirmative injury determination. Thus, according to the United States, the Panel correctly found that the USITC conducted a separate analysis of imports from non-NAFTA sources, and that Korea failed to demonstrate otherwise.

[54]United States' appellee's submission, paras. 6 and 77.

3. The Requirement to Demonstrate *a priori* the Necessity of the Line Pipe Measure

54. Korea challenges the Panel's finding that Article 5.1, first sentence, does not require a Member to issue an explanation of its compliance with that provision at the time that it takes a safeguard measure. In reply, the United States argues that the text of Article 5.1 confirms the Panel's finding that "justification" of certain types of quantitative restrictions is explicitly required in the second sentence, but that there is no such requirement in the first sentence, which is generally applicable to all safeguard measures.

55. The United States submits that the Appellate Body endorsed this interpretation in *Korea – Dairy.*[55] The United States contends that Korea criticizes the Panel's interpretation of Article 5.1 as "loose" and suggests that a more "rigorous" approach is necessary. However, Korea cites no authority for the view that the *Agreement on Safeguards* may be interpreted by anything other than customary rules of treaty interpretation, which the Panel applied. Korea also argues that Members bear an obligation to "ensure" compliance with Article 5.1, which in Korea's view, creates an obligation to issue an explanation of that compliance at the time of taking a safeguard action. However, ensuring conformity with obligations is part of the basic good faith with which Members undertake all WTO commitments. The obligation to ensure conformity has never been found to create a separate obligation to issue a public explanation, at the time of taking a measure, of how that measure conforms to WTO obligations. This interpretation does not prejudice Members whose exports are subject to a safeguard measure. Their position is no different from that of any Member concerned about another Member's conformity with its WTO obligation. Indeed, the United States argues, Members whose exports are subject to a safeguard measure are in a *better* position, because compliance with Article 5.1 is determined with reference to the public findings of the competent authorities.

4. The Proportionality of the Line Pipe Measure

56. In the view of the United States, Korea's challenge of the Panel's finding that Korea failed to demonstrate that the United States applied the line pipe safeguard beyond the extent necessary to prevent or remedy serious injury and to facilitate adjustment is not convincing. Korea first contends that the United States was required to indicate whether it based the measure either on serious injury or on threat of serious injury because the Panel found that a discrete determination was necessary. As the United States showed in its appellant's submission, the Panel erred in this finding. In any event, no such distinction is necessary to comply with Article 5.1, which puts a limit on the extent of

[55]Appellate Body Report, *supra*, footnote 52, paras. 98 and 99.

application of a safeguard measure. According to the United States, "[i]f the limit implicated by a finding of serious injury is different from the limit implicated by a finding of threat, one measure that was less [extensive] than [either limit] could comply with both, thus removing any need to specify the basis for the measure."[56]

57. With respect to Korea's argument that the United States failed to apply its measure only to that portion of the serious injury caused by imports, the United States contends that the Appellate Body has established, in past disputes, that the term "serious injury" in Article 4.2(b) refers to injury caused by both increased imports and other factors.[57] Thus, "serious injury" in Article 5.1, first sentence, is the entirety of the serious injury experienced by the domestic industry, and not just the injury attributable to increased imports. In any event, the United States asserts that it has shown that the line pipe measure did not address injury caused by factors other than increased imports. However, the Panel bore no obligation to analyze whether the explanation given by the United States as to compliance with Article 5.1 was sufficient, since Korea failed to present a *prima facie* case on its Article 5 claim. Korea has also failed to identify any deficiency in the explanation given by the United States. Finally, Korea contends that the Panel erred in rejecting import statistics for the period after application of the safeguard measure as evidence of the effect of the measure. In this regard, the United States submits that, as the Panel pointed out, in the absence of information on other factors that could have been affecting imports, it could not assume that the safeguard measure was responsible in part or in full for observed import patterns.

E. *Arguments of the Third Participants*

1. Australia

58. Australia supports Korea's appeal against the Panel's finding that there was no requirement for the United States to demonstrate, at the time of imposition, that the line pipe measure was "necessary to prevent or remedy serious injury and to facilitate adjustment", as required by Article 5.1, first sentence, of the *Agreement on Safeguards*. Because of the exceptional nature of safeguard measures, and because of the requirement that they also facilitate adjustment, there is an *ex ante* obligation on a Member to ensure that the affected Members are in a position to verify and monitor compliance with the obligations of Article 5.1, first sentence, of the *Agreement on Safeguards*. Without a sufficient demonstration of why the applied measure is necessary in terms of the level of the remedy and how it will contribute to the process of adjustment, the obligations stipulated in Article 5.1 may be

[56]United States' appellee's submission, para. 9.

[57]Appellate Body Report, *US – Wheat Gluten*, *supra*, footnote 39, para. 70; Appellate Body Report, *US – Lamb*, *supra*, footnote 38, para. 166.

undermined. Australia submits that, in order to ensure the protection of the rights of affected Members, the onus of this demonstration must be on the Member applying the safeguard measure.

59. Australia also supports the arguments presented by Korea, Japan and the European Communities with respect to causation, parallelism and Article XXIV of the GATT 1994.

2. Canada

60. Canada requests the Appellate Body to reject Korea's appeal and to find that the exclusion of a free-trade area partner from a safeguard measure is not inconsistent with Article 2.2 of the *Agreement on Safeguards* or with Articles I, XIII or XIX of the GATT 1994. The Panel correctly found that the United States is entitled to rely on Article XXIV of the GATT 1994 as a defence against Korea's claims under Articles XI, XIII and XIX. The United States demonstrated that the NAFTA established a free-trade area within the meaning of Article XXIV and Korea has not presented any pertinent evidence to the contrary. The NAFTA safeguard exclusion was part of the package of trade liberalizing measures introduced in accordance with Article XXIV:8(b) and, therefore, was necessary for the formation of a free-trade area consistent with Article XXIV. Canada agrees with the United States that nothing in the Appellate Body Report in *Turkey – Textiles* requires an analysis of whether each trade liberalizing measure introduced in forming a free-trade area or customs union is, by itself, necessary to reach the Article XXIV:8 threshold.

61. Canada further submits that the Panel correctly found that Article XXIV also applies as a defence against claims under Article 2.2 of the *Agreement on Safeguards*. The last sentence of footnote 1 to the *Agreement on Safeguards* confirms the applicability of Article XXIV against claims brought under the *Agreement on Safeguards*. The Appellate Body's findings regarding the exclusion of customs union members from a safeguard measure in *Argentina – Footwear (EC)* were not based on the last sentence of footnote 1. Finally, Canada contends that this sentence does not specifically mention customs unions and thus also applies to free-trade areas.

3. European Communities

(a) Necessity of a Discrete Determination Either of Serious Injury or of Threat of Serious Injury

62. The European Communities believes that the Panel's finding on the necessity of a discrete finding either of serious injury or of threat of serious injury is correct and requests the Appellate Body to uphold it. The United States has not demonstrated that "serious injury" and "threat thereof " may coexist and are not, therefore, different concepts. Coexistence is, in any event, not dispositive of the issue of whether a "discrete" finding by domestic authorities is required. In addition, the European

Communities submits that, contrary to what the United States seems to suggest, the requirement of a discrete finding of "serious injury" or of "threat of serious injury" is not incompatible with entrusting "multiple decision makers" with safeguards enforcement at the national level.

63. The European Communities takes issue with the United States' proposition that the distinction between serious injury and threat of serious injury is without legal significance. First, this proposition would render redundant the two definitions in Article 4.1 of the *Agreement on Safeguards*. Second, Article 5.1 assumes a difference between the concepts, since a measure "necessary" to prevent serious injury may differ in type and extent from a measure "necessary" to remedy a serious injury that has already materialized. Third, a finding of "serious injury" and a finding of "threat of serious injury" are likely to have different implications for any extension of a safeguard measure under Article 7.2 of the *Agreement on Safeguards*: in the case of an initial finding of threat of serious injury, it would be difficult to maintain that materialization of injury is still imminent after three years. The European Communities submits, therefore, that an extension of a measure would be difficult to justify in such circumstances.

(b) Non-Attribution of the Injurious Effects of Other Factors to Increased Imports

64. The European Communities requests the Appellate Body to uphold the Panel's finding with respect to causation. The Panel's approach was justified and consistent with previous Appellate Body Reports. In particular, the Panel correctly concluded that the United States authorities' discussion of the "other factors" included no indication as to how those authorities complied with the obligation, in the second sentence of Article 4.2(b) of the *Agreement on Safeguards*, to ensure that the injurious effect of the other factors *were not included* in the assessment of the *injury ascribed to increased imports*. The European Communities adds that the United States, while insisting that the Panel did not examine the USITC Report, does not indicate where those questions are addressed and answered in the USITC Report.

65. The European Communities believes that the Panel was also correct in criticizing the United States authorities for immediately determining whether there was a link between the increased imports and the serious injury, without first attempting to separate out injury caused by other factors.

(c) Article XXIV of the GATT 1994

66. With respect to the exclusion of NAFTA imports from the line pipe measure, the European Communities submits that the Panel's flawed findings should be reversed on appeal. The defence of Article XXIV of the GATT 1994 is not available in this case because the test set out by the Appellate

Body in *Turkey – Textiles*[58] is applicable, and the United States has not met this test. In *Argentina – Footwear (EC)*, the Appellate Body confirmed the applicability of this test in this type of situation.[59] The Panel "hastily dismissed"[60] this test as irrelevant. The imposition of a new safeguard measure in the present case amounted precisely to the *introduction* of a trade restriction having an adverse effect on the trade of other Members. According to the European Communities, the argument that the exclusion of its NAFTA imports from the measure was authorized as part of the elimination of the restrictions necessary to establish a free-trade area is contradicted by the facts. The European Communities stresses that the United States retains discretion to apply safeguard measures on NAFTA imports.

67. As for the relationship between Article XXIV of the GATT 1994 and the *Agreement on Safeguards*, the European Communities submits that footnote 1 to the *Agreement on Safeguards* does not affect the applicability of Article 2.2 of the *Agreement on Safeguards* to this case. The Panel was wrong to dismiss the Appellate Body's characterization of the scope of footnote 1 to the *Agreement on Safeguards* in *Argentina – Footwear (EC)* as applying only in the case of a customs union taking a safeguard measure.[61] The Panel failed to recognize that the various sentences of footnote 1 constitute context for one another. By stating that the Appellate Body's finding does not provide any guidance for the interpretation of the last sentence of footnote 1, in the view of the European Communities, the Panel effectively reduced the status of that Appellate Body Report to less than an unadopted panel report under the GATT 1947.

(d) "Parallelism" Between the Investigation and the Application of the Line Pipe Measure

68. The European Communities submits that, contrary to Article 2 of the *Agreement on Safeguards*, the United States did not respect the parallelism between the exporting Members included in the investigation and those included in the scope of the measure applied as a result of the investigation. Contrary to what was required by the Appellate Body in *US – Wheat Gluten*[62], the United States authorities did not make a finding that all imports, excluding those from NAFTA parties, were responsible for serious injury. On the contrary, footnote 168 to the USITC Report at best includes a hypothetical finding and, therefore, has no significance. The European Communities argues that, consistent with previous findings of the Appellate Body, the United States, therefore,

[58]Appellate Body Report, *supra*, footnote 47, para. 58.

[59]Appellate Body Report, *supra*, footnote 50, paras. 109 and 110.

[60]European Communities' third participant's submission, para. 86.

[61]Appellate Body Report, *supra*, footnote 50, paras. 106–108.

[62]Appellate Body Report, *supra*, footnote 39, para. 98.

violated Article 2.2 of the *Agreement on Safeguards* by excluding Canada and Mexico from the scope of the safeguard measure.

(e) The Requirement to Demonstrate *a priori* the Necessity of the Line Pipe Measure

69. In the European Communities' view, the Panel's interpretation of Article 5.1 of the *Agreement on Safeguards* and the Panel's rejection of Korea's claim under that provision are flawed. Accordingly, the European Communities submits that they should be reversed on appeal.

70. According to the European Communities, Article 5.1 of the *Agreement on Safeguards* embodies an obligation to ensure that the measure applied is *commensurate* with the goals of preventing or remedying serious injury and of facilitating adjustment. Although this does not always require a "clear justification" (which is reserved by the second sentence of Article 5.1 to a very specific case), it still means that the respect for that obligation must be explained. The European Communities submits that providing such an explanation is incumbent upon the investigating authorities, since respect for this obligation is part of the conditions upon which safeguard action is authorized under the *Agreement on Safeguards*.

4. Japan

(a) Adequate Opportunity for Prior Consultations and Obligation to Endeavour to Maintain a Substantially Equivalent Level of Concessions

71. Japan submits that the Panel correctly found that the United States failed to provide an adequate opportunity for prior consultations. The United States did not disclose the proposed measure to Korea prior to or during the consultations held in Washington, D.C. on 24 January 2000. Korea learned of the details of the proposed measure through a White House press release issued on 11 February 2000. The Panel correctly found that a press release does not ensure that exporting Members obtain the necessary detailed information on the proposed measure, since a press release may not even be accessible to all Members having a substantial interest. Japan, therefore, supports the Panel's findings and requests the Appellate Body to uphold the Panel's conclusion.

(b) Article XXIV of the GATT 1994

72. Japan requests the Appellate Body to rule that the Panel erred in finding the exclusion of Canada and Mexico from the remedy to be consistent with Article XXIV of the GATT 1994. Japan argues that the Panel misinterpreted the relationship between Article XIX and Article XXIV of the GATT 1994, as it failed to assess objectively whether safeguard measures are restrictive regulations

of commerce in the sense of Article XXIV:8(b). The list of exceptions in Article XXIV:8(b) is not exhaustive, since otherwise even security exceptions pursuant to Article XXI would not be allowed in a free-trade area. Hence, safeguard measures, which are permitted only as exceptional emergency actions, should be included among those exceptions. As provided in Article 2.2 of the *Agreement on Safeguards*, safeguard measures must be applied to a product irrespective of its source. Japan adds that the Panel failed to make an objective assessment explaining why it considered the information provided by the United States and the information submitted to the Committee on Regional Trade Agreements in order to establish a *prima facie* case that the NAFTA is in compliance with Article XXIV of the GATT 1994.

5. Mexico

73. Mexico requests the Appellate Body to reject Korea's claims with respect to the conditions for invoking Article XXIV of the GATT 1994 and the relationship between that Article and the *Agreement on Safeguards*. According to Mexico, NAFTA is clearly a free-trade area that fully meets the requirements of Articles XXIV:8(b) and XXIV:5(b) of the GATT 1994.

74. Mexico emphasizes that the right to be excluded from the application of a safeguard measure forms part of the elimination of the "other restrictive regulations of commerce" referred to in Article XXIV:8(b) of the GATT 1994. This right does not make the "duties" and the "other restrictive regulations of commerce" applied to Korea any more rigorous. Mexico contends that Korea improperly interpreted the "necessity test" elaborated by the Appellate Body in *Turkey – Textiles*.[63] If WTO Members had to demonstrate that the elimination of a non-tariff restriction was the determining factor in establishing a free-trade area, in Mexico's view, it would be highly improbable that they could ever invoke Article XXIV.

75. Mexico also submits that Korea's claims with respect to the inapplicability of footnote 1 of the *Agreement on Safeguards* are unfounded. The last sentence of that footnote does not distinguish between customs unions and free-trade areas. According to Mexico, the ordinary meaning of that sentence clearly establishes that the entire *Agreement on Safeguards* cannot affect the rights of parties to a free-trade area.

[63] Appellate Body Report, *supra*, footnote 47, para. 58.

III. Issues Raised in this Appeal

76. The measure at issue in this dispute is the safeguard measure applied by the United States on imports of circular welded carbon quality line pipe ("line pipe"). At the oral hearing in this appeal, Korea confirmed that this safeguard measure alone is the measure at issue in this dispute, and that Korea is not challenging any provision of United States law *as such*.[64] Rather, Korea is challenging only the application of United States law through the line pipe measure and the investigation leading to the imposition of the measure.

77. With this in mind, we confine our rulings in this appeal to the safeguard measure applied, effective as of 1 March 2000, on imports of line pipe, in the form of an increased duty applicable for three years, to imports of more than 9,000 short tons per year from each country (the "line pipe measure"). The main features of the line pipe measure have been described earlier in this Report.[65] The duty increase was 19 percent *ad valorem* in the first year, and 15 percent in the second year. In the third year, the duty increase will be 11 percent. The line pipe measure applies to imports from all countries, including WTO Members, but excludes imports from Canada and Mexico.

78. With respect to the line pipe measure, we will address the issues raised in this appeal in the following order:

(a) whether the Panel erred in finding that the United States acted inconsistently with its obligation under Article 12.3 of the *Agreement on Safeguards* to provide an adequate opportunity for prior consultations;

(b) whether the Panel erred in finding that the United States, by failing to comply with its obligations under Article 12.3 of the *Agreement on Safeguards*, had also failed to comply with its obligation to endeavour to maintain a substantially equivalent level of concessions and other obligations, as required by Article 8.1 of the *Agreement on Safeguards*;

(c) whether the Panel erred in finding that the United States did not comply with its obligations under Article 9.1 of the *Agreement on Safeguards* by applying the line pipe measure to developing countries whose imports do not exceed the *de minimis* individual and collective thresholds contained in that provision;

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[64]Korea's response to questioning at the oral hearing.

[65]See, *supra*, para. 6.

(d) whether the Panel erred in finding that the United States acted inconsistently with Articles 3.1 and 4.2(c) of the *Agreement on Safeguards* by failing to include in its published report a distinct finding or reasoned conclusion either (i) that increased imports have caused serious injury, or (ii) that increased imports are threatening to cause serious injury;

(e) whether the Panel erred in finding that Korea had not established a *prima facie* case that the United States violated Articles 2 and 4 of the *Agreement on Safeguards* by including Canada and Mexico in the determination under Article 2.1 of the *Agreement on Safeguards* but excluding Canada and Mexico from the scope of the line pipe measure;

(f) whether the Panel erred in finding that the United States was entitled to rely on Article XXIV of the GATT 1994 as a defence to Korea's claims under Articles I, XIII and XIX of the GATT 1994 and Article 2.2 of the *Agreement on Safeguards* regarding the exclusion of imports from Canada and Mexico from the scope of the line pipe measure;

(g) whether the Panel erred in finding that the United States acted inconsistently with Article 4.2(b) of the *Agreement on Safeguards* by not adequately explaining in the USITC Report how it ensured that injury caused by factors other than increased imports was not attributed to increased imports;

(h) whether the Panel erred in finding that the United States was not required under Article 5.1, first sentence, of the *Agreement on Safeguards* to demonstrate, at the time of the imposition of the measure, that the line pipe measure was necessary to prevent or remedy serious injury and to facilitate adjustment; and

(i) whether the Panel erred in finding that Korea failed to meet its burden to assert and prove that the United States violated Article 5.1, first sentence, of the *Agreement on Safeguards* by imposing the line pipe measure beyond the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

79. Before taking up the issues raised in this appeal, we note, with respect to the ambit of this appeal, that the Panel reached certain conclusions on the inconsistency of the line pipe measure with WTO obligations of the United States which have not been appealed. The Panel found that the line pipe measure is inconsistent with the general rule contained in the *chapeau* of Article XIII:2 of the

GATT 1994 because it has been applied without respecting traditional trade patterns.[66] In addition, the Panel found that the line pipe measure is inconsistent with Article XIII:2(a) of the GATT 1994 because it has been applied without establishing the total amount of imports permitted at the lower tariff rate.[67] The Panel found as well that the United States had acted inconsistently with its obligations under Article XIX of the GATT 1994 by failing to demonstrate the existence of unforeseen developments before applying the line pipe measure.[68] Neither participant challenges these findings. Accordingly, in view of our mandate under Article 17.12 of the DSU, we do not address those issues in this appeal. Thus, whatever conclusions we reach with respect to the issues raised in this appeal, the line pipe measure has been found, in any event and to the extent of the Panel's findings, to be inconsistent with the obligations of the United States under the *WTO Agreement.*

IV. Introductory Remarks

80. Before turning to the first issue raised in this appeal, it is useful to recall that safeguard measures are extraordinary remedies to be taken only in emergency situations. Furthermore, they are remedies that are imposed in the form of import restrictions in the absence of any allegation of an unfair trade practice. In this, safeguard measures differ from, for example, anti-dumping duties and countervailing duties to counter subsidies, which are both measures taken in response to unfair trade practices. If the conditions for their imposition are fulfilled, safeguard measures may thus be imposed on the "fair trade" of other WTO Members and, by restricting their imports, will prevent those WTO Members from enjoying the full benefit of trade concessions under the *WTO Agreement.*

[66]Panel Report, para. 8.1(1).

[67]*Ibid*., para. 8.1(2).

[68]*Ibid*., para. 8.1(6).

81. As we held in our Report in *Argentina – Footwear (EC)*, both the context and the object and purpose of Article XIX of the GATT 1994 confirm the extraordinary nature of safeguard measures:

> … As part of the context of paragraph 1(a) of Article XIX, we note that the title of Article XIX is: "*Emergency Action on Imports of Particular Products*". The words "emergency action" also appear in Article 11.1(a) of the *Agreement on Safeguards*. We note once again, that Article XIX:1(a) requires that a product be imported "*in such increased quantities* and *under such conditions* as *to cause or threaten serious injury* to domestic producers". (emphasis added) Clearly, this is not the language of ordinary events in routine commerce. In our view, the text of Article XIX:1(a) of the GATT 1994, read in its ordinary meaning and in its context, demonstrates that safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, "emergency actions." And, such "emergency actions" are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, a Member finds itself confronted with developments it had not "foreseen" or "expected" when it incurred that obligation. The remedy that Article XIX:1(a) allows in this situation is temporarily to "suspend the obligation in whole or in part or to withdraw or modify the concession". Thus, Article XIX is clearly, and in every way, an extraordinary remedy.
>
> This reading of these phrases is also confirmed by the object and purpose of Article XIX of the GATT 1994. The object and purpose of Article XIX is, quite simply, to allow a Member to re-adjust temporarily the balance in the level of concessions between that Member and other exporting Members when it is faced with "unexpected" and, thus, "unforeseen" circumstances which lead to the product "being imported" in "such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products". In perceiving and applying this object and purpose to the interpretation of this provision of the *WTO Agreement*, it is essential to keep in mind that a safeguard action is a "fair" trade remedy. The application of a safeguard measure does not depend upon "unfair" trade actions, as is the case with anti-dumping or countervailing measures. Thus, the import restrictions that are imposed on products of exporting Members when a safeguard action is taken must be seen, as we have said, as extraordinary. And, when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account.
>
> … In furthering this statement of the object and purpose of the *Agreement on Safeguards*, it must always be remembered that safeguard measures result in the temporary suspension of concessions or withdrawal of obligations, such as those in Article II and Article XI of the GATT 1994, which are fundamental to the *WTO Agreement*. …[69] (original emphasis, underlining added)

[69] Appellate Body Report, *supra*, footnote 50, paras. 93–95. See also, Appellate Body Report, *Korea – Dairy*, *supra*, footnote 52, paras. 86–88.

82. These statements are valid for both Article XIX of the GATT 1994 and the *Agreement on Safeguards*, since both rest on the same premise, and since the *Agreement on Safeguards* both reiterates, and further elaborates on, much of what long prevailed under the GATT 1947. Nevertheless, part of the *raison d'être* of Article XIX of the GATT 1994 and the *Agreement on Safeguards* is, unquestionably, that of giving a WTO Member the possibility, as trade is liberalized, of resorting to an effective remedy in an extraordinary emergency situation that, in the judgement of that Member, makes it necessary to protect a domestic industry temporarily.

83. There is, therefore, a natural tension between, on the one hand, defining the appropriate and legitimate scope of the right to apply safeguard measures and, on the other hand, ensuring that safeguard measures are not applied against "fair trade" beyond what is necessary to provide extraordinary and temporary relief. A WTO Member seeking to apply a safeguard measure will argue, correctly, that the *right* to apply such measures must be respected in order to maintain the *domestic* momentum and motivation for ongoing trade liberalization. In turn, a WTO Member whose trade is affected by a safeguard measure will argue, correctly, that the *application* of such measures must be limited in order to maintain the *multilateral* integrity of ongoing trade concessions. The balance struck by the WTO Members in reconciling this natural tension relating to safeguard measures is found in the provisions of the *Agreement on Safeguards*.

84. This natural tension is likewise inherent in two basic inquiries that are conducted in interpreting the *Agreement on Safeguards*. These two basic inquiries are: *first*, is there a right to apply a safeguard measure? And, *second*, if so, has that right been exercized, through the application of such a measure, within the limits set out in the treaty? These two inquiries are separate and distinct. They must not be confused by the treaty interpreter. One necessarily precedes and leads to the other. *First*, the interpreter must inquire whether there is a right, under the circumstances of a particular case, to apply a safeguard measure. For this right to exist, the WTO Member in question must have determined, as required by Article 2.1 of the *Agreement on Safeguards* and pursuant to the provisions of Articles 3 and 4 of the *Agreement on Safeguards*, that a product is being imported into its territory in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry. *Second*, if this first inquiry leads to the conclusion that there *is* a right to apply a safeguard measure in that particular case, then the interpreter must next consider whether the Member has applied that safeguard measure "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment", as required by Article 5.1, first sentence, of the *Agreement on Safeguards*. Thus, the right to apply a safeguard measure—even where it has been found to exist in a particular case and thus can be exercized—is not unlimited. Even when a Member has fulfilled the treaty requirements that establish the right to apply a safeguard measure in a particular case, it must do so "only to the extent necessary … ."

85. With these general considerations in mind, we address the issues raised in this particular appeal.

V. Adequate Opportunity for Prior Consultations

86. We begin with the issue of whether the Panel erred in finding that, when applying the line pipe measure, the United States violated its obligations under Article 12.3 of the *Agreement on Safeguards*. Article 12.3 provides:

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

87. First, we recall briefly the sequence of events relevant to this issue:[70]

- on 4 August 1999: pursuant to Article 12.1(a) of the *Agreement on Safeguards*, the United States notified the Committee on Safeguards that its competent authorities had initiated a safeguard investigation on 29 July 1999 regarding imports of line pipe [71];

- on 8 November 1999: pursuant to Article 12.1(b) of the *Agreement on Safeguards*, the United States notified the Committee on Safeguards that the USITC had reached an affirmative finding of serious injury or threat thereof caused by increased imports of line pipe [72];

- on 8 December 1999: the USITC announced to the President of the United States its recommendations for a remedy [73];

- on 24 January 2000: the United States made a supplemental notification under Article 12.1(b), summarizing the USITC Report of 22 December 1999 and containing

[70]See, s*upra*, paras. 2–7.

[71]G/SG/N/6/USA/7, 6 August 1999.

[72]G/SG/N/8/USA/7, 11 November 1999; Panel Report, para. 7.310.

[73]Panel Report, para. 2.4.

detailed information on the measures recommended by the USITC to the President of the United States [74];

– on 24 January 2000: the United States and Korea held consultations in Washington, D.C. on the USITC Report [75];

– on 11 February 2000: the United States issued a press release announcing the President's decision on a safeguard measure for line pipe that "differed substantially" [76] from the measure recommended to the President and notified to the Committee on Safeguards on 24 January 2000 [77];

– on 18 February 2000: the United States issued a Presidential Proclamation on the line pipe measure as described in the press release and indicating its effective date of 1 March 2000 [78];

– on 22 February 2000: the United States notified the Committee on Safeguards pursuant to Article 12.1(c) of its decision to apply a safeguard measure on imports of line pipe as described in the press release [79]; and

– on 1 March 2000: the safeguard measure as described in the press release took effect. [80]

88. Before the Panel, Korea argued that "the United States did not advise Korea of the measure the President intended to take before the bilateral consultations" [81] held on 24 January 2000, and that "Korea was only informed of the actual measure imposed by a press release from the White House on 11 February 2000." [82] On this basis, Korea argued before the Panel that it "had no meaningful ability to discuss the actual remedy proposed before it was imposed" because it was "a *fait accompli* at that

[74]G/SG/N//8/USA/7/Suppl.1, 25 January 2000; Panel Report, para. 7.310.

[75]Panel Report, para. 7.310.

[76]*Ibid*., footnote 243 to para. 7.313.

[77]*Ibid*., para. 7.310.

[78]Proclamation 7274 of 18 February 2000 – To Facilitate Positive Adjustment to Competition From Imports of Certain Circular Welded Carbon Quality Line Pipe", United States Federal Register, 23 February 2000 (Volume 65, Number 36), pp. 9193–9196.

[79]G/SG/N/10/USA/5, 23 February 2000; G/SG/N/10/USA/5Rev.1, G/SG/N/11/USA/4, 28 March 2000.

[80]Panel Report, para. 7.310; Presidential Proclamation, *supra*, footnote 78, at p. 9194.

[81]Korea's first submission to the Panel, para. 324.

[82]*Ibid*.

point."[83] Therefore, the United States had not complied with its obligations under Article 12.3 of the *Agreement on Safeguards*.[84]

89. In reply, the United States maintained before the Panel that it had fulfilled its obligations under Article 12.3 when it issued the press release on 11 February 2000. The United States argued that, as of that date, it stood ready to hold consultations and had provided the information an exporting Member, such as Korea, would need to conduct consultations. Therefore, in the view of the United States, Korea had been provided with an adequate opportunity to request consultations, an opportunity that Korea failed to seize.[85]

90. Agreeing with Korea, the Panel concluded that the United States had acted inconsistently with its obligations under Article 12.3 of the *Agreement on Safeguards* by failing to provide an adequate opportunity for prior consultations. The Panel reasoned that:

> … a press release does not ensure that exporting Members obtained the necessary detailed information on the proposed measure. A simple press release does not guarantee that exporting Members obtained the information contained therein … . Therefore, we find that the 11 February 2000 press release, regardless of its content, cannot itself be considered to have provided Korea with an adequate opportunity for prior consultations.[86]

91. The United States appeals this finding, arguing that the Panel relied on an incorrect legal interpretation of Article 12.3, and that the Panel failed to perform the factual analysis necessary to evaluate compliance with Article 12.3.

92. According to the United States, the Panel erred in concluding that Article 12.3 requires a Member proposing to apply a safeguard measure to "ensure"[87] that exporting Members "obtained"[88] the information that Members must review in consultations pursuant to that Article. The United States submits that the text imposes no such obligation. Rather, as the United States sees it, Article 12.3 requires a Member to provide an "adequate opportunity" prior to the application of a safeguard measure for consultations with Members having a substantial export interest in the product in question, with a view to reviewing certain information. The United States contends that this standard is met when the Member with a substantial export interest *obtains* the relevant information.

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[83]Korea's first submission to the Panel, para. 324.

[84]Panel Report, para. 7.307. See also, Korea's first submission to the Panel, para. 323.

[85]Panel Report, para. 7.309.

[86]*Ibid*., para. 7.314.

[87]*Ibid*.

[88]*Ibid*.

The United States points out that Korea admitted it obtained the information about the measure on 11 February 2000, when it received the press release. The United States asserts, moreover, that Korea was provided with "much of the information"[89] about the measure before 11 February 2000. In the view of the United States, consultation is a "dynamic"[90] process which is "triggered"[91] by an Article 12.1(b) notification and which continues until the measure takes effect. The United States maintains, therefore, that the period from the initial Article 12.1(b) notification to the day the measure takes effect is relevant for assessing whether the United States provided an adequate opportunity for prior consultations.

93. In addition, according to the United States, the Panel did not conduct the factual analysis necessary to determine compliance with Article 12.3. Instead, the United States argues that the Panel assumed—without citing any evidence—that the press release did not ensure receipt of the necessary information by exporting Members. The relevant question, according to the United States, is not whether a Member applying the safeguard measure "ensure[s]"[92] or "guarantee[s]"[93] receipt of information by exporting Members, but whether the exporting Members "obtain"[94] the information. The United States emphasizes the fact that Korea admitted that it did.[95]

94. The United States asks us, for these reasons, to reverse the Panel's finding on Article 12.3.[96]

95. Korea maintains on appeal that the necessary information about the line pipe measure had never been communicated to Korea before the press release of 11 February 2000. Korea argues also that the press release was an inappropriate means for providing the necessary information, as it was an announcement of a "*fait accompli*"[97] followed by a Presidential Proclamation of the measure on 18 February 2000. Moreover, according to Korea, there was "no practical possibility"[98] to hold consultations after 11 February 2000.

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[89]United States' statement at the oral hearing.

[90]United States' response to questioning at the oral hearing.

[91]*Ibid*.

[92]United States' appellant's submission, para. 78.

[93]*Ibid*.

[94]United States' appellant's submission, para. 81.

[95]*Ibid*., paras. 74 and 81.

[96]*Ibid*., para. 80.

[97]Korea's appellee's submission, paras. 80 and 99.

[98]*Ibid*., para. 80.

96. Relying on our ruling in *US – Wheat Gluten* [99], Korea emphasizes that a Member proposing to apply a safeguard measure "should provide exporting Members with sufficient *information* and *time* … to allow a *meaningful exchange* on the issues identified." [100] In Korea's view, the United States "failed to provide either sufficient *information* or *time*" [101] and, hence, Korea was deprived of an "adequate opportunity" for prior consultations under Article 12.3.

97. In considering these arguments, we note, first, that the requirements of Article 12.3 of the *Agreement on Safeguards* have been examined previously in *US – Wheat Gluten*. [102] In that case, the panel found that consultations were held "on the basis of the information contained in the USITC Report [and] that no consultations were held on the final measure that was approved by the United States President". [103] The panel in *US – Wheat Gluten* concluded that the notifications by the United States under Article 12.1(b) "did not provide a description of the measure under consideration sufficiently precise as to allow the European Communities to conduct meaningful consultations with the United States, as required by Article 12.3 of the *Agreement on Safeguards*." [104]

98. On appeal in that case, we agreed with the panel's assessment. We also noted that "the recommendations made by the USITC did *not* include specific numerical quota shares for the individual exporting Members concerned", and that, therefore, "these 'recommendations' did not allow the European Communities to assess accurately the likely impact of the measure being contemplated, nor to consult adequately on overall equivalent concessions with the United States." [105]

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[99]Korea's appellee's submission, para. 85, referring to Appellate Body Report, *US – Wheat Gluten*, *supra*, footnote 39, para. 136.

[100]*Ibid*., para. 85. (original emphasis)

[101]*Ibid.*

[102]Panel Report, WT/DS166/R, adopted 19 January 2001, as modified by the Appellate Body Report, WT/DS166/AB/R; Appellate Body Report, *supra*, footnote 39.

[103]Appellate Body Report, *supra*, footnote 39, para. 139, referring to Panel Report, *supra*, footnote 102, para. 8.217.

[104]Appellate Body Report, *supra*, footnote 39, para. 142; Panel Report, *supra*, footnote 102, paras. 8.218 and 8.219.

[105]Appellate Body Report, *US – Wheat Gluten, supra*, footnote 39, para. 141.

99. With respect to the requirements of Article 12.3, we observed in that appeal that:

> Article 12.3 states that an "adequate opportunity" for consultations is to be provided "with a view to": reviewing the information furnished pursuant to Article 12.2; exchanging views on the measure; and reaching an understanding with exporting Members on an equivalent level of concessions. In view of these objectives, we consider that Article 12.3 requires a Member proposing to apply a safeguard measure to provide exporting Members with *sufficient information and time to allow for the possibility, through consultations, for a meaningful exchange* on the issues identified.[106] (emphasis added)

100. We explained there what is necessary in order to comply with those requirements:

> … it follows from the text of Article 12.3 itself that information on the *proposed* measure must be provided in *advance* of the consultations, so that the consultations can adequately address that measure. Moreover, the reference, in Article 12.3, to "the information provided under" Article 12.2, indicates that Article 12.2 identifies the information that is needed to enable meaningful consultations to occur under Article 12.3. Among the list of "mandatory components" regarding information identified in Article 12.2 are: a precise description of the *proposed* measure, and its *proposed* date of introduction.[107] (original emphasis, footnote omitted)

101. We concluded that:

> … an exporting Member will not have an "adequate opportunity" under Article 12.3 to negotiate overall equivalent concessions through consultations unless, prior to those consultations, it has obtained, *inter alia*, sufficiently detailed information on the form of the proposed measure, including the nature of the remedy.[108]

102. The factual similarities between the present case and the *US – Wheat Gluten* case are manifest. In this case, as in *US – Wheat Gluten*, consultations were held on the basis of information in the USITC Report, and not on the basis of the measure eventually announced by the President of the United States. In this case, as in *US – Wheat Gluten*, the USITC recommendations did not include the proposed date of application.

103. The notifications that informed the consultations held on 24 January 2000 described the measures proposed by the USITC. The Panel found, as a matter of fact, that these proposed measures

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[106] Appellate Body Report, *US – Wheat Gluten, supra*, footnote 39, para. 136.

[107] *Ibid*.

[108] *Ibid*., para. 137.

"differed substantially"[109] from the one announced by the President on 11 February 2000 and eventually applied by the United States, effective as of 1 March 2000. For this reason, we do not believe that the notifications by the United States under Article 12.1(b) in this case were sufficiently precise to allow Korea to conduct meaningful consultations on the measure at issue.

104. We do not mean by this to imply that the "prior consultations" envisioned by Article 12.3 must be on a proposed measure that is identical, in every respect, to the one that is eventually applied. Presumably, the "prior consultations" will, from time to time, result in some changes in a proposed measure. But where, as here, the proposed measure "differed substantially" from the measure that was later applied, and not as a consequence of "prior consultations", we fail to see how meaningful "prior consultations" could have occurred, as required by Article 12.3. Therefore, to determine whether the United States has fulfilled its obligations under Article 12.3 with respect to the line pipe measure, we must examine whether the issuance on 11 February 2000 of the press release announcing the pending application of the measure—which described the measure as it was actually applied—served the purpose of fulfilling those obligations.

105. As we have noted[110], the Panel concluded that the United States was in violation of Article 12.3 because "a press release does not ensure that exporting Members obtained the necessary detailed information on the proposed measure."[111]

106. As we stated in *US – Wheat Gluten*, and as we have here reaffirmed[112], Article 12.3 requires "a Member proposing to apply a safeguard measure to provide exporting Members with *sufficient information and time* to allow for the possibility, through consultations, for a *meaningful exchange*".[113] In this case, Korea has acknowledged that it obtained the information about the measure through the press release issued on 11 February 2000. Therefore, the Panel's inquiry as to whether the United States "*ensure[d]*"[114] that Korea obtained the information was, in our view, misdirected. The appropriate inquiry here is whether the United States provided Korea with "sufficient time" to allow for a "meaningful exchange" on the information.

107. Article 12.3 does not specify precisely how much time should be made available for consultations. Therefore, a finding on the adequacy of time in any particular case must necessarily be addressed on a case-by-case basis. The facts before us in this case are these: Korea learned of the

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[109]Panel Report, footnote 243 to para. 7.313.

[110]*Supra*, para. 90.

[111]Panel Report, para. 7.314.

[112]*Supra*, paras. 99–101.

[113]Appellate Body Report, *supra*, footnote 39, para. 136. (emphasis added)

[114]Panel Report, para. 7.314.

actual measure on 11 February 2000—18 days before the measure took effect. Korea learned of the effective date of the measure on 18 February 2000—11 days before the measure took effect. And, lastly, the United States filed a notification of the measure pursuant to Article 12.1(c) of the *Agreement on Safeguards* on 22 February 2000—eight days before the measure took effect.

108. As we stated in *US – Wheat Gluten*, there must be sufficient time "to allow for the possibility … for a meaningful exchange".[115] This requirement presupposes that exporting Members will obtain the relevant information sufficiently in advance to permit analysis of the measure, and assumes further that exporting Members will have an adequate opportunity to consider the likely consequences of the measure before the measure takes effect. For it is only in such circumstances that an exporting Member will be in a position, as required by Article 12.3, to "reach[] an understanding on ways to achieve the objective set out in paragraph 1 of Article 8" of "maintain[ing] a substantially equivalent level of concessions and other obligations to that existing under GATT 1994". We see this specific textual link between Article 12.3 and paragraph 1 of Article 8 as especially significant.

109. We note that reaching such an "understanding" serves the interests not only of the exporting Members, but also of the importing Member, who will wish to avoid excessive compensatory measures in response to the safeguard action. As we have said, the *Agreement on Safeguards* permits Members to impose measures against "fair trade". As a result, Members against whom such measures are imposed are prevented from enjoying the full benefit of trade concessions. For this reason, Article 8.1 of the *Agreement on Safeguards* provides that "Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade." If no agreement on compensation is reached, Article 8.2 provides that "the affected … Members shall be free, not later than 90 days after the measure is applied, to suspend … the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure".[116] Thus, there is an interest on the part of both the exporting Member and the importing Member applying the safeguard measure to engage in "prior consultations" with a view to reaching an understanding on the import of the measure.

110. Finally, the notion of a *meaningful exchange*, as we see it, assumes that the importing Member will enter into consultations in good faith[117] and will take the time appropriate to give due consideration to any comments received from exporting Members before implementing the measure.

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[115]Appellate Body Report, *supra*, footnote 39, para. 136.

[116]The suspension must be notified to the Council for Trade in Goods and must not be "disapprove[d]" by the Council. See, Article 8.2 of the *Agreement on Safeguards*.

[117]Article 26 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*") provides that "[e]very treaty in force is binding on the parties to it and must be performed by them *in good faith*." (Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679) (emphasis added)

As always, we must assume that WTO Members seek to carry out their WTO obligations in good faith.

111. We are mindful of the need for Members to act quickly when applying a safeguard measure. A safeguard measure is, as we have stressed, an extraordinary measure that is applied in extraordinary circumstances. As we have said, the amount of time needed for a meaningful exchange must be judged on a case-by-case basis, depending on the prevailing circumstances. In this case, we do not believe it would have been possible, under the circumstances, to have a meaningful exchange within the period following the proclamation of the effective date of the measure, or even during the period following the issuance of the press release. It would not have been possible, in our view, for Korea to have analyzed the measure, considered its likely consequences, conducted appropriate consultations domestically, and prepared for consultations with the United States in so short a time. Indeed, the United States appears to have recognized the need for adequate time to prepare for the consultations held on 24 January 2000 with respect to the measure recommended by the USITC. Those consultations took place 77 days after the initial notification under Article 12.1(b) and 47 days after the announcement of the USITC recommendations. Korea may not have needed that much time to prepare for consultations, but, in our view, Korea needed more time than it got.

112. The United States also argues that "[s]ince Korea never attempted to hold such consultations, its assertions that they could not be meaningful are pure speculation, and cannot create a *prima facie* case of a breach of the Safeguards Agreement."[118] We are not persuaded by this argument. The obligation of an importing Member under Article 12.3 is to "provide adequate opportunity for *prior* consultations". (emphasis added) That obligation cannot be met if there is insufficient time prior to the application of the measure to have a *meaningful* exchange. The importing Member's failure to provide information about a safeguard measure to an exporting Member sufficiently in advance of that measure taking effect is not excused by the fact that the exporting Member did not request consultations during that inadequate time-period.

113. In the light of these considerations, we uphold, albeit for different reasons, the conclusion of the Panel in paragraph 8.1(7) of the Panel Report that the United States acted inconsistently with its obligations under Article 12.3 of the *Agreement on Safeguards* by failing to provide an adequate opportunity for prior consultations on the line pipe measure with Korea, a Member having a substantial interest as an exporter of line pipe.

[118]United States' statement at the oral hearing.

VI. Obligation to Endeavour to Maintain a Substantially Equivalent Level of Concessions and Other Obligations

114. We next consider the issue of compliance by the United States with its obligations under Article 8.1 of the *Agreement on Safeguards*. Article 8.1 provides:

> *Level of Concessions and Other Obligations*
>
> A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure, in accordance with the provisions of paragraph 3 of Article 12. To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade.

115. Before the Panel, Korea argued that Articles 8.1 and 12.3 of the *Agreement on Safeguards* "are explicitly linked, and require … an opportunity for prior consultation with full knowledge of the proposed measure."[119] In reply, the United States argued that Korea's claim under Article 8.1 was explicitly linked to its claim under Article 12.3 and that, as the United States had complied with Article 12.3, it had also acted in conformity with Article 8.1.[120]

116. The Panel agreed with Korea, and found that:

> … the United States, by failing to comply with its obligations under Article 12.3, has also acted inconsistently with its obligations under Article 8.1 to endeavour to maintain a substantially equivalent level of concessions and other obligations.[121]

117. The United States argues on appeal that the sole basis for the Panel's finding of inconsistency with Article 8.1 is its erroneous finding with respect to Article 12.3. Accordingly, the United States asks us to conclude that the Article 8.1 finding is equally flawed, and to reverse the Panel's finding on this ground.

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[119]Panel Report, para. 7.315.

[120]*Ibid*., para. 7.316.

[121]*Ibid*., para. 7.319.

118. In coming to its conclusion on this matter, the Panel relied on our Report in *US – Wheat Gluten*, where we said:

> In view of [the] explicit link between Articles 8.1 and 12.3 of the *Agreement on Safeguards*, a Member cannot, in our view, "endeavour to maintain" an adequate balance of concessions unless it has, as a first step, provided an adequate opportunity for prior consultations on a proposed measure.[122]

119. In our view, our reasoning in *US – Wheat Gluten* is also applicable in this case. Therefore, we agree with the Panel that the United States, "by failing to comply with its obligations under Article 12.3, has also acted inconsistently with its obligations under Article 8.1 to endeavour to maintain a substantially equivalent level of concessions … ."[123] We, therefore, uphold the Panel's finding that the United States acted inconsistently with its obligations under Article 8.1 of the *Agreement on Safeguards*.

VII. Exclusion of "*de minimis*" Developing Country Exporters from the Line Pipe Measure

120. Next we turn to Article 9.1 of the *Agreement on Safeguards*, which states:

> *Developing Country Members*
>
> Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned. [2]
>
> [2] A Member shall immediately notify an action taken under paragraph 1 of Article 9 to the Committee on Safeguards.

121. Korea claimed before the Panel that the line pipe measure is inconsistent with Article 9.1 because it treats developing countries the same as all other suppliers and allocates to each of the developing countries, irrespective of their previous import levels, the same quota of 9,000 short tons that has been allocated to all other exporters. Korea argued before the Panel that Article 9.1 of the *Agreement on Safeguards* requires a Member imposing a safeguard measure to "determine which developing countries were to be exempted from the measure"[124], and that the United States did not fulfill this requirement.

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[122] Appellate Body Report, *supra*, footnote 39, para. 146.

[123] Panel Report, para. 7.319.

[124] *Ibid*., para. 7.172.

122. As we have explained, the line pipe measure took the form of a duty increase for three years, effective as of 1 March 2000. The first 9,000 short tons of imports from each country, irrespective of their origin, were excluded each year from the duty increase, with annual reductions in the rate of duty in the second and third years. In the first year, imports above 9,000 short tons were subject to an additional duty of 19 percent *ad valorem*. The additional duty was reduced to 15 percent in the second year. The additional duty is to be reduced to 11 percent in the third year. Imports from Canada and Mexico have been excluded in their entirety from the measure. The measure has no explicit exclusion for developing countries exporting under the *de minimis* levels set out in Article 9.1 of the *Agreement on Safeguards*. Nor does the measure contain an explicit inclusion of developing countries exporting above those *de minimis* levels.

123. In considering whether this measure complies with Article 9.1, the Panel asked, first, whether it is necessary to make an express exclusion of those developing countries exporting below *de minimis* levels. The Panel's answer to this question was not conclusive. The Panel said: "[i]n our view, if a measure is not to apply to certain countries, it is *reasonable to expect* an express exclusion of those countries from the measure". [125]

124. In an effort to determine whether the line pipe measure contains an express exclusion of those developing countries which fit the description of *de minimis* importers in Article 9.1, the Panel examined the notification by the United States to the WTO Committee on Safeguards pursuant to footnote 2 to Article 9, as well as three internal United States documents relating to the implementation of the measure. The Panel found that the notification by the United States to the Committee on Safeguards did not specify the developing countries excluded from the measure. [126] Likewise, the Panel found also that none of the internal United States documents—namely, the Presidential Proclamation of the measure, dated 18 February 2000; the President's Memorandum to the Secretary of the Treasury and the United States Trade Representative, dated 18 February 2000; and the Memorandum from the Customs Service Director of Trade Programs to all Port Directors, dated 29 February 2000—contained a list of developing countries excluded from the measure, or any other indication of how the measure would comply with the obligation under Article 9.1. [127] The Panel, therefore, found that these documents "do not contain any express exclusion", and, "[i]n the absence of any other relevant documentation", concluded that the line pipe measure "applies to those

[125]Panel Report, para. 7.175. (emphasis added, footnote omitted)

[126]*Ibid*., para. 7.179.

[127]*Ibid*., paras. 7.176–7.178.

developing countries" with *de minimis* imports.[128] Accordingly, the Panel found that "the United States has not complied with its obligations under Article 9.1".[129]

125. The Panel then went on to ask whether, despite the absence of an express exclusion, the measure was crafted, as the United States asserted, in such a way as to ensure that it would not be "applied against a product originating in a developing country Member" whose share of imports is below the *de minimis* levels provided in Article 9.1. The United States acknowledged before the Panel that the 9,000 short-ton exemption from the supplemental duty represented only 2.7 percent of total imports in 1998, but argued that, because the total volume of imports would decrease as a result of the measure, any country reaching the 9,000 ton limit of the exemption would in fact account for *more* than three percent of total imports in 2000 and thereafter. In considering this argument, the Panel noted that the line pipe measure does not set an overall limit on the quantity of imports of line pipe and that, therefore, if importers are willing to pay the duty for over-quota imports, there is no restriction on the total volume of line pipe imports that may enter the United States from any one country. The Panel also noted that, given that Canada and Mexico were completely excluded from the measure, there is no impediment to an increase in imports from those countries. For this reason, the Panel found that there was no assurance in the line pipe measure that the total volume of imports would decrease, or that the three-percent threshold would be exceeded. The Panel concluded that:

> Article 9.1 contains an obligation not to apply a measure, and we find that the line pipe measure "applies" to all developing countries in principle, even though it may not have any impact in practice. Therefore, for the reasons described above we find that the United States has not complied with its obligations under Article 9.1 of the Agreement on Safeguards.[130]

126. The United States appeals this finding. The United States argues on appeal that the "most basic flaw in the Panel's reasoning is that Article 9.1 does not obligate Members to provide specifically for 'non-application' of a safeguard measure", and that the "text requires only that the safeguard measure 'not be applied' against a developing country Member having less than three percent of imports."[131] According to the United States, Article 9.1 "is silent as to *how* a Member may meet this obligation [in Article 9.1], and certainly does not require a list of the developing countries [excluded from the measure]".[132] The United States believes that it met the Article 9.1

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[128]Panel Report, para. 7.180.

[129]*Ibid*.

[130]*Ibid*., para. 7.181. The Panel made a similar finding in paragraph 7.180 after examining the relevant United States documents pertaining to the application of the measure. See, *supra*, para. 124.

[131]United States' appellant's submission, para. 89.

[132]*Ibid*., para. 86. (original emphasis)

requirement by establishing a mechanism—a 9,000 ton exemption for each country—under which the safeguard duty on imports could not possibly apply to any developing country Member accounting for less than three percent of total imports.[133]

127. We agree with the United States that Article 9.1 does not indicate how a Member must comply with this obligation. There is nothing, for example, in the text of Article 9.1 to the effect that countries to which the measure will not apply must be expressly excluded from the measure. Although the Panel may have a point in saying that it is "reasonable to expect" an express exclusion, we see nothing in Article 9.1 that requires one.

128. We agree also with the United States that it is possible to comply with Article 9.1 without providing a specific list of the Members that are either included in, or excluded from, the measure. Although such a list could, and would, be both useful and helpful by providing transparency for the benefit of all Members concerned, we see nothing in Article 9.1 that mandates one.

129. The United States argues as well that special attention should be paid to the word "apply" in Article 9.1. On this point, we start by observing that Article 9.1 obliges Members not to *apply* a safeguard measure against *products* originating in developing countries whose individual exports are below a *de minimis* level of three percent of the imports of that product, provided that the collective import share of such developing countries does not account for more than nine percent of the total imports of that product. We believe the United States is correct insofar as it stresses the significance of the word "applied" in Article 9.1. However, we note that Article 9.1 is concerned with the application of a safeguard measure on a *product.* And we note, too, that a duty, such as the supplemental duty imposed by the line pipe measure, does not need actually to be enforced and collected to be "applied" to a product. In our view, duties are "applied against a *product*" when a Member imposes conditions under which that product can enter that Member's market—including when that Member establishes, as the United States did here, a duty to be imposed on over-quota imports. Thus, in our view, duties are "applied" irrespective of whether they result in making imports more expensive, in discouraging imports because they become more expensive, or in preventing imports altogether.

130. The United States argues in its appellant's submission that it has complied with Article 9.1 by structuring the safeguard duty "so that it *automatically* would not apply to developing countries accounting for less than three percent of imports."[134] On this basis, the United States argues that the line pipe measure has not been "applied" to those developing countries with *de minimis* imports in

[133]United States' appellant's submission, para. 86.

[134]*Ibid*. (emphasis added)

the United States. But, according to the latest data available at the time the line pipe measure took effect—data found in the Panel record and not disputed by the United States—the 9,000 short-ton exemption from the over-quota duty imposed by the line pipe measure did *not* represent three percent of the total imports. Rather, the exemption represented only 2.7 percent of total imports. According to the evidence in the Panel record, an exemption of approximately 10,000 short tons would have amounted at the time to a three-percent exclusion. The exemption applied by the United States was, on the evidence, too small.

131. As we have already noted, the United States argued before the Panel that it "expected" the measure would result in a decrease from the total volume of imports in 1998 and that, consequently, the general 9,000 short-ton exemption from the supplemental duty would satisfy the requirements of Article 9.1 because "any country reaching the 9000 ton limit of the exemption would account for more than three per cent of total imports."[135] But expectations are not realized "automatically". The facts indicate that, when the measure was adopted, the 9,000 ton exclusion represented less than three percent of total imports into the United States market. The over-quota duty applied to imports that exceeded the 9,000 short-ton exemption, irrespective of their origin.

132. As the Panel emphasized, too, the available documents reveal no effort whatsoever by the United States—apart from the claimed "automatic" structure of the measure itself—to make certain that *de minimis* imports from developing countries were excluded from the application of the measure. Whatever the "expectations" of the United States, we are not persuaded by the facts before us that the United States took all reasonable steps that it could and, thus, should have taken to exclude developing countries exporting less than the *de minimis* levels in Article 9.1 from the scope and, therefore, the application of the supplemental duty.

133. For these reasons, we find that the line pipe measure has been applied against products originating in those developing countries whose imports into the United States are below the *de minimis* levels set out in Article 9.1. And, consequently, we uphold the Panel's findings in paragraphs 7.180 and 7.181 of its Report, that the United States acted inconsistently with its obligations under Article 9.1 of the *Agreement on Safeguards*.

[135]Panel Report, para. 7.173.

VIII. Necessity of a Discrete Determination Either of Serious Injury or of Threat of Serious Injury

134. We turn now to the issue of whether the *Agreement on Safeguards* requires a discrete [136] determination *either* of serious injury *or* of threat of serious injury.

135. In applying the line pipe measure, the USITC determined that "circular welded carbon quality line pipe … is being imported into the United States in such increased quantities as to be a substantial cause of *serious injury or the threat of serious injury*". [137]

136. With respect to this USITC determination, the Panel found:

> … that the United States violated Articles 3.1 and 4.2(c) by failing to include in its published report a finding or reasoned conclusion either (1) that increased imports have caused serious injury, or (2) that increased imports are threatening to cause serious injury. [138]

137. The Panel decided that, when applying a safeguard measure, the fulfilment of the basic conditions set out in Article 2.1 of the *Agreement on Safeguards* constitutes a "pertinent issue[] of … law" for which, pursuant to Article 3.1, "findings" or "reasoned conclusions" must be included in the published report of the competent authorities. The Panel added that among those "issues" is the condition that the "product" must be "imported … in such increased quantities, … and under such conditions as *to cause or threaten to cause serious injury* ". [139] Based on this, the Panel reasoned that Article 3.1 requires WTO Members to include in their published reports findings or reasoned conclusions on whether increased imports have caused or threatened to cause serious injury. [140] The Panel concluded that this requirement cannot be met by a finding, such as that by the USITC in this case, of "serious injury or the threat of serious injury". [141]

138. The Panel reached this conclusion in part "as a result of the definitions" [142] of "serious injury" and "threat of serious injury" contained in Articles 4.1(a) and 4.1(b), respectively. Noting the distinctions in these definitions, the Panel concluded that if "serious injury" is present, it cannot *"at*

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[136]Discrete determination means in this context a determination of serious injury only, or a determination of threat of serious injury only. By "discrete", it is meant, "separate, detached from others; individually distinct". (*The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 688)

[137]USITC Report, p. I-3. (emphasis added)

[138]Panel Report, para. 7.271.

[139]*Ibid*., para. 7.263. (emphasis added)

[140]*Ibid*.

[141]*Ibid*., para. 7.264.

[142]*Ibid*.

the same time" be "clearly imminent", as required to meet the definition of "threat of serious injury".[143] Thus, the Panel saw these definitions as "mutually exclusive".[144]

139. The Panel agreed with the United States that "the condition of the … industry is the benchmark for application of a safeguard measure".[145] However, the Panel did not agree with the United States that the definitions of "serious injury" and "threat of serious injury" "do not themselves indicate the condition of the industry".[146] The Panel concluded that the two definitions "do indicate the condition of the industry, as a result of the definitions … contained in Article 4.1(a) and (b)."[147]

140. The Panel read Article 5.1 of the *Agreement on Safeguards* as reinforcing the conclusion that "serious injury" and "threat of serious injury" are "mutually exclusive". Observing that Article 5.1 allows a Member to apply a safeguard measure "to prevent … serious injury", the Panel reasoned that *preventing* serious injury presupposes a finding of *threat of serious injury.* Observing also that Article 5.1 allows a Member to "remedy serious injury", the Panel reasoned that *remedying* serious injury presupposes a finding of *serious injury*. The Panel reasoned further that, since Article 5.1 does not allow Members to apply safeguard measures to "'prevent and/or remedy serious injury', … Members must clearly determine in advance whether there is either a threat of serious injury to be prevented, or present serious injury to be remedied."[148]

141. The Panel also saw Article 5.2 of the *Agreement on Safeguards* as supporting this conclusion. The Panel pointed out that Article 5.2(b) precludes quota modulation "in the case of threat of serious injury". Thus, the Panel noted, "important substantive consequences result[] from whether a Member finds 'serious injury' or 'threat of serious injury'."[149]

142. The Panel reasoned as well that the inclusion of the phrase "in accordance with the provisions of Article 3" in Article 4.2(c) implies that Article 4.2(c) should be read in the light of Article 3.1, and, in particular, its last sentence. Accordingly, the Panel concluded that the "detailed analysis" to be published under Article 4.2(c) should include the elements required by Article 3.1, last sentence,

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[143]Panel Report, para. 7.264.

[144]*Ibid*.

[145]*Ibid*., para. 7.266.

[146]*Ibid*.

[147]*Ibid*. (original underlining)

[148]*Ibid*., para. 7.267. (original underlining)

[149]*Ibid*., para. 7.268.

namely, "findings and conclusions reached on all pertinent issues of fact and law", including "a finding and conclusion on whether there is *either* serious injury, *or* threat of serious injury."[150]

143. In sum, the Panel concluded that a discrete determination *either* of serious injury *or* of a threat of serious injury is necessary, and found that "the United States violated Articles 3.1 and 4.2(c) by failing to include in its published report a finding or reasoned conclusion either (1) that increased imports have caused serious injury, or (2) that increased imports are threatening to cause serious injury."[151]

144. On appeal, the United States claims that the Panel erred by concluding that the *Agreement on Safeguards* requires a discrete—that is, a separate and distinct—finding *either* of serious injury *or* of threat of serious injury.[152]

145. The United States argues that the USITC Report complied fully with the express requirements of Article 3.1 of the *Agreement on Safeguards*. The United States points out that the USITC Commissioners who made a determination of serious injury and the USITC Commissioners who made a determination of threat of serious injury fully explained their findings and conclusions. The United States argues that, by requiring a discrete determination *either* of serious injury *or* of threat of serious injury, the Panel essentially read into Article 2.1 a substantive requirement that does not exist in the *Agreement on Safeguards*. The United States argues further that the Panel's decision is not supported by the ordinary meaning of the terms of the *Agreement on Safeguards*. More specifically, the United States submits that the word "or" connecting the two concepts in Article 2.1 is used in the *inclusive* sense, so that a finding either of serious injury, or of threat of serious injury, or both, will satisfy this basic condition of Article 2.1.[153]

146. The United States further submits that the conditions of serious injury and threat of serious injury are closely interrelated, and that neither Article XIX of the GATT 1994 nor the *Agreement on Safeguards*, except for the particular situation contemplated in Article 5.2(b) relating to quota modulation, distinguishes between the procedural and substantive legal effects of the two conditions. According to the United States, the definitions of "serious injury" and "threat of serious injury" in the *Agreement on Safeguards* describe two variations of the same basic condition. As the United States reads them, those definitions do not require a competent authority consisting of multiple decision-

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[150]Panel Report, para. 7.270. (emphasis added)

[151]*Ibid*., para. 7.271.

[152]United States' appellant's submission, para. 24.

[153]*Ibid*., para. 34.

makers—such as the USITC—to make a discrete finding *either* of serious injury *or* of threat of serious injury. [154]

147. The United States further stresses that the *Agreement on Safeguards* leaves entirely to Members' discretion how they structure their competent authorities and the decision-making process in safeguard investigations. According to the United States, by construing the *Agreement on Safeguards* to require a discrete finding by a competent authority either of serious injury or of threat of serious injury, the Panel infringed unnecessarily on the manner in which the United States has internally structured the decision-making process of its competent authority. [155]

148. Korea replies that an interpretation of Articles 2.1 and 4.2(a) in accordance with the ordinary meaning of the terms of those provisions, in their context and in the light of their object and purpose, supports the finding of the Panel. In particular, Korea considers that the word "or" connecting the terms "cause" and "threaten to cause" in Article 2.1 has an *exclusive* meaning. [156]

149. Korea also submits that the Panel's finding is supported by the two separate definitions for "serious injury" and "threat of serious injury" provided in Article 4.1. Korea contends further that a discrete finding of serious injury or threat of serious injury is also required because Article 5.2(b) establishes a distinction, be it procedural or substantive in effect, between a determination of serious injury and one premised on a threat of serious injury. Finally, Korea concludes that the argument of the United States to the effect that the Panel's finding infringes on United States sovereignty by interfering with how the United States has structured its internal decision-making process is irrelevant and should be rejected because a party may not invoke provisions of its internal law as a justification for its failure to perform a treaty. [157]

150. In addressing this issue, we begin by setting out the relevant treaty provisions.

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[154]United States' appellant's submission, para. 40.

[155]*Ibid*., paras. 10 and 47.

[156]Korea's appellee's submission, paras. 17 and 19.

[157]*Ibid*., paras. 21–26, 32 and 43.

151. Article 2.1 of the *Agreement on Safeguards* states:

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

152. Also, Article 3.1 of the *Agreement on Safeguards* provides:

> *Investigation*
>
> A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, inter alia, as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on *all pertinent issues of fact and law.* (emphasis added)

153. Further, Article 4.2(c) of the *Agreement on Safeguards* 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.

154. We note, too, that paragraphs (a) and (b) of Article 4.1 provide definitions of "serious injury" and "threat of serious injury":

> *Determination of Serious Injury or Threat Thereof*
>
> For the purposes of this Agreement:
>
> (a) "serious injury" shall be understood to mean a significant overall impairment in the position of a domestic industry;
>
> (b) "threat of serious injury" shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of paragraph 2. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility; []

155. And we note also that there is a reference to "prevent or remedy serious injury" in Article 5.1, first sentence, which provides:

> A Member shall apply safeguard measures only to the extent necessary to *prevent or remedy serious injury* and to facilitate adjustment. (emphasis added)

156. The issue to be decided is whether, under these provisions of the *Agreement on Safeguards*, the USITC was obliged to make a discrete determination *either* of serious injury *or* of threat of serious injury.

157. We begin by noting that we are dealing here with the first of two basic inquiries that can confront an interpreter of the *Agreement on Safeguards*: whether there is a right in a particular case for a WTO Member to apply a safeguard measure. Under the *Agreement on Safeguards*, that right exists only if certain conditions are met, and among those conditions is that, in the words of Article 2.1, a product must be "imported … in such increased quantities, absolute or relative to domestic production, and under such conditions as to *cause or threaten to cause serious injury* to the domestic industry that produces like or directly competitive products." (emphasis added) The crux of this particular issue is: what do the words "cause or threaten to cause serious injury" mean with respect to the determination that must be made by the competent authorities of a WTO Member as a necessary prerequisite *to establishing a right to apply a safeguard measure*?

158. We note also that we are not concerned with how the competent authorities of WTO Members reach their determinations in applying safeguard measures. The *Agreement on Safeguards* does not prescribe the internal decision-making process for making such a determination. That is entirely up to WTO Members in the exercise of their sovereignty. We are concerned only with the determination itself, which is a singular act for which a WTO Member may be accountable in WTO dispute settlement. It is of no matter to us whether that singular act results from a decision by one, one hundred, or—as here—six individual decision-makers under the municipal law of that WTO Member. What matters to us is whether the determination, however it is decided domestically, meets the requirements of the *Agreement on Safeguards*.

159. With these considerations in mind, we turn to the Panel's reasoning and conclusions on this issue. As always in our treaty interpretation, we take the approach of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*") and, thus, look first to the text of the treaty. The principal treaty provision at issue here is Article 2.1 of the *Agreement on Safeguards*, which establishes the "conditions" for applying a safeguard measure. Those conditions include the requirement that a "product is being imported" into the "territory" of the Member that wishes to apply the safeguard

measure "in such increased quantities, absolute or relative to domestic production, and under such conditions as to *cause or threaten to cause* serious injury to the domestic industry that produces like or directly competitive products." (emphasis added)

160. We agree with the Panel that the fulfilment of the basic conditions set out in Article 2.1 is a "pertinent issue[] of law" for which "finding[s]" or "reasoned conclusion[s]" must be included in the published report of the competent authorities, as required by Article 3.1.[158] We agree with the Panel also that among those "issues" is the condition that the "product" must be "imported … in such increased quantities, … and under such conditions as *to cause or threaten to cause serious injury*".[159]

161. But precisely what kind of "finding" on this "pertinent issue of law" must appear in the published report of the competent authorities? The question is: should the phrase "*cause or threaten to cause*" in Article 2.1 be read as "cause or threaten to cause" in the sense of either *one* ("cause") *or the other* ("threaten to cause"), *but not both* ? Or should this phrase be read rather as "cause or threaten to cause" in the sense of *either one or the other, or both in combination* ("cause or threaten to cause") ?

162. The crucial word in the text of this treaty provision is, thus, "or". The Panel did not dwell, in its reasoning, on the word "or". Rather, pointing to the different definitions of "serious injury" and "threat of serious injury", the Panel found that "serious injury" and "threat of serious injury" are "mutually exclusive".[160] As we previously explained, the Panel reached this conclusion by reasoning that:

> [s]ince "threat of serious injury" is defined as "serious injury that is clearly imminent", necessarily "threat of serious injury" can only arise if serious injury is not present. If serious injury is present, it cannot at the same time be "clearly imminent".[161]

From this reasoning, and from the conclusion the Panel reached about what it saw as a requirement for a discrete determination, it seems clear to us that the Panel considered that the phrase "cause or threaten to cause" means *one or the other, but not both*. Korea submits that the Panel was right to do so. The United States submits that the Panel erred because, in the view of the United States, the word "or" connecting the terms "to cause" and "threaten to cause" in Article 2.1 is used in the inclusive

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[158]Panel Report, para. 7.271.

[159]*Ibid*., para. 7.263.

[160]*Ibid*., para. 7.264.

[161]*Ibid*.

sense. If so, this would imply that the phrase "cause or threaten to cause" in Article 2.1, should be read instead as *either one or the other, or both in combination*.

163. Our view is that the phrase "cause or threaten to cause" can be read either way. As we read it, the dictionary definition of "or" supports either conclusion. *The New Shorter Oxford English Dictionary* provides several definitions of the word "or". The dictionary definitions accommodate both usages.[162] *The New Shorter Oxford English Dictionary* recognizes that the word "or" can have an inclusive meaning as well as an exclusive meaning.

164. Thus, "or" can be exclusive, and "or" can also be inclusive. The text of Article 2.1 does not provide decisive interpretative guidance in this respect. This is not to say that we believe that "serious injury" and "threat of serious injury" are the same thing, or that competent authorities may make a finding that both exist at the same time. Rather, we believe that the text of Article 2.1 lends itself to either interpretation.

165. As with every word of the Agreement, we must identify a proper meaning for this word. Having found that the text of Article 2.1 is not determinative of the meaning of the word "or", we must look to the context of this treaty provision for guidance in interpreting it. In doing so, we must consider the provisions of the *Agreement on Safeguards* as a whole.

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[162] *Supra*, footnote 136, Vol. II, p. 2012, provides the following definition of "or":

> **or** / **A** *conj.* **1** Introducing the second of two, or all but the first or only the last of several, alternatives. ME. **b** Introducing an emphatic repetition of a rhetorical question. *colloq.* M20 **2** Introducing the only remaining possibility or choice of two or more quite different or mutually exclusive alternatives. Freq. following *either*, **other*, (in neg. contexts, *colloq.*) *neither*. ME. **3** Followed by or, as an alternative; either. Formerly also, introducing alternative questions. Now *arch.* & *poet.* ME. **4** Introducing, after a primary statement, a secondary alternative, or consequence of setting aside the primary statement; otherwise, else; if not. ME **5** Connecting two words denoting the same thing, or introducing an explanation of a preceding word etc.; otherwise called, that is. ME. **6** Introducing a significant afterthought, usu. in the form of a question, which casts doubt on a preceding assertion or assumption. E20.
>
> …
>
> **B** *n.* (Usu. **OR**.) *Computing.* A Boolean operator which gives the value unity if at least one of the operands is unity, and is otherwise zero. Usu. *attrib.* M20.
>
> **inclusive OR** = sense B. above. **exclusive OR** a function that has the value unity if at least one, but not all, of the variables are unity.
>
> **C** *v.t.* (Usu. **OR**.) *Computing.* Combine using a Boolean OR operator. Chiefly ass *ORed* ppl a. L20.

166. As the Panel rightly observes, Article 4.1 is part of the context of Article 2.1. Indeed, we see Article 4.1 as the most relevant context to the phrase "cause or threaten to cause" in Article 2.1, because Article 4.1 provides two different definitions of terms that are crucial to the interpretation of that phrase in Article 2.1—"serious injury" and "threat of serious injury". Paragraph (a) of Article 4.1 defines "serious injury" as "a significant overall impairment in the position of a domestic industry". Paragraph (b) of Article 4.1 defines "threat of serious injury" as "serious injury that is clearly imminent …". In *US – Lamb*, we clarified the meaning of the term "threat of serious injury". We recognized there that "serious injury" and "threat of serious injury" are different and distinct, as they refer to different moments in time. We explained:

> Returning now to the term "*threat* of serious injury", we note that this term is concerned with "serious injury" which has *not* yet occurred, but remains a future event whose actual materialization cannot, in fact, be assured with certainty. We note, too, that Article 4.1(b) builds on the definition of "serious injury" by providing that, in order to constitute a "threat", the serious injury must be "*clearly imminent*". The word "imminent" relates to the moment in time when the "threat" is likely to materialize. The use of this word implies that the anticipated "serious injury" must be on the very verge of occurring. Moreover, we see the word "clearly", which qualifies the word "imminent", as an indication that there must be a high degree of likelihood that the anticipated serious injury will materialize in the very near future. We also note that Article 4.1(b) provides that any determination of a threat of serious injury "shall be based on facts and not merely on allegation, conjecture or *remote possibility*." (emphasis added) To us, the word "clearly" relates also to the *factual* demonstration of the existence of the "threat". Thus, the phrase "clearly imminent" indicates that, as a matter of fact, it must be manifest that the domestic industry is on the brink of suffering serious injury.[163] (original emphasis)

167. For these reasons, we agree with the Panel that the respective definitions of "serious injury" and "threat of serious injury" are two distinct concepts that must be given distinctive meanings in interpreting the *Agreement on Safeguards*. Yet, although we agree with the Panel that the *Agreement on Safeguards* establishes a distinction between "serious injury" and "threat of serious injury", we do not agree with the Panel that a requirement follows from such a distinction to make a discrete finding either of "serious injury" or of "threat of serious injury" when making a determination relating to the application of a safeguard measure.

168. As we see it, these two definitions reflect the reality of how injury occurs to a domestic industry. In the sequence of events facing a domestic industry, it is fair to assume that, often, there is a continuous progression of injurious effects eventually rising and culminating in what can be

[163] Appellate Body Report, *supra*, footnote 38, para. 125.

determined to be "serious injury". Serious injury does not generally occur suddenly. Present serious injury is often preceded in time by an injury that threatens clearly and imminently to become serious injury, as we indicated in *US – Lamb*.[164] Serious injury is, in other words, often the realization of a threat of serious injury. Although, in each case, the investigating authority will come to the conclusion that follows from the investigation carried out in compliance with Article 3 of the *Agreement on Safeguards*, the precise point where a "threat of serious injury" becomes "serious injury" may sometimes be difficult to discern. But, clearly, "serious injury" is something *beyond* a "threat of serious injury".

169. In our view, defining "threat of serious injury" separately from "serious injury" serves the purpose of setting a *lower threshold* for establishing the *right* to apply a safeguard measure. Our reading of the balance struck in the *Agreement on Safeguards* leads us to conclude that this was done by the Members in concluding the Agreement so that an importing Member may act sooner to take preventive action when increased imports pose a "threat" of "serious injury" to a domestic industry, but have not yet caused "serious injury".[165] And, since a "threat" of "serious injury" is defined as "serious injury" that is "clearly imminent", it logically follows, to us, that "serious injury" is a condition that is above that *lower threshold* of a "threat". A "serious injury" is *beyond* a "threat", and, therefore, is *above* the threshold of a "threat" that is required to establish a right to apply a safeguard measure.

170. We emphasize that we are dealing here with the first of two inquiries we have previously mentioned that must be conducted by an interpreter of the *Agreement on Safeguards*:[166] whether there is a right in a particular case to apply a safeguard measure. The question at issue is whether the right exists in this particular case. And, as the right exists if there is a finding by the competent authorities of a "threat of serious injury" or—something *beyond*—"serious injury", then it seems to us that it is irrelevant, *in determining whether the right exists*, if there is "serious injury" or only "threat of serious injury"—so long as there is a determination that there is *at least* a "threat". In terms of the rising continuum of an injurious condition of a domestic industry that ascends from a "threat of serious injury" up to "serious injury", we see "serious injury"—because it is something *beyond* a "threat"—as necessarily *including* the concept of a "threat" and *exceeding* the presence of a "threat" for purposes of answering the relevant inquiry: is there a right to apply a safeguard measure?

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[164]Appellate Body Report, *supra*, footnote 38, para. 125.

[165]During the negotiations on the *Agreement on Safeguards*, a delegation participating in the Negotiating Group on Safeguards commented that "if a threat of injury could no longer be a justification for action under Article XIX, the result would probably be an expansion of the scope and trade effect of safeguard actions." (Negotiating Group on Safeguards, MTN.GNG/NG9/3/Add.1, 17 November 1987, p. 2)

[166]*Supra*, para. 84.

171. Based on this analysis of the most relevant context of the phrase "cause or threaten to cause" in Article 2.1, we do not see that phrase as necessarily meaning *one or the other, but not both*. Rather, that clause could also mean *either one or the other, or both in combination*. Therefore, for the reasons we have set out, we do not see that it matters—for the purpose of determining whether there is a right to apply a safeguard measure under the *Agreement on Safeguards*—whether a domestic authority finds that there is "serious injury", "threat of serious injury", or, as the USITC found here, "serious injury or threat of serious injury". In any of those events, the right to apply a safeguard is, in our view, established.

172. We disagree with the Panel that a requirement of a discrete determination of serious injury or threat of serious injury results from the language of Article 5.1.[167] The Panel's finding is based on the assumption that the permissible extent of the measure depends upon one of two objectives: either of preventing the threat of future injury, or of remedying present injury. As we explain later in this Report, the permissible extent of a safeguard measure is defined by the share of serious injury that is attributed to increased imports, not by the characterization the competent authority ascribes to the situation of the industry. For this reason, we believe the Panel's reasoning on Article 5.1 does not resolve or, in fact, pertain to the issue raised in this appeal relating to the textual interpretation of Article 2.1.

173. Further, we disagree with the support the Panel finds for its conclusions on this issue in the context of Article 5.2(b) of the *Agreement on Safeguards*. Article 5.2(b) excludes quota modulation in the case of threat of serious injury. It is, in our view, the only provision in the *Agreement on Safeguards* that establishes a difference in the legal effects of "serious injury" and "threat of serious injury". Under Article 5.2(b), in order for an importing Member to adopt a safeguard measure in the form of a quota to be allocated in a manner departing from the general rule contained in Article 5.2(a), that Member must have determined that there is "serious injury". A Member cannot engage in quota modulations if there is only a "threat of serious injury". This is an exception that must be respected. But we do not think it appropriate to generalize from such a limited exception to justify a general rule. In any event, this exceptional circumstance is not relevant to the line pipe measure. We find nothing in Article 5.2(b), viewed as part of the context of Article 2.1, that would support a finding that, in this case, the USITC acted inconsistently with the *Agreement on Safeguards* by making a non-discrete determination in this case.

[167]Panel Report, para. 7.267.

174. Following the *Vienna Convention* approach, we have also looked to the GATT *acquis* and to the relevant negotiating history of the pertinent treaty provisions. We have concluded that our view is reinforced by the jurisprudence under the GATT 1947. In the only relevant GATT 1947 case, *Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade* ("*US – Fur Felt Hats*")[168], the Working Party established under the GATT 1947 was required to assess the consistency of a safeguard measure with Article XIX of the GATT 1947. The Working Party concluded that the available data presented supported the view "that increased imports had caused or threatened some adverse effect to United States producers."[169] We note that the Working Party conducted a single analysis based on the presence of serious injury or threat of serious injury, and that it did not consider it necessary to make a discrete determination of serious injury or of threat of serious injury.[170] The question of a discrete determination apparently was not an issue in that case.

175. We also note that the negotiating history of Article XIX of the GATT 1947 and of the *Agreement on Safeguards* does not provide guidance as to whether the Members intended to establish a requirement of a discrete determination of serious injury or of threat of serious injury.[171]

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[168]Working Party Report, GATT/CP/106, adopted 22 October 1951.

[169]*Ibid*., para. 30.

[170]*Ibid*., paras. 13–30.

[171]As regards Article XIX of the GATT 1947, this provision was discussed during the four negotiation rounds that took place between 1946 and 1948 and which formed the basis of the Havana Charter. First, at the London 1946 negotiations, a Committee was set up specifically to deal with issues of general commercial policy (Committee II). At the end of these negotiations, the Committee produced a draft provision on Emergency Action on Imports of Particular Products (United Nations Economic and Social Council, Preparatory Committee of the International Conference on Trade and Employment, "General Commercial Policy (Restrictions, Regulations and Discriminations)", Report of Committee II, E/PC/T/30, 24 November 1946, Appendix); second, negotiations on safeguard rules continued during the course of the Lake Success meetings in early 1947 (see, *inter alia*, United Nations Economic and Social Council, Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, Summary Record of the Tenth Meeting held on 31 January 1947, E/PC/T/C.6/29); third, safeguard rules were addressed at the Geneva negotiations in 1947 (see, *inter alia*, United Nations Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Commission A, Summary Record of the Eleventh Meeting held on 11 June 1947, E/PC/T/A/SR/11; United Nations Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Commission A, Summary Record of the 35th Meeting held on 11 August 1947, E/PC/T/A/SR/35; United Nations Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, (Draft) General Agreement on Tariffs and Trade, E/PC/T/189, 30 August 1947; and United Nations Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Twenty-eighth Meeting of the Tariff Agreement Committee held on 24 September 1947, E/PC/T/TAC/PV/28); and finally, the Havana negotiations addressed emergency action such as safeguard rules between November 1947 and March 1948 (see, *inter alia*, United Nations Conference on Trade and Employment, Third Committee : Commercial Policy, Summary Record of the Seventeenth Meeting (III.a) held on 22 December 1947, E/CONF.2/C.3/SR.17; United Nations Conference on Trade and Employment, Third Committee : Commercial Policy, Report of Sub-Committee D on Articles 40, 41 and 43, E/CONF.2/C.3/37, 28 January 1948; and United Nations Conference on Trade and Employment, Third Committee : Commercial Policy, Summary Record of the Thirty-second

176. However, we wish to emphasize that every safeguard measure must comply with Article 5.1, first sentence, of the *Agreement on Safeguards*. A safeguard measure must be applied "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment." As we explain later in this Report, the extent of the remedy permitted by Article 5.1, first sentence, is not determined by the characterization in the determination of the situation of the industry as "serious injury" or "threat of serious injury", but by the extent to which that "serious injury" or "threat of serious injury" has been caused by increased imports. This will be so regardless of the characterization used in the determination of the competent authorities of the WTO Member when applying a measure—whether it be "serious injury", "threat of serious injury", or, as here, "serious injury or the threat of serious injury".

177. Thus, on this issue, we reverse the finding of the Panel in paragraph 7.271 of the Panel Report that there is a requirement of a discrete determination either of serious injury or of threat of serious injury under the *Agreement on Safeguards*.

Meeting held on 5 February 1948, E/CONF.2/C.3/SR.32). The reference to the term "cause or threaten [to cause] serious injury" appeared as early as in the draft produced by Committee II. (United Nations Economic and Social Council, Preparatory Committee of the International Conference on Trade and Employment, "General Commercial Policy (Restrictions, Regulations and Discriminations)", Report of Committee II, E/PC/T/30, 24 November 1946, Appendix) However, the record of those four negotiations does not indicate that the issue of the requirement of a discrete determination was expressly raised.

During the Uruguay Round, the negotiations on safeguards took place within the framework of the Negotiating Group on Safeguards. The early documents prepared by the Negotiating Group on Safeguards suggest that the participants wanted the terms "serious injury" and "threat of serious injury" to be clarified in the course of the Uruguay Round. (Negotiating Group on Safeguards, "Work Already Undertaken in the GATT on Safeguards", Note by the Secretariat, MTN.GNG/NG9/W/1, 7 April 1987, which describes some of the main points raised in past negotiations and discussions, both formal and informal, on elements enumerated in the Ministerial Declaration on the Uruguay Round) At an early stage of the negotiations, a proposal supported by Brazil and Egypt to allow for safeguard measures only in case of "serious injury" was set aside. (Negotiating Group on Safeguards, MTN.GNG/NG9/W/3, 25 May 1987; Negotiating Group on Safeguards, MTN.GNG/NG9/W/9, 5 October 1987; Negotiating Group on Safeguards, MTN.GNG/NG9/3/Add.1, 17 November 1987) In June 1989, the Chairman of the Negotiating Group on Safeguards presented a first draft text where "serious injury" was defined as "a severe or critical overall deterioration in the position of domestic producers responsible for at least a major proportion of the domestic production of like products or directly competitive products" whereas "threat of serious injury" was defined as "serious injury that is clearly imminent and is demonstrated to be a virtual certainty." (Negotiating Group on Safeguards, MTN.GNG/NG9/W/25, 27 June 1989)

After several discussions and revisions a final revised draft was submitted in October 1990. This draft further defined "serious injury" as "a significant overall impairment in the position of a domestic industry", whereas "threat of serious injury" was defined as "serious injury that is clearly imminent …". (Negotiating Group on Safeguards, MTN.GNG/NG9/W/25/Rev.3, 31 October 1990) This proposal evolved into the definitions of "serious injury" and "threat of serious injury" contained in Article 4 of the *Agreement on Safeguards*. Although the Negotiating Group on Safeguards spent much effort on the clarification of the terms "serious injury" and "threat of serious injury", its deliberations do not provide guidance as to whether the distinct definitions of "serious injury" and "threat of serious injury" imply a requirement of a discrete finding.

IX. "Parallelism" Between the Investigation and the Application of the Line Pipe Measure

178. We turn now to the issue of parallelism between the investigation and the application of the line pipe measure.

179. The concept of parallelism is derived from the parallel language used in the first and second paragraphs of Article 2 of the *Agreement on Safeguards*. Article 2 provides as follows:

> *Conditions*
>
> 1. A Member[1] may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.
>
> 2. Safeguard measures shall be applied to a product being imported irrespective of its source.
>
> [1] A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole. When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State. Nothing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.

180. In *US – Wheat Gluten*, we explained:

> The same phrase – "product … being imported" – appears in *both* … paragraphs of Article 2. In view of the identity of the language in the two provisions, and in the absence of any contrary indication in the context, we believe that it is appropriate to ascribe the *same* meaning to this phrase in both Articles 2.1 and 2.2. To include imports from all sources in the determination that increased imports are causing serious injury, and then to exclude imports from one source from the application of the measure, would be to give the phrase "product being imported" a *different* meaning in Articles 2.1 and 2.2 of the *Agreement on Safeguards*. In Article 2.1, the phrase would embrace imports from *all* sources whereas, in Article 2.2, it would exclude imports from certain sources. This would be incongruous and unwarranted. [172] (original emphasis)

[172] Appellate Body Report, *supra*, footnote 39, para. 96.

181. As we then stated in *US – Wheat Gluten*, "the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2."[173] We added that a gap between imports covered under the investigation and imports falling within the scope of the measure can be justified only if the competent authorities "establish explicitly" that imports from sources covered by the measure "satisf[y] the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*."[174] And, as we explained further in *US – Lamb*, in the context of a claim under Article 4.2(a) of the *Agreement on Safeguards*, "establish[ing] explicitly" implies that the competent authorities must provide a "*reasoned and adequate explanation* of how the facts support their determination".[175]

182. Before the Panel, Korea claimed that the United States violated Articles 2 and 4 of the *Agreement on Safeguards* by including Canada and Mexico in the USITC analysis of serious injury but by excluding Canada and Mexico from the application of the safeguard measure.

183. In response to this claim by Korea, the Panel stated:

> … we would only be in a position to uphold Korea's Claim 7 if it had established a prima facie case that the United States had excluded imports from Canada and Mexico from the line pipe measure, without establishing explicitly that imports from sources other than Canada and Mexico satisfied the conditions for the application of a safeguard measure. To do so, at a minimum Korea would have had to specifically address, and rebut, the contents of note 168. We recall that Korea has made no attempt to do this. Instead, Korea limited itself to arguing that note 168 has no legal significance, without making any attempt to substantiate that argument. On balance, therefore, and particularly in light of the contents of note 168, we are unable to find that Korea has established a prima facie case that the United States "also violated Articles 2 and 4 of the Agreement on Safeguards by including Mexico and Canada in the analysis of injurious imports but by excluding Mexico and Canada from the application of the safeguard measure." We therefore reject Korea's Claim 7.[149]
>
> [149] In doing so, we do not find that note 168 is sufficient for the purposes of Articles 2.1 and 4.1. We merely find that Korea has failed to establish a prima facie case that the United States violated those provisions.[176]

[173] Appellate Body Report, *supra*, footnote 39, para. 96.

[174] *Ibid*., para. 98.

[175] Appellate Body Report, *supra*, footnote 38, para. 103. (original emphasis)

[176] Panel Report, para. 7.171 and footnote 149 thereto.

184. Korea appeals this finding. Korea submits that the Panel imposed a "flawed standard"[177] for the establishment of a *prima facie* case, committed a "serious error"[178] in its treatment of arguments and evidence submitted by the parties, and introduced an "arbitrary and flawed"[179] minimum condition for Korea to establish a *prima facie* case.

185. The United States replies that the Panel correctly found that Korea failed to establish a *prima facie* case of inconsistency with the obligation that the imports included in the determination made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure under Article 2.2. The United States submits that Korea did not demonstrate that the USITC failed to perform an injury analysis specific to imports from non-NAFTA sources. According to the United States, despite the undisputed existence of an exhaustive discussion of the relevant data on imports from sources other than Canada and Mexico in footnote 168 of the USITC Report, Korea's claim rests on the bare assertion that the USITC non-NAFTA analysis has "no legal significance."[180] The United States contends that the Panel was correct in rejecting this assertion, and in finding that footnote 168 clearly formed part of the USITC's published determination and contained findings by the USITC.

186. We observe that the USITC described the scope of its investigation by identifying the product according to its tariff heading and commercial characteristics[181], with no reference to product origin. The USITC considered "imports from *all sources* in determining whether imports have increased"[182] and relied on data corresponding to total imports.[183] In considering the injurious effects of increased imports on the United States domestic industry, the USITC examined the share of the domestic market held by United States producers compared to the market share held by imports from all sources.[184] When performing its causation analysis, the USITC assessed increased imports[185] and found that "the surge in imports and consequent shift in market share from the domestic industry to imports occurred at the same time that the domestic industry went from healthy performance to poor performance."[186] This conclusion and the preceding analysis of increased imports were based on data

[177]Korea's other appellant's submission, para. 70.

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

[179]*Ibid*., para. 101.

[180]United States' appellee's submission, para. 70.

[181]USITC Report, p. I-3, footnote 1.

[182]*Ibid*., p. I-14. (emphasis added)

[183]*Ibid*., footnote 62, referring to data contained in Table C-1.

[184]*Ibid*., p. I-18, footnotes 98–100.

[185]*Ibid*., pp. I-23 ff.

[186]*Ibid*., p. I-24, third para. and footnotes 145–147.

contained in Table C-1 of the USITC Report, which includes imports from all sources. It is clear, therefore, that, in its investigation, the USITC considered imports from *all sources*, including imports from Canada and Mexico. Nevertheless, exports from Canada and Mexico were excluded from the safeguard measure at issue. Therefore, there is a gap between imports covered under the investigation performed by the USITC and imports falling within the scope of the measure.

187. In our view, Korea has demonstrated that the USITC considered imports from all sources in its investigation. Korea has also shown that exports from Canada and Mexico were excluded from the safeguard measure at issue. And, in our view, this *is* enough to have made a *prima facie* case of the absence of parallelism in the line pipe measure. Contrary to what the Panel stated [187], we do not consider that it was necessary for Korea to address the information set out in the USITC Report, or in particular, in footnote 168 in order to establish a *prima facie* case of violation of parallelism. Moreover, to require Korea to rebut the information in the USITC Report, and in particular, in footnote 168, would impose an impossible burden on Korea because, as the exporting country, Korea would not have had any of the relevant data to conduct its own analysis of the imports.

188. Having determined that Korea did establish a *prima facie* case of violation of parallelism of the line pipe measure, we now examine whether the United States rebutted Korea's argument. To do so, it would be necessary for the United States to demonstrate, consistent with our ruling in *US – Wheat Gluten*, that the USITC provided a *reasoned and adequate explanation* that *establishes explicitly* that imports from non-NAFTA sources "satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*." [188]

189. Before the panel and on appeal, the United States has relied on footnote 168 of the USITC Report. In the oral hearing in this appeal, the United States stressed footnote 168, which reads, in its entirety, as follows:

[187] Panel Report, para. 7.171.

[188] Appellate Body Report, *US – Wheat Gluten*, *supra*, footnote 39, para. 98.

> We note that we would have reached the same result had we excluded imports from Canada and Mexico from our analysis. Imports from non-NAFTA sources increased significantly over the period of investigation, in absolute terms and as a percentage of domestic production. Non-NAFTA imports fell from *** tons in 1994 to *** tons in 1996, but then rose sharply to *** tons in 1997 and *** tons in 1998. While non-NAFTA imports fell from *** tons in interim 1998 to *** tons in interim 1999, they remained at a very high level in interim 1999, exceeding in just 6 months the level of *full* year 1995 and 1996 imports. These imports also increased significantly in terms of market share at the end of the period of investigation, rising from *** percent in 1996 to *** percent in 1998, and from *** percent in interim 1998 to *** percent in interim 1999. Moreover, the non-NAFTA imports were among the lowest-priced imports. Except for 1994, the average unit value of imports from Canada exceeded the average import unit value throughout the period of investigation, and the volume of imports was relatively small. The average unit value of imports from Mexico exceeded the average for all imports in 1998 and interim 1999, the period in which the serious injury occurred, and the volume of imports from Mexico declined during this period. Moreover, in the 244 possible product-specific price comparisons, non-NAFTA imports undersold domestic line pipe in 194 instances (about 80 percent), and Korean product accounted for by far the largest number of instances of underselling (95 of the 194). Data are based on those in Table C-1 adjusted to exclude certain imports of Arctic-grade and alloy line pipe.[189]

190. The Panel examined footnote 168 and concluded that:

> … note 168 contains *a finding* by the ITC that imports from non-NAFTA sources increased significantly over the period of investigation, in absolute terms and as a per centage of domestic production. Note 168 also contains *the basis for a finding* that non-NAFTA [imports] caused serious injury to the relevant domestic industry.[190] (emphasis added)

191. On appeal, Korea argues that the first sentence of footnote 168 indicates that the USITC was not in a position to *assert* that the result of its investigation would remain "the same" if imports from Canada and Mexico were excluded. In Korea's view, the USITC Report is drafted in conditional terms: "we *would* have reached the same result *had* we excluded imports from Canada and Mexico from our analysis."[191] As a consequence, according to Korea, "the footnote has no legal significance."[192]

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[189]USITC Report, pp. I-26 and I-27.

[190]Panel Report, para. 7.170.

[191]USITC Report, p. I-26, footnote 168. (emphasis added)

[192]Korea's other appellant's submission, paras. 102 and 108.

192. The flaw in Korea's argument is that the first sentence of footnote 168 is followed by language indicating that the USITC did, in fact, as the Panel found, consider whether "[i]mports from non-NAFTA sources increased significantly over the period of investigation". Consequently, we do not agree with Korea that the conditional nature of the first sentence of footnote 168 invalidates the whole footnote and, thus, renders it void of "legal significance". What we must determine, then, is whether, as the United States submits, footnote 168 satisfies the requirement of parallelism.

193. As the Panel put it, footnote 168 has two elements: a "*finding*" that imports from non-NAFTA sources increased significantly over the period of investigation, and the "*basis for a finding*" that imports from non-NAFTA sources caused serious injury [193] to the relevant domestic industry.

194. Although footnote 168 contains a determination that imports from non-NAFTA sources increased significantly, footnote 168 does not, as we read it, establish *explicitly* that increased imports from non-NAFTA sources alone caused serious injury or threat of serious injury. Nor does footnote 168, as we read it, provide a *reasoned and adequate explanation* of how the facts would support such a finding. To be explicit, a statement must express distinctly all that is meant; it must leave nothing merely implied or suggested; it must be clear and unambiguous.

195. Footnote 168 does not express distinctly or state clearly and unambiguously how the facts would support a finding by the USITC that imports from non-NAFTA sources alone caused serious injury or threat of serious injury. Footnote 168 may, as the Panel found, provide a basis for a finding that imports from non-NAFTA sources, alone, caused serious injury, but this is not enough. Footnote 168 does not establish explicitly that imports from sources covered by the measure "satisf[y] the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*." Footnote 168 does not amount to a "*reasoned and adequate explanation* of how the facts support [the] determination." Therefore, by referring to footnote 168, the United States did not rebut the *prima facie* case made by Korea.

196. During the oral hearing, in response to our questioning, the United States referred also to other parts of the USITC Report addressing the imports from NAFTA countries [194], and contended that those parts established explicitly that imports from sources covered by the line pipe measure satisfied the conditions for the application of the measure. We have read those pages of the USITC Report with this contention of the United States in mind. We find that those pages of the USITC Report likewise do not establish explicitly, through a reasoned and adequate explanation, that

[193]Panel Report, para. 7.170.

[194]United States' response to questioning at the oral hearing. See, USITC Report, pp. I-32–I-35 and I-51–I-54.

increased imports from non-NAFTA sources by themselves caused serious injury or threat of serious injury. Therefore, those pages of the USITC Report do not rebut the *prima facie* case made by Korea.

197. Therefore, we reverse the Panel's finding in paragraph 7.171 of the Panel Report, that Korea has not established a *prima facie* case of the absence of parallelism in the line pipe measure. And, we find that the United States has violated Articles 2 and 4 of the *Agreement on Safeguards* by including Canada and Mexico in the analysis of whether increased imports caused or threatened to cause serious injury, but excluding Canada and Mexico from the application of the safeguard measure, without providing a reasoned and adequate explanation that establishes explicitly that imports from non-NAFTA sources by themselves satisfied the conditions for the application of a safeguard measure.

198. In doing so, we do not prejudge whether Article 2.2 of the *Agreement on Safeguards* permits a Member to exclude imports originating in member states of a free-trade area from the scope of a safeguard measure. We need not, and so do not, rule on the question whether Article XXIV of the GATT 1994 permits exempting imports originating in a partner of a free-trade area from a measure in departure from Article 2.2 of the *Agreement on Safeguards*.[195] The question of whether Article XXIV of the GATT 1994 serves as an exception to Article 2.2 of the *Agreement on Safeguards* becomes relevant in only two possible circumstances. One is when, in the investigation by the competent authorities of a WTO Member, the imports that are exempted from the safeguard measure *are not considered* in the determination of serious injury. The other is when, in such an investigation, the imports that are exempted from the safeguard measure *are considered* in the determination of serious injury, *and* the competent authorities have *also* established explicitly, through a reasoned and adequate explanation, that imports from sources outside the free-trade area, alone, satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2. The first of these two possible circumstances does not apply in this case; it is *not* the case here that the imports that were exempted from the line pipe measure—those from Canada and Mexico—were *not* considered in the determination of serious injury. It is undisputed that they were so considered. The second of these two possible circumstances also does not apply in this case. The competent authority—in this case, the USITC—has not provided in its determination a *reasoned and adequate explanation* that "establish[es] explicitly" that imports from non-NAFTA sources satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*.

[195]In this respect, we recall that Korea appeals several of the Panel's findings referring to the relationship between Article XXIV of the GATT 1994 and the *Agreement on Safeguards*.

199. Given these conclusions, we need not address the question whether an Article XXIV defence is available to the United States. Nor are we required to make a determination on the question of the relationship between Article 2.2 of the *Agreement on Safeguards* and Article XXIV of the GATT 1994. We, therefore, modify the findings and conclusions of the Panel relating to these two questions contained in paragraphs 7.135 to 7.163 and in paragraph 8.2(10) of the Panel Report by declaring them moot and as having no legal effect.

X. Non-Attribution of the Injurious Effects of Other Factors to Increased Imports

200. We turn now to the issue of whether the United States met the non-attribution requirement of Article 4.2(b) of the *Agreement on Safeguards*.

201. Article 4.2(b) of the *Agreement on Safeguards* provides as follows:

> *Determination of Serious Injury or Threat Thereof*
>
> The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

202. Before the Panel, Korea argued that the USITC violated Article 4.2(b) by failing to demonstrate properly that injury[196] caused by other factors had not been attributed to increased imports. Korea asserted that the USITC did not properly distinguish the injurious effects caused by the other factors from the injurious effects of increased imports, with the result that the USITC was not able to assure that it did not attribute injury caused by other factors to increased imports.

203. The United States replied that the USITC properly distinguished the effects of other factors from the effects of increased imports. In particular, the USITC examined six factors other than increased imports, as the possible contributing causes of serious injury. Although the USITC found that one other causal factor, declining demand in the oil and gas sector, contributed to the serious injury experienced by the domestic industry, the USITC also found that the impact of increased imports was as great or greater than the effect of the downturn in oil and gas sector demand.

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[196]In this section, in order to facilitate reading, we mean "serious injury or threat of serious injury" even where we refer only to "serious injury" or "injury". Despite the absence of the notion of threat in the second sentence of Article 4.2(b), the non-attribution requirement also applies to the causes of threat of serious injury. See, Appellate Body Report, *US – Lamb*, *supra*, footnote 38, para. 179.

204. The Panel found that:

> … the ITC in its report did not adequately explain how it ensured that injury caused to the domestic industry by factors other than increased imports was not attributed to increased imports. For this reason, we find that the United States acted inconsistently with Article 4.2(b) of the Safeguards Agreement.[197]

205. The United States appeals the Panel's finding on Article 4.2(b). The United States submits that the Panel's finding is flawed because it rests on the theory that the USITC, by determining whether injury caused by any other factor is not greater than the injury caused by the increased imports, was performing a causation analysis which the Panel ruled "was inherently inconsistent with Article 4.2(b)."[198] In addition, the United States argues that, in the course of its analysis, the USITC expressly explained how it ensured that it did not attribute injury caused by other factors to the increased imports.[199]

206. On this issue, we begin by recalling that, in its causation analysis, the USITC applied a standard established by United States law that consists of determining whether the subject product is being imported in such increased quantities as to be a "substantial cause" of serious injury or threat of serious injury. The United States Trade Act of 1974 defines the term "substantial cause" as "a cause which is important and not less than any other cause".[200] Pursuant to statute, the USITC employed this "substantial cause" standard in the investigation and determination that led to the line pipe measure. As we emphasized previously, we are examining the measure as defined in this appeal; we are not reviewing the "substantial cause" standard in the United States law *per se*, but rather only its application in this case.[201]

207. In this investigation, the USITC identified a number of factors, apart from increased imports, which caused injury or threat of injury to the line pipe industry. Those factors were: a decline in line pipe demand resulting from reduced oil and natural gas drilling and production activities; competition among domestic producers; a decline in export markets in 1998 and interim 1999[202]; a shift from oil country tubular goods production to line pipe production; and a decline in raw material costs.[203] Applying the "substantial cause" standard, the USITC analyzed the relative causal importance of these

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[197]Panel Report, para. 7.290.

[198]United States' appellant's submission, para. 52.

[199]*Ibid*., para. 56.

[200]Section 202(b)(1)(B) of the United States Trade Act of 1974, as amended.

[201]See, *supra*, paras. 76 and 77.

[202]January–June 1999.

[203]Panel Report, para. 7.283.

factors by determining whether any other factor was a more important cause of injury than increased imports. The USITC paid particular attention to the decline in line pipe demand resulting from reduced oil and natural gas drilling and production activities. Although recognizing that this decline contributed to the serious injury sustained by the domestic industry in 1998–1999, the USITC nevertheless found that the decline in activities related to oil and natural gas was not a greater contributing factor to the industry's serious injury than the increased imports.[204] Accordingly, the USITC concluded that the "substantial cause" standard was met and that a causal link existed between increased imports and serious injury.

208. Article 4.2(b) of the *Agreement on Safeguards* establishes two distinct legal requirements for competent authorities in the application of a safeguard measure. First, there must be a demonstration of the "existence of the causal link between increased imports of the product concerned and serious injury or threat thereof ". Second, the injury caused by factors other than the increased imports must not be attributed to increased imports.

209. We have explained, in *US – Wheat Gluten*, that the causal link required by Article 4.2(b), first sentence, of the *Agreement on Safeguards* is "a relationship of cause and effect such that increased imports contribute to 'bringing about', 'producing' or 'inducing' the serious injury."[205] More specifically, we said there that "[t]he word 'causal' means 'relating to a cause or causes', while the word 'cause', in turn, denotes a relationship between, at least, two elements, whereby the first element has, in some way, 'brought about', 'produced' or 'induced' the existence of the second element."[206] We also explained that the word "link" indicates "that increased imports have played a part in, or contributed to, bringing about serious injury so that there is a causal 'connection' or 'nexus' between these two elements."[207] Article 4.2(b) does not require that increased imports be the sole cause of serious injury. In addition, we determined in *US – Wheat Gluten* that the causation requirement of Article 4.2(b) can be met where the serious injury is caused by the interplay of increased imports and other factors.[208] In other words, to meet the causation requirement in Article 4.2(b), it is not necessary to show that increased imports alone—on their own—must be capable of causing serious injury.[209]

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[204]USITC Report, p. I-28.

[205]Appellate Body Report, *supra*, footnote 39, para. 67.

[206]*Ibid*. (footnote omitted)

[207]*Ibid*.

[208]*Ibid*., paras. 67 and 68.

[209]*Ibid*., para. 70.

210. We have also had occasion to construe the second sentence of Article 4.2(b), which requires that the competent authorities not attribute to increased imports injury caused by factors other than increased imports. In *US – Wheat Gluten*, we stated:

> The need to ensure a proper attribution of "injury" under Article 4.2(b) indicates that competent authorities must take account, in their determination, of the effects of increased imports *as distinguished from* the effects of other factors.[210] (original emphasis)

211. In *US – Lamb*, we reiterated and elaborated on this requirement:

> The primary objective of the process we described in *United States – Wheat Gluten Safeguard* is, of course, to determine whether there is "a genuine and substantial relationship of cause and effect" between increased imports and serious injury or threat thereof. As part of that determination, Article 4.2(b) states expressly that injury caused to the domestic industry by factors other than increased imports "shall not be attributed to increased imports." In a situation where *several factors* are causing injury "at the same time", a final determination about the injurious effects caused by *increased imports* can only be made if the injurious effects caused by all the different causal factors are distinguished and separated. Otherwise, any conclusion based exclusively on an assessment of only one of the causal factors – increased imports – rests on an uncertain foundation, because it *assumes* that the other causal factors are *not* causing the injury which has been ascribed to increased imports. The non-attribution language in Article 4.2(b) precludes such an assumption and, instead, requires that the competent authorities assess appropriately the injurious effects of the other factors, so that those effects may be disentangled from the injurious effects of the increased imports. In this way, the final determination rests, properly, on the genuine and substantial relationship of cause and effect between increased imports and serious injury.[211] (original emphasis)

212. Article 3.5 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") provides, in language similar to that of the last sentence of Article 4.2(b) of the *Agreement on Safeguards*, that, with respect to a determination of injury: "[t]he authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports." In *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*US – Hot-Rolled Steel*"), we construed this similar language in Article 3.5 of the *Anti-Dumping Agreement* when we stated:

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[210]Appellate Body Report, *supra*, footnote 39, para. 70.

[211]Appellate Body Report, *supra*, footnote 38, para. 179.

> … investigating authorities must ensure that injuries which are caused to the domestic industry by known factors, other than dumped imports, are not "*attributed* to the dumped imports." …
>
> The non-attribution language in Article 3.5 of the *Anti-Dumping Agreement* applies solely in situations where dumped imports and other known factors are causing injury to the domestic industry *at the same time*. In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not "attributed" to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the *Anti-Dumping Agreement*, justifies the imposition of anti-dumping duties.[212] (original emphasis)

213. We specified in that same appeal that Article 3.5 of the *Anti-Dumping Agreement* requires an identification of "the nature and extent of the injurious effects of the other known factors"[213] as well as "a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports."[214]

214. These statements in *US – Hot-Rolled Steel* provide guidance for us here. As we noted in that appeal: "[a]lthough the text of the *Agreement on Safeguards* on causation is by no means identical to that of the *Anti-Dumping Agreement*, there are considerable similarities between the two Agreements as regards the non-attribution language."[215] We then went on to say that "adopted panel and Appellate Body reports relating to the non-attribution language in the *Agreement on Safeguards* can provide guidance in interpreting the non-attribution language in Article 3.5 of the *Anti-Dumping Agreement*."[216] We are of the view that this reasoning applies both ways. Our statements in *US – Hot-Rolled Steel* on Article 3.5 of the *Anti-Dumping Agreement* likewise provide guidance in interpreting the similar language in Article 4.2(b) of the *Agreement on Safeguards*.

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[212] Appellate Body Report, WT/DS184/AB/R, adopted 23 August 2001, paras. 222 and 223.

[213] *Ibid*., para. 227.

[214] *Ibid*., para. 226.

[215] *Ibid*., para. 230.

[216] *Ibid*.

215. Article 4.2(b), last sentence, requires that, when factors other than increased imports are causing injury at the same time as increased imports, competent authorities must ensure that injury caused to the domestic industry by other factors is not attributed to the increased imports. We have previously ruled, and we reaffirm now, that, to fulfill this requirement, competent authorities must separate and distinguish the injurious effects of the increased imports from the injurious effects of the other factors.[217] As we ruled in *US – Hot-Rolled Steel* with respect to the similar requirement in Article 3.5 of the *Anti-Dumping Agreement*, so, too, we are of the view that, with respect to Article 4.2(b), last sentence, competent authorities are required to identify the nature and extent of the injurious effects of the known factors other than increased imports, as well as explain satisfactorily the nature and extent of the injurious effects of those other factors as distinguished from the injurious effects of the increased imports.

216. In addition, in *US – Wheat Gluten*, we stated in the context of parallelism that the competent authorities must "establish explicitly" that imports from sources covered by the measure "satisf[y] the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*."[218] We explained further in *US – Lamb*, in the context of a claim under Article 4.2(a) of the *Agreement on Safeguards*, that the competent authorities must provide a "*reasoned and adequate explanation* of how the facts support their determination".[219] We are of the view that, by analogy, the requirements elaborated in *US – Wheat Gluten* and in *US – Lamb*, also apply to the exercise contemplated in Article 4.2(b), last sentence, since in all those cases, the competent authorities are under a procedural obligation to provide an explanation as regards a determination.

217. Thus, to fulfill the requirement of Article 4.2(b), last sentence, the competent authorities must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports. This explanation must be clear and unambiguous. It must not merely imply or suggest an explanation. It must be a straightforward explanation in express terms.

218. Therefore, the question before us is whether the USITC performed such an analysis and provided such a reasoned and adequate explanation. The United States submits that the USITC did so. In support of this submission, the United States refers to footnote 56 of its appellant's

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[217]Appellate Body Report, *US – Wheat Gluten*, *supra*, footnote 39, para. 70; Appellate Body Report, *US – Lamb*, *supra*, footnote 38, para. 179. In the context of the *Anti-Dumping Agreement*, see, Appellate Body Report, *US – Hot-Rolled Steel*, *supra*, footnote 212, para. 222.

[218]Appellate Body Report, *supra*, footnote 39, para. 98.

[219]Appellate Body Report, *supra*, footnote 38, para. 103.

submission, which cites paragraphs 112 to 159 of the United States' first written submission to the Panel; paragraphs 55 to 79 of the United States' oral statement at the first Panel meeting; paragraphs 53 to 59 and 92 to 106 of the United States' response to questions posed by the Panel and Korea (7 May 2001); and paragraphs 47 to 56 of the United States' oral statement at the second Panel meeting. The United States also refers to Appendix A to the United States' appellant's submission and to page I-30 of the USITC Report [220], more specifically to the following passage:

> … Respondents also argued that we may not attribute injury caused by these factors to the imports. [187] We have not done so. As required by the statute, after evaluating all possible causes of injury, we have determined that the imports are an important cause of serious injury and are not less than any other cause.

[187] Japanese and Korean Respondents' Prehearing Brief on Injury at 46-49.

219. Korea argues that, although the USITC recognized that the decline in oil and gas drilling and production caused injury [221], the USITC did not explain the nature and extent of the injurious effects attributable to decreased oil and gas drilling and did not properly separate and distinguish these injurious effects from those of the increased imports. Korea adds that the USITC did not provide "a reasoned and adequate explanation as to how the facts support such a determination." [222] As for the various citations in footnote 56 and Appendix A to the United States' appellant's submission, Korea argues that they are based only on certain limited portions of the USITC Report. [223] In particular, Korea maintains that page I-30 of the USITC Report does not meet the non-attribution requirements of Article 4.2(b) of the *Agreement on Safeguards*, because the focus of the passage is not non-attribution, but the reaffirmation of the substantial cause methodology. [224]

220. We have examined thoroughly Appendix A to the United States' appellant's submission as well as the citations contained in footnote 56. Appendix A and the citations in footnote 56 refer to certain parts of the USITC Report, which we have likewise examined thoroughly. Our examination leads us to conclude that those cited parts of the USITC Report do not *establish explicitly*, with a *reasoned and adequate explanation*, that injury caused by factors other than the increased imports was not attributed to increased imports. The passage on page I-30 of the USITC Report highlighted by the United States is but a mere assertion that injury caused by other factors is not attributed to increased imports. A mere assertion such as this does not *establish explicitly*, with a *reasoned and*

[220] United States' appellant's submission, footnote 36 to para. 56 and footnote 3 to para. 2 of Appendix A.

[221] Korea's response to questioning at the oral hearing.

[222] Korea's appellee's submission, para. 64.

[223] *Ibid*., para. 62; Korea's response to questioning at the oral hearing.

[224] Korea's appellee's submission, para. 68.

adequate explanation, that injury caused by factors other than the increased imports was not attributed to increased imports. This brief assertion in the USITC Report offers no reasoning and no explanation at all, and therefore falls short of what we have earlier described as a reasoned and adequate explanation.

221. Finally, we do not agree with the United States' contention that the Panel "essentially found that the U.S. causation methodology was inherently inconsistent with Article 4.2(b)."[225] The Panel did not make such a finding, either explicitly or implicitly.

222. Therefore, we uphold the Panel's finding, in paragraph 7.290 of the Panel Report, that the USITC did not adequately explain how it ensured that injury caused to the domestic industry by factors other than increased imports was not attributed to increased imports, and that, consequently, the United States acted inconsistently with Article 4.2(b) of the *Agreement on Safeguards*.

XI. The Application of the Line Pipe Measure: Express Justification and Permissible Extent

223. We turn now to the issue of the consistency of the application of the line pipe measure with Article 5.1 of the *Agreement on Safeguards*, which states:

Application of Safeguard Measures

> A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury. Members should choose measures most suitable for the achievement of these objectives.

224. Korea appeals two findings of the Panel relating to Article 5.1, first sentence, and the line pipe measure. Korea sees in Article 5.1, first sentence, two obligations for the Member applying a safeguard measure: a procedural obligation and a substantive obligation. Korea believes that the two obligations are different in nature. According to Korea, the United States violated both of these obligations, and the Panel erred in not finding that the United States did so. Korea's two claims are interrelated, so we deal with them together.

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[225]United States' appellant's submission, para. 52. (footnote omitted)

225. Before taking up the claims relating to this provision, we note that, here, we are dealing with the second of two basic inquiries that face an interpreter of the *Agreement on Safeguards*. Having inquired and established, first, that, in a particular case, there is a right to apply a safeguard measure, an interpreter must inquire and establish, second, that the safeguard measure, in that particular case, has been applied, in the words of Article 5.1, first sentence, "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment." It is this inquiry that is addressed in Article 5.1, first sentence.

A. *The Express Justification of the Line Pipe Measure at the Time of Application*

226. We start with Korea's first claim, which relates to the procedural obligation Korea discerns in Article 5.1, first sentence. The Panel found that the United States was not required to demonstrate, at the time of its application, that the line pipe measure was "necessary to prevent or remedy serious injury and to facilitate adjustment".[226] Korea appeals this Panel finding and claims that the Member applying a safeguard measure must, as a procedural obligation, "demonstrate its compliance with the first sentence of Article 5.1"[227] at the time of its application. Korea argues that upholding the Panel's findings would "seriously undermine the fundamental discipline"[228] on safeguard measures contained in the first sentence of Article 5.1 of the *Agreement on Safeguards*. According to Korea, this "would lead to abuse" and "prejudice the rights of WTO Members".[229]

227. In reply, the United States argues that there is no such procedural obligation in Article 5.1, first sentence. The United States submits that the text of the Agreement confirms the Panel's view that while Article 5.1 requires a "justification" for certain types of quantitative restrictions, it does not require a "justification" for safeguard measures in general. The United States contends that we have already endorsed this interpretation in *Korea – Dairy*.[230]

[226]Panel Report, para. 7.81.

[227]Korea's other appellant's submission, para. 114.

[228]*Ibid*., para. 111.

[229]*Ibid*.

[230]United States' appellee's submission, para. 86.

228. We discussed Article 5.1 of the *Agreement on Safeguards* extensively in *Korea – Dairy*. In that case, the panel had found that:

> … Members are required, in their recommendations or determinations on the application of a safeguard measure, to explain how they considered the facts before them and why they concluded, at the time of the decision, that the measure to be applied was necessary to remedy the serious injury and facilitate the adjustment of the industry.[231]

229. According to the panel in *Korea – Dairy*, this requirement is applied irrespective of whether or not the safeguard measure is a quantitative restriction reducing the quantity of imports below the average of imports in the last three representative years. On the basis of this interpretation of Article 5.1, the panel concluded that Korea, the respondent there, had not met the requirements of Article 5.1.

230. We reversed this finding on appeal[232], stating with respect to the first sentence of Article 5.1 that:

> … the wording of this provision leaves no room for doubt that it imposes an *obligation* on a Member applying a safeguard measure to ensure that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment. … [T]his obligation applies regardless of the particular form that a safeguard measure might take. Whether it takes the form of a quantitative restriction, a tariff or a tariff rate quota, the measure in question must be applied "only to the extent necessary" to achieve the goals set forth in the first sentence of Article 5.1.[233] (original emphasis, footnotes omitted)

231. We then addressed the second sentence of Article 5.1:

> This sentence requires a "clear justification" if a Member takes a safeguard measure in the form of a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years for which statistics are available. We agree with the Panel that this "clear justification" has to be given by a Member applying a safeguard measure *at the time of the decision, in its recommendations or determinations on the application of the safeguard measure*.[234] (original emphasis)

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[231]Panel Report, *Korea – Dairy*, WT/DS98/R and Corr.1, adopted 12 January 2000, as modified by the Appellate Body Report, *supra*, footnote 52, para. 7.109.

[232]Appellate Body Report, *Korea – Dairy*, *supra*, footnote 52, para. 103.

[233]*Ibid*., para. 96.

[234]*Ibid*., para. 98.

232. With respect to the need to provide a "clear justification" for measures other than those specifically described in that second sentence, we stated in the same appeal that:

> … we do not see anything in Article 5.1 that establishes such an obligation 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. In 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 for which statistics are available".[235] (original emphasis)

233. It is clear, therefore, that, apart from one exception, Article 5.1, including the first sentence, does not oblige a Member to justify, at the time of application, that the safeguard measure at issue is applied "only to the extent necessary". The exception we identified in *Korea – Dairy* lies in the second sentence of Article 5.1. That exception concerns safeguard measures in the form of quantitative restrictions, which reduce the quantity of imports below the average of imports in the last three representative years. That exception does not apply to the line pipe measure.

234. Thus, our findings in *Korea – Dairy* establish that Article 5.1 imposes a general substantive obligation, namely, to apply safeguard measures only to the permissible extent, and also a particular procedural obligation, namely, to provide a clear justification in the specific case of quantitative restrictions reducing the volume of imports below the average of imports in the last three representative years. Article 5.1 does not establish a general procedural obligation to demonstrate compliance with Article 5.1, first sentence, at the time a measure is applied.

235. Accordingly, since the line pipe safeguard measure is not a quantitative restriction, we uphold the Panel's finding in paragraph 7.81 of its Report that "the United States was not required to demonstrate, at the time of imposition, that the line pipe measure was 'necessary to prevent or remedy serious injury and to facilitate adjustment'."

236. This does not imply, as Korea seems to assert, that the measure may be devoid of justification or that the multilateral verification of the consistency of the measure with the *Agreement on Safeguards* is impeded. The Member imposing a safeguard measure must, in any event, meet several obligations under the *Agreement on Safeguards*. And, meeting those obligations should have the effect of clearly explaining and "justifying" the extent of the application of the measure. By separating and distinguishing the injurious effects of factors other than increased imports from those caused by increased imports, as required by Article 4.2(b), and by including this detailed analysis in

[235] Appellate Body Report, *Korea – Dairy*, *supra*, footnote 52, para. 99.

the report that sets forth the findings and reasoned conclusions, as required by Articles 3.1 and 4.2(c), a Member proposing to apply a safeguard measure should provide sufficient motivation for that measure. Compliance with Articles 3.1, 4.2(b) and 4.2(c) of the *Agreement on Safeguards* should have the incidental effect of providing sufficient "justification" for a measure and, as we will explain, should also provide a benchmark against which the permissible extent of the measure should be determined.

B. *The Permissible Extent of the Line Pipe Measure*

237. We turn next to Korea's second claim, which relates to the general substantive obligation contained in Article 5.1, first sentence, to apply a safeguard measure "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment". The Panel found that Korea failed to make a *prima facie* case demonstrating that the United States violated Article 5.1, first sentence, by applying a measure that exceeds what is "necessary to prevent or remedy serious injury and to facilitate adjustment".[236] On appeal, Korea claims that the Panel erred, and puts forward three arguments to sustain the claim. However, we find it necessary to consider only one of Korea's arguments to come to a conclusion on this claim.

238. Korea argues that there is a link between the causation analysis that resulted in the determination to apply the line pipe measure and the permissible extent of the line pipe measure.[237] Korea contends that the extent of the measure should be confined to the amount of the "serious injury" that can be attributed to increased imports.[238] Korea maintains that the USITC failed to ensure that injury caused to the domestic industry by factors other than increased imports was not attributed to increased imports, and that, as a consequence, the United States could not ensure that the measure was applied only to the extent of the injury that can be attributed to increased imports. Korea argues that the burden of establishing a *prima facie* case on this claim was satisfied by Korea's identification of this inconsistency.[239]

239. In reply, the United States asserts that the line pipe measure did not attempt to address the injurious effects caused by factors other than increased imports. The United States argues further that, in any event, a safeguard measure need not be limited to addressing the injury that can be attributed to

[236]Panel Report, para. 7.111.

[237]Korea's other appellant's submission, paras. 155 and 158–160.

[238]Panel Report, para. 7.107.

[239]Korea's other appellant's submission, para. 155.

increased imports [240], but can cover also the injury caused by other factors. [241] The United States seeks support for this argument in our Report in *US – Wheat Gluten* [242], where we stated:

> The need to ensure a proper attribution of "injury" under Article 4.2(b) indicates that competent authorities must take account, in their determination, of the effects of increased imports *as distinguished from* the effects of other factors. However, the need to distinguish between the effects caused by increased imports and the effects caused by other factors does *not* necessarily imply, as the Panel said, that increased imports *on their own* must be capable of causing serious injury, nor that injury caused by other factors must be *excluded* from the determination of serious injury. [243] (original emphasis)

240. The Panel did not make a finding on the merits of this argument by Korea. The Panel noted that "Korea has failed to identify any aspect of the line pipe measure which would suggest that it was intended to address the injurious effects of the decline in the oil and gas industry." [244] Moreover, the Panel added, "even assuming for the sake of argument" that the remedy recommended by the USITC was intended to so do, this did not mean that the line pipe measure that was eventually applied by the United States, and that "differed substantially" [245] from the remedy recommended by the USITC, was intended to do so. The Panel said, furthermore, that there was "certainly no evidence before us that might prompt us to assume that this was the case." On this basis, the Panel concluded that "[s]ince Korea has failed to establish any factual basis for its argument, it is not necessary for us to consider the substantive issue of whether or not safeguard measures should be confined to addressing the injurious effects of imports." [246]

241. The Panel, thus, did not reach the crucial legal question raised by Korea's claim, which is *whether the permissible extent of a safeguard measure is limited to the injury that can be attributed to increased imports, or whether a safeguard measure may also address the injurious effects caused by other factors*.

242. We begin our analysis of this issue by observing that the United States is mistaken in its characterization of our finding in paragraph 70 of our Report in *US – Wheat Gluten.* As we have

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[240]United States' appellee's submission, para. 120.

[241]Panel Report, para. 7.108.

[242]United States' appellee's submission, para. 120 and footnote 100 thereto; United States' response to questioning at the oral hearing.

[243]Appellate Body Report, *supra*, footnote 39, para. 70.

[244]Panel Report, para. 7.110.

[245]*Ibid*., footnote 243 to para. 7.313.

[246]*Ibid*., para. 7.110.

said, two basic inquiries are relevant to the process of determining whether, in the circumstances of a particular case, a safeguard measure is consistent with the rules set out in the *Agreement on Safeguards*: first, it must be determined that the conditions have been met for applying a safeguard measure; second, if it is established that such a right exists, then it must be determined whether the measure has been applied "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment."[247] Paragraph 70 of our Report in *US – Wheat Gluten* addressed the first of these two inquiries. In stating that Article 4.2(b) should not be read as necessarily implying that increased imports, *on their own*, must be capable of causing serious injury, or that injury caused by other factors must be *excluded* from the determination of serious injury, we were addressing the question of whether there is a right to apply a safeguard measure; we were not addressing the permissible extent of the application of a safeguard measure.

243. The United States is, therefore, mistaken in maintaining that our ruling in *US – Wheat Gluten* supports the proposition that Article 5.1, first sentence, permits a Member to apply a safeguard measure to prevent or remedy "the *entirety* of the serious injury experienced by the domestic industry".[248] The United States submits that because we "decided that in accordance with Article 4.2(a) serious injury was the entirety of the condition of the industry"[249], it follows that the serious injury to which Article 5.1, first sentence, refers must be the "entirety" of the serious injury. But, our ruling in *US – Wheat Gluten* makes no mention of the permissible extent to which a safeguard measure may be applied, nor of the "entirety" of serious injury as it relates to that permissible extent. The permissible extent of a safeguard measure is the subject of Article 5.1, first sentence. The meaning of Article 5.1, first sentence, was not at issue in *US – Wheat Gluten*; it is at issue here.

244. With this in mind, we look now at the text of Article 5.1, first sentence. We are, as always, guided by Article 31(1) of the *Vienna Convention*, which codifies the fundamental rule of treaty interpretation, and which provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning of its terms, in their context and in the light of the object and purpose of the treaty.

245. We observe, first of all, that the words of Article 5.1, first sentence, state that a safeguard measure may be applied "*only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment*". (emphasis added) This phrase sets the maximum permissible extent for the

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[247] *Supra*, para. 84.

[248] United States' appellee's submission, para. 120. (emphasis added)

[249] United States' response to questioning at the oral hearing.

application of a safeguard measure under the *Agreement on Safeguards*. To address this claim by Korea, we must discern the meaning of certain terms found in this phrase.

246. We note the presence of the words "only to the extent necessary". We see these words as indicating that this provision has a limited objective. We see them also as drawing the outer boundary of that limited objective—the maximum permissible "*extent*" to which a safeguard measure may be applied. These words instruct WTO Members to focus on what is "*necessary*" to fulfill that limited objective, which is "to prevent or remedy serious injury and to facilitate adjustment."

247. The limited objective of this provision is founded in the determination of "serious injury" that justifies the application of a safeguard measure. For this reason, a key to understanding the nature of the objective, and thus to determining whether a measure has been applied "only to the extent necessary" to achieve that objective, is the "serious injury" to which this phrase in the first sentence of Article 5.1 refers.

248. To what "serious injury" does this phrase refer? The Panel did not answer this question because the Panel did not reach the substantive issue of the meaning of Article 5.1, first sentence. For the reasons we will set out, we believe that we must do so in order to address the issue raised in this appeal.

249. In our view, the "serious injury" to which Article 5.1, first sentence, refers is, in any particular case, necessarily the same "serious injury" that has been determined to exist by competent authorities of a WTO Member pursuant to Article 4.2. We think it reasonable to assume that, as the Agreement provides only one definition of "serious injury", and as the Agreement does not distinguish the "serious injury" to which Article 5.1 refers from the "serious injury" to which Article 4.2 refers, the "serious injury" in Article 5.1 and the "serious injury" in Article 4.2 must be considered as one and the same. On this, we agree with the United States. But, contrary to what the United States argues, the fact that these two provisions refer to the same "serious injury" does not necessarily lead to the conclusion that a safeguard measure may address the "entirety" of the "serious injury", including the part of the "serious injury" that is attributable to factors other than increased imports.

250. This is because Article 5.1, first sentence, sets out the maximum permissible extent to which a safeguard measure may be applied. With its emphasis on the "entirety" of the "serious injury", the United States seems to read the word "all" as if it were between the word "remedy" and the words "serious injury" in this provision, so that the phrase would be "remedy *all* serious injury". But the

word "all" is not there. And, as we have said more than once, words must not be read into the Agreement that are not there.[250]

251. We do not see the text of Article 5.1, first sentence, alone, as indicating one certain meaning. Therefore, in keeping with our customary approach, we must seek the meaning of the terms of this provision in their context and in the light of the object and purpose of the Agreement.

252. We observe here that the non-attribution language of the second sentence of Article 4.2(b) is an important part of the architecture of the *Agreement on Safeguards* and thus serves as necessary context in which Article 5.1, first sentence, must be interpreted. In our view, the non-attribution language of the second sentence of Article 4.2(b) has two objectives. First, it seeks, in situations where several factors cause injury at the same time, to prevent investigating authorities from inferring the required "causal link" between increased imports and serious injury or threat thereof on the basis of the injurious effects caused by factors other than increased imports. Second, it is a benchmark for ensuring that only an appropriate share of the overall injury is attributed to increased imports. As we read the Agreement, this latter objective, in turn, informs the permissible extent to which the safeguard measure may be applied pursuant to Article 5.1, first sentence. Indeed, as we see it, this is the only possible interpretation of the obligation set out in Article 4.2(b), last sentence, that ensures its consistency with Article 5.1, first sentence. It would be illogical to require an investigating authority to ensure that the "causal link" between increased imports and serious injury not be based on the share of injury attributed to factors other than increased imports while, at the same time, permitting a Member to apply a safeguard measure addressing injury caused by all factors.

253. This interpretation of this important context of Article 5.1 is further reinforced if we look at Article 5.1 from an overall perspective of the *WTO Agreement*. We found, in *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* ("*US – Cotton Yarn*"), with respect to Article 6.4, second sentence, of the *Agreement on Textiles and Clothing* (the "*ATC*"), that

[250] Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, para. 45; Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted 22 September 1999, para. 94; Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 181. See also, Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, para. 83; Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, para. 83; and Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, para. 146.

"the part of the total serious damage attributed to an exporting Member must be proportionate to the damage caused by the imports from that Member." [251]

254. In support of this conclusion, we pointed there to Article 22.4 of the DSU, which provides:

> The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.

255. We noted there that:

> … Article 22.4 of the DSU stipulates that the suspension of concessions shall be equivalent to the level of nullification or impairment. This provision of the DSU has been interpreted consistently as not justifying punitive damages. [252] (footnotes omitted)

256. We concluded:

> *It would be absurd if the breach of an international obligation were sanctioned by proportionate countermeasures, while, in the absence of such breach, a WTO Member would be subject to a disproportionate and, hence, "punitive", attribution of serious damage not wholly caused by its exports.* In our view, such an exorbitant derogation from the principle of proportionality in respect of the attribution of serious damage could be justified only if the drafters of the *ATC* had expressly provided for it, which is not the case. [253] (emphasis added)

257. We think the same reasoning applies here. If the pain inflicted on exporters by a safeguard measure were permitted to have effects beyond the share of injury caused by increased imports, this would imply that an exceptional remedy, which is not meant to protect the industry of the importing country from unfair or illegal trade practices, could be applied in a more trade-restrictive manner than countervailing and anti-dumping duties. On what basis should the *WTO Agreement* be interpreted to limit a countermeasure to the extent of the injury caused by unfair practices or a violation of the treaty but not so limit a countermeasure when there has not even been an allegation of a violation or an unfair practice?

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[251] Appellate Body Report, WT/DS192/AB/R, adopted 5 November 2001, para. 119.

[252] *Ibid*., para. 120. See also, Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU,* where the Arbitrators stated that "there is nothing in Article 22.1 of the DSU, let alone in paragraphs 4 and 7 of Article 22, that could be read as a justification for counter-measures of a *punitive* nature" (WT/DS27/ARB, 9 April 1999, para. 6.3) (original emphasis); and, Decision by the Arbitrators, *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS46/ARB, 20 August 2000, para. 3.55.

[253] Appellate Body Report, *US – Cotton Yarn, supra*, footnote 251, para. 120.

258. The object and purpose of the *Agreement on Safeguards* support this reading of the context of Article 5.1, first sentence. The *Agreement on Safeguards* deals only with *imports*. It deals only with measures that, under certain conditions, can be applied to *imports*. The title of Article XIX of the GATT 1994 is "Emergency Action on *Imports* of Particular Products". (emphasis added) It seems apparent to us that the object and purpose of both Article XIX of the GATT 1994 and the *Agreement on Safeguards* support the conclusion that safeguard measures should be applied so as to address only the consequences of *imports*. And, therefore, it seems apparent to us as well that the limited objective of Article 5.1, first sentence, is limited by the consequences of *imports*.

259. We note as well the customary international law rules on state responsibility, to which we also referred in *US – Cotton Yarn*.[254] We recalled there that the rules of general international law on state responsibility require that countermeasures in response to breaches by States of their international obligations be proportionate to such breaches. Article 51 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts provides that "countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question".[255] Although Article 51 is part of the International Law Commission's Draft Articles, which do not constitute a binding legal instrument as such, this provision sets out a recognized principle of customary international law.[256] We observe also that the United States has acknowledged this principle elsewhere. In its comments on the International Law Commission's Draft Articles, the United States stated that "under customary international law a rule of proportionality applies to the exercise of countermeasures".[257]

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[254]Appellate Body Report, *supra*, footnote 251, para. 120.

[255]Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001). (United Nations International Law Commission, Report on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001), General Assembly, Official Records, Fifty-fifth Session, Supplement No. 10 (A/56/10), chapter IV.E.1).

[256]See, *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986, (1986) I.C.J. Rep., p. 14, at p. 127, para. 249; and, *Case Concerning the Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), (1997) I.C.J. Rep., p. 7, at p. 220.

[257]See, *Draft Articles on State Responsibility: Comments of the Government of the United States of America*, dated 22 October 1997, in response to the United Nations Secretary General's request of 12 February 1997 for comments and observations on the draft articles on State responsibility adopted provisionally on first reading by the International Law Commission, reprinted in, M. Nash, "Contemporary Practice of the United States Relating to International Law", *American Journal of International Law*, Vol. 92, No. 2 (1998), p. 251, at pp. 252 and 254.

The United States has also acknowledged this principle before the Arbitral Tribunal established by the Compromis of 11 July 1978 in the *Case Concerning the Air Services Agreement of 27 March 1946 (United States vs. France)*. See, *Reply of the United States to the Memorial Submitted by France*, excerpted in M. Nash, *Digest of United States Practice in International Law 1978* (Office of the Legal Adviser, Department of State, 1980), at p. 776.

260. For all these reasons, we conclude that the phrase "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment" in Article 5.1, first sentence, must be read as requiring that safeguard measures may be applied only to the extent that they address serious injury attributed to increased imports.

261. Having reached this conclusion, we must consider now whether the Panel erred in concluding that Korea did not make a *prima facie* case that the United States had not fulfilled this substantive obligation in Article 5.1, first sentence. On this, we conclude that, by establishing that the United States violated Article 4.2(b) of the *Agreement on Safeguards*, Korea has made a *prima facie* case that the application of the line pipe measure was not limited to the extent permissible under Article 5.1. In the absence of a rebuttal by the United States of this *prima facie* case by Korea, we find that the United States applied the line pipe measure beyond the "extent necessary to prevent or remedy serious injury and to facilitate adjustment". Therefore, we reverse the Panel's finding in paragraph 7.111 of its Report that Korea failed to make a *prima facie* case that the United States violated Article 5.1, first sentence, by imposing a measure that exceeds what is "necessary to prevent or remedy serious injury and to facilitate adjustment".

262. We note that, had the Panel found differently, the United States might have attempted to rebut the presumption raised by Korea in successfully establishing a violation of Article 4.2(b) of the *Agreement on Safeguards*, that the United States had also violated Article 5.1. For even if the USITC failed to separate and distinguish the injurious effects of the increased imports from the injurious effects of the other factors, it is still possible that the safeguard measure may have been applied in such a manner that it addressed only a portion of the identified injurious effects, namely, the portion that is equal to or less than the injurious effects of increased imports. The United States did not rebut Korea's *prima facie* case by showing that this was so. We offer this observation only to emphasize that we are not stating that a violation of the last sentence of Article 4.2(b) implies an *automatic* violation of the first sentence of Article 5.1 of the *Agreement on Safeguards*.

XII. Findings and Conclusions

263. For the reasons set out in this Report, the Appellate Body:

(a) upholds, albeit for different reasons, the Panel's finding, in paragraph 8.1(7) of the Panel Report, that the United States acted inconsistently with its obligation under Article 12.3 of the *Agreement on Safeguards* by failing to provide an adequate opportunity for prior consultations with Korea, a Member having a substantial interest in exports of line pipe;

(b) upholds the Panel's finding, in paragraph 8.1(8) of the Panel Report, that the United States acted inconsistently with its obligation under Article 8.1 of the *Agreement on Safeguards* to endeavour to maintain a substantially equivalent level of concessions and other obligations;

(c) upholds the Panel's finding, in paragraph 8.1(5) of the Panel Report, that the United States did not comply with its obligation under Article 9.1 of the *Agreement on Safeguards* that safeguard measures shall not be applied against a product originating in a developing country Member as long as its imports do not exceed the individual and collective thresholds in that provision;

(d) reverses the Panel's finding, in paragraph 8.1(3) of the Panel Report, that the United States acted inconsistently with its obligations under Articles 3.1 and 4.2(c) of the *Agreement on Safeguards* by failing to include in its published report a finding or reasoned conclusion either (1) that increased imports have caused serious injury, or (2) that increased imports are threatening to cause serious injury;

(e) reverses the Panel's finding, in paragraph 8.2(9) of the Panel Report, that the United States did not violate its obligations under Articles 2 and 4 of the *Agreement on Safeguards* by exempting Canada and Mexico from the line pipe measure;

(f) modifies the Panel's finding, in paragraph 8.2(10) of the Panel Report, that the United States did not violate its obligations under Articles I, XIII:1 and XIX of GATT 1994 by exempting Canada and Mexico from the line pipe measure, declaring it moot and as having no legal effect;

(g) upholds the Panel's finding, in paragraph 8.1(4) of the Panel Report, that the United States acted inconsistently with its obligation under Article 4.2(b) of the

Agreement on Safeguards by failing to establish a causal link between the increased imports and the serious injury or threat thereof;

(h) upholds the Panel's finding, in paragraph 7.81 of the Panel Report, that the United States was not required by Article 5.1, first sentence, of the *Agreement on Safeguards* to demonstrate, at the time of imposition, that the line pipe measure was necessary to prevent or remedy serious injury and to facilitate adjustment;

(i) reverses the Panel's finding, in paragraph 8.2(2) of the Panel Report, that Korea failed to make a *prima facie* case that the United States violated its obligation under Article 5.1, first sentence, of the *Agreement on Safeguards*, by imposing a measure that exceeds what is "necessary to prevent or remedy serious injury and to facilitate adjustment", and finds that the United States applied the line pipe measure beyond the "extent necessary to prevent or remedy serious injury and to facilitate adjustment".

264. The Appellate Body *recommends* that the DSB request the United States to bring the line pipe measure, which has been found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the obligations of the United States under the *Agreement on Safeguards* and the GATT 1994, into conformity with its obligations under those Agreements.

Signed in the original at Geneva this 31st day of January 2002 by:

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Julio Lacarte-Muró
Presiding Member

_____ _____

James Bacchus
Member

Georges Abi-Saab
Member