1 ARTICLE 5

1.1 Text of Article 5

Article 5

Application of Safeguard Measures

1. 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.

2. (a) In cases in which a quota is allocated among supplying countries, the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product.

(b) A Member may depart from the provisions in subparagraph (a) provided that consultations under paragraph 3 of Article 12 are conducted under the auspices of the Committee on Safeguards provided for in paragraph 1 of Article 13 and that clear demonstration is provided to the Committee that (*i*) imports from certain Members have increased in disproportionate percentage in relation to the total increase of imports of the product concerned in the representative period, (*ii*) the reasons for the departure from the provisions in subparagraph (a) are justified, and (*iii*) the conditions of such departure are equitable to all suppliers of the product concerned. The duration of any such measure shall not be extended beyond the initial period under paragraph 1 of Article 7. The departure referred to above shall not be permitted in the case of threat of serious injury.

1.2 Article 5.1

1.2.1 Scope of the requirement to explain the necessity of a safeguard measure

1. In *Korea – Dairy*, the Appellate Body upheld the finding by the Panel in that dispute that the first sentence of Article 5.1 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 facilitating adjustment of the domestic industry, and that this obligation applies irrespective of the particular form of the safeguard measure.[1] However, the Appellate Body reversed the Panel's finding regarding the scope of the requirement to explain the necessity of a safeguard measure.[2] In this respect, the Appellate Body stated:

> "[The second sentence of Article 5.1] 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*.
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> However, 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'.
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> For these reasons, we do not agree with the Panel's broad finding in paragraph 7.109 that:
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> > '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 serious injury and facilitate the adjustment of the industry.'"[3]

2. In *US – Line Pipe*, the Appellate Body reiterated its finding in *Korea – Dairy*, that Article 5.1 imposes a general "substantive obligation" to apply safeguard measures only to the "permissible extent", and a particular "procedural obligation" to provide a "clear justification" only when in the specific case of quantitative restrictions reducing the volume of imports below the average of imports in the last three representative years.[4] The Appellate Body also reaffirmed its interpretation in *Korea – Dairy* that Article 5.1 does not establish a "general procedural obligation" to demonstrate compliance with Article 5.1, first sentence, at the time of application, in its recommendations or determinations on the application of the safeguard measure:

> "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."[5]

[1] Appellate Body Report, *Korea – Dairy*, paras. 96 and 103.
[2] Appellate Body Report, *Korea – Dairy*, para. 103.
[3] Appellate Body Report, *Korea – Dairy*, paras. 98-100.
[4] Appellate Body Report, *US – Line Pipe*, paras. 231 and 234.
[5] Appellate Body Report, *US – Line Pipe*, para. 233.

3. In *US – Safeguard Measure on Washers*, the Panel found that Article 5.1 does not require an investigating authority to calibrate the safeguard measure to match the degree of price underselling. According to the Panel:

> "[S]uch a requirement would be at odds with the fact that the Agreement on Safeguards (a) does not even specifically require a price underselling analysis; and (b) permits the imposition of quantitative restrictions (it is unclear to us how exactly as a mathematical matter a quantitative restriction could be designed to match the degree of price underselling, and in any case, the Agreement on Safeguards does not provide rules on this matter). In this regard, the provisions of the Agreement on Safeguards stand in contrast to, for example, the provisions of the Anti-Dumping Agreement, which require authorities to calibrate their remedy by ensuring that the anti-dumping duty not exceed the margin of dumping established under Article 2 of that agreement (see Article 9.3 of the Anti-Dumping Agreement). Therefore, we do not find any basis in Article 5.1 to require investigating authorities to calibrate their safeguard measures to reflect the degree of price underselling."[6]

4. Regarding the "permissible extent" of the application of a safeguard measure under Article 5.1, the Appellate Body in *US – Line Pipe*, in the context of Article 4.2 and the objective and purpose of the Agreement, concluded that although the "serious injury" in Article 5.1 and Article 4.2 was "one and the same"[7], 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[8], not "*all* serious injury".[9] The Appellate Body, in particular, ruled that Article 4.2(b) as the context for Article 5.1, seeks to prevent investigating authorities from inferring a causal link between serious injury and increased imports as a result of injurious effects from other sources, and it is "a benchmark for ensuring that only an appropriate share of the overall injury is attributed to increased imports":

> "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.
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> …
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> 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."[10]

[6] Panel Report, *US – Safeguard Measure on Washers*, para. 7.229.
[7] Appellate Body Report, *US – Line Pipe*, para. 249.
[8] Appellate Body Report, *US – Line Pipe*, para. 260.
[9] Appellate Body Report, *US – Line Pipe*, para. 250.
[10] Appellate Body Report, *US – Line Pipe*, paras. 252 and 260.

5. In addition, the Appellate Body in *US – Line Pipe* referred to the object and purpose of the Agreement on Safeguards and the rules of general international law on state responsibility to support its conclusion 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:

> "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?"[11]

6. The Appellate Body in *US – Line Pipe* found support for this approach in the object and purpose of the Agreement on Safeguards as well as in customary international law on state responsibility:

> "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*.
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> We note as well the customary international law rules on state responsibility, to which we also referred in *US – Cotton Yarn*. 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'. 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. 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'."[12]

7. In *Ukraine – Passenger Cars*, the Panel rejected Japan's argument that Ukraine's failure to provide for a progressive liberalization of the safeguard measure at issue as required under Article 7.4 of the Agreement on Safeguards also amounted to a violation of Articles 5.1 and 7.1 of the same Agreement:

> "The Panel notes that Japan bases its claims with respect to 'the extent necessary to facilitate adjustment' on its separate claim that Ukraine acted inconsistently with Article 7.4 because it failed to progressively liberalize the safeguard measure. We have found in the immediately preceding section that when this Panel was established, Ukraine was not acting inconsistently with Article 7.4, first sentence. We also note

[11] Appellate Body Report, *US – Line Pipe*, para. 257.
[12] Appellate Body Report, *US – Line Pipe*, paras. 258-259.

> that Ukraine's competent authorities published and notified a liberalization schedule on 28 March 2014.
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> In examining the claims under Articles 5.1 and 7.1, we note that the reasons we have developed in the preceding section in support of our interpretation of Article 7.4 also apply, *mutatis mutandis*, to Articles 5.1 and 7.1. Accordingly, we do not accept Japan's argument that failure to provide a timetable before a safeguard measure is applied establishes, by itself, that a Member has acted inconsistently with Articles 5.1 and 7.1. We also do not consider that Ukraine has acted inconsistently with Articles 5.1 and 7.1 because it had not yet progressively liberalized the safeguard measure at issue as of the date of establishment of this Panel. As discussed above, there is nothing that requires Ukraine to have begun that liberalization at any given point in time. Finally, we observe that it is in any event unclear to us how a failure to provide for progressive liberalization would give rise to a breach of Article 7.1. As we understand it, the requirement in Article 7.4, first sentence, to progressively liberalize a safeguard measure only applies to measures whose duration, as notified under Article 12.1, is over one year. Thus, Article 7.4, first sentence, takes as a given that the duration of a safeguard measure has been notified, and is over one year. The fact that a Member fails to provide for progressive liberalization of a notified measure does not demonstrate that the duration of the measure is excessive and that the Member concerned is therefore not complying with its obligation to apply its safeguard measure only for such period of time as is necessary to facilitate adjustment."[13]

1.2.2 Adjustment plans

8. The Panel in *Korea – Dairy* rejected the view that Article 5.1 imposes an obligation to consider adjustment plans:

> "We wish to make it clear that we do not interpret Article 5.1 as requiring the consideration of an adjustment plan by the authorities … The Panel finds no specific requirement that an adjustment plan as such must be requested and considered in the text of the *Agreement on Safeguards*. Although there are references to industry adjustment in two of its provisions, nothing in the text of the Agreement on Safeguards suggests that consideration of a specific adjustment plan is required before a measure can be adopted. Rather, we believe that the question of adjustment, along with the question of preventing or remedying serious injury, must be a part of the authorities' reasoned explanation of the measure it has chosen to apply. Nonetheless, we note that examination of an adjustment plan, within the context of the application of a safeguard measure, would be strong evidence that the authorities considered whether the measure was commensurate with the objective of preventing or remedying serious injury and facilitating adjustment."[14]

1.2.3 Effect of other existing trade remedy measures

9. In *US – Safeguard Measure on Washers*, the Panel rejected Korea's argument that the United States' safeguard measure was excessive because it did not account for the protection already afforded to the domestic industry through the imposition of anti-dumping and countervailing measures on the product under consideration.[15] The Panel noted that:

> "[T]he Agreement on Safeguards imposes conditions for the imposition of safeguards, including a need for increased imports, and the existence of serious injury caused by those imports. Existing trade remedy measures may affect the level of imports (they could decrease it, particularly from sources affected by the order) and the injury situation of the domestic industry (they could improve the domestic industry's situation). Therefore, to the extent existing trade remedy measures affect those parameters, that effect would be reflected in the relevant data examined by the investigating authority (be it increased imports, or data pertaining to the injury situation of the domestic industry). If the data shows that imports have been declining

[13] Panel Report, *Ukraine – Passenger Cars*, paras. 7.373-7.374.
[14] Panel Report, *Korea – Dairy*, para. 7.108.
[15] Panel Report, *US – Safeguard Measure on Washers*, para. 7.232.

> instead of increasing, or if it shows that the domestic industry is not injured (irrespective of whether this is because of existing trade remedy measures), the substantive conditions for the imposition of safeguard measures would not be met. If, however, an investigating authority finds that the substantive conditions for the safeguard measures are met, despite existing trade remedy measures, nothing in the Agreement on Safeguards requires any calibration of the measures with those existing trade remedy measures.
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> We also note in this regard that Article 5.1 refers to the application of safeguard measures only to the extent necessary to prevent or remedy serious injury. Once serious injury is established pursuant to a safeguard investigation, the Member has the right to impose safeguard measures to the full extent necessary to remedy that serious injury. It follows that if the serious injury has been found despite the existing trade remedy measures, nothing in the Agreement on Safeguards would require Members to adjust the safeguard measures to account for existing trade remedy measures. Indeed, if they were to do so, they may not be able to apply safeguard measures to the extent necessary to prevent or remedy the serious injury found. To the extent a complainant considers that the substantive conditions for imposition of such a safeguard measure are not met, the complainant would be expected to make its case under the substantive provisions of the Agreement on Safeguards."[16]

1.2.4 Reference period for calibrating level of safeguard measures

10. In *EU – Safeguard Measures on Steel (Turkey)*, the complainant, Türkiye, argued that the European Union's safeguard measure (which consisted of tariff rate quotas and an out-of-quota duty) was inconsistent with Article 5.1 of the Agreement on Safeguards because it was based on the average imports from January 2015 to December 2017, whereas the finding of threat of serious injury was based, *inter alia*, on an increase in imports observed during the first six months of 2018; and the import data for the first six months of 2018 was excluded from the calculation of the of the level of the safeguard, i.e., the size of the tariff rate quotas.[17] The European Union responded that its competent authority had ensured that the safeguard measure was commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment.[18] The Panel explained that Article 5.1 does not require the time periods used by the competent authority to determine the level of the safeguard to be the same as the period of investigation for the injury analysis:

> "We first note that nothing in Article 5.1 of Agreement on Safeguards requires the period during which the Member concerned finds an increase in imports that causes or threatens to cause serious injury to be identical to the period that the Member uses to establish the level of a safeguard, or for the two periods to have the same end-points. In fact, Article 5.1 and its context establish that the Agreement on Safeguards does *not* require the two periods to be identical. We note, for example, that the second sentence of Article 5.1 generally requires that the level of a safeguard that takes the form of a quantitative restriction be set on the basis of data for 'the last three representative years for which statistics are available'. By comparison, Article 4 of the Agreement on Safeguards, which concerns the determination of serious injury or the threat thereof, does not prescribe a default length of the POI for the injury analysis. Thus, even though the second sentence of Article 5.1 is limited to quantitative restrictions, the comparison between Articles 4 and 5.1 illustrates that the Agreement on Safeguards does not require that the time periods that are used for setting the level of the safeguard be the same as the period that is used for the injury analysis.
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> Second, we note that Turkey appears to be confusing two different concepts, i.e. (a) what is *necessary to prevent or remedy* serious injury, and (b) the *period over which* an increase in imports giving rise to that serious injury is *observed*. Article 5.1 requires a safeguard to be applied only to the extent necessary to prevent or remedy serious injury. As noted above, setting a TRQ based on the level of imports during the

[16] Panel Report, *US – Safeguard Measure on Washers*, paras. 7.234-7.235.
[17] Panel Report, *EU – Safeguard Measures on Steel (Turkey)*, para. 7.253.
[18] Panel Report, *EU – Safeguard Measures on Steel (Turkey)*, para. 7.254.

> same period as the one used by the competent authority in its examination of the increase in imports causing injury is not always necessary to fulfil this requirement, and Turkey has not explained why it was necessary in this particular case."[19]

1.2.5 Relationship with other provisions of the Safeguards Agreement

11. The Panel in *Argentina – Footwear (EC)*, after finding that the safeguard investigation and determination leading to the imposition of the definitive safeguard measure at issue were inconsistent with Articles 2 and 4, exercised judicial economy with respect to claims under Article 5.[20]

12. The Panel in *US – Wheat Gluten*, after finding the measure at issue to be inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, exercised judicial economy with respect to claims under Article 5 of the Agreement on Safeguards (and under Articles I and XIX of the GATT 1994).[21] The Appellate Body upheld this exercise of judicial economy by the Panel. In so doing, the Appellate Body referred to its statements on judicial economy in *US – Wool Shirts and Blouses* and in *Australia – Salmon*, and recalled that in *Argentina – Footwear (EC)* it had found that, since inconsistency with Articles 2 and 4 deprived the measure at issue in that case of its legal basis, it was not necessary to complete the analysis of the Panel relating to Article XIX:1 of the GATT 1994.[22] Similarly, the Appellate Body also upheld the Panel's exercise of judicial economy with respect to the claims under Article I of the GATT 1994 and Article 5 of the Agreement on Safeguards.[23]

13. The Panel in *US – Lamb*, after making findings of inconsistency with Articles 2.1, 4.1(c), and 4.2(b) of the Agreement on Safeguards (and with Article XIX:1(a) of the GATT 1994), exercised judicial economy with respect to claims raised under Article 5.1 (and Articles 2.2, 3.1, 8, 11, and 12) of the Agreement on Safeguards.[24] The Appellate Body upheld this exercise of judicial economy.[25]

1.2.6 Relationship with other WTO Agreements

1.2.6.1 GATT 1994

14. As regards the relationship with Article XIII of the GATT 1994, the Panel in *US – Line Pipe* held that Article XIII applies to tariff quota safeguard measures. In its view, "[i]f Article XIII did not apply to tariff quota safeguard measures, such safeguard measures would escape the majority of the disciplines set forth in Article 5":

> "[I]t is the paucity of disciplines governing the application of tariff quota safeguard measures in Article 5 of the Safeguards Agreement that supports our interpretation of Article XIII. If Article XIII did not apply to tariff quota safeguard measures, such safeguard measures would escape the majority of the disciplines set forth in Article 5. This is an important consideration, given the quantitative aspect of a tariff quota. For example, if Article XIII did not apply, quantitative criteria regarding the availability of lower tariff rates could be introduced in a discriminatory manner, without any consideration to prior quantitative performance.[26] In our view, the potential for such discrimination is contrary to the object and purpose of both the Safeguards Agreement, and the WTO Agreement. In this regard, the preamble of the Safeguards Agreement refers to the 'need to clarify and reinforce the disciplines of GATT 1994' in the context of safeguards. We consider that the 'disciplines of GATT 1994' surely include those providing for non-discrimination. In any event 'the elimination of discriminatory treatment in international trade relations' is referred to explicitly in the

[19] Panel Report, *EU – Safeguard Measures on Steel (Turkey)*, paras. 7.257-7.258.
[20] Panel Report, *Argentina – Footwear (EC)*, para. 8.289.
[21] Panel Report, *US – Wheat Gluten*, para. 8.220.
[22] Appellate Body Report, *US – Wheat Gluten*, paras. 179-182.
[23] Appellate Body Report, *US – Wheat Gluten*, paras. 184-185.
[24] Panel Report, *US – Lamb*, para. 7.280.
[25] Appellate Body Report, *US – Lamb*, paras. 193-195.
[26] *(footnote original)* The same concern does not arise in respect of tariff measures – which also appear not to be covered by all Article 5 disciplines – because tariff measures affect all exporting Members equally.

> preamble to the WTO Agreement. We further note that the preamble of the Safeguards Agreement also mentions that one of the objectives of the Safeguards Agreement is to 'establish multilateral control over safeguards and eliminate measures that escape such control'. We are of the view that non-application of Article XIII in the context of safeguards would result in tariff quota safeguard measures partially escaping the control of multilateral disciplines. This result would be contrary to the objectives set out in the preamble of the Safeguards Agreement."[27]

15. The Panel in *US – Lamb*, after making findings of inconsistency with Article XIX:1(a) of the GATT 1994 (and with Articles 2.1, 4.1(c), and 4.2(b) of the Agreement on Safeguards), exercised judicial economy with respect to claims raised under Article 5.1 (and Articles 2.2, 3.1, 8, 11, and 12) of the Agreement on Safeguards.[28] The Appellate Body upheld this exercise of judicial economy.[29]

1.3 Article 5.2

1.3.1 Article 5.2(b)

1.3.1.1 "the departure referred to above shall not be permitted in the case of threat of serious injury"

16. In *US – Line Pipe,* the Appellate Body ruled that Article 5.2(b) is an "exception" to the general rule, and not relevant to the non-discrete determination of injury or threat thereof in the safeguard measure in *US – Line Pipe*:

> "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."[30]

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[27] Panel Report, *US – Line Pipe*, para. 7.49
[28] Panel Report, *US – Lamb*, para. 7.280.
[29] Appellate Body Report, *US – Lamb*, paras. 193-195.
[30] Appellate Body Report, *US – Line Pipe*, para. 173.