INTERNATIONAL AND REGIONAL TRADE LAW: THE LAW OF THE WORLD TRADE ORGANIZATION

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Unit XV: Safeguard Measures

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The Law of the World Trade Organization
Through the Cases

Unit XV: Safeguard Measures

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Guiding Questions

1. Safeguard Measures in General

a. What is the basic rationale of the safeguard measures? Wouldn't they be a blatant breach of free market access that the WTO pursues? Should governments keep feeding dying industries instead of letting markets liquidate them? Wouldn't such intervention be countercyclical and even against a basic capitalistic premise? Wouldn't such measures hurt domestic consumers or other businesses while they may protect specific industries in trouble momentarily?

b. Note that most WTO Members have their own domestic safeguard legislation such as the US Section 201. Such legislation tend to contain provisions for "domestic adjustment" programs such as job training and unemployment insurance to take care of "losers" who some say are "victims" of trade liberalization.

c. Why do you think did the Uruguay Round negotiators bother to establish the Agreement on Safeguards despite the existence of GATT Escape Clause (GATT Article XIX)?

d. Compare safeguard measures with other trade remedies such as anti-dumping measures and VERs. What are the differences? Why do you think would governments tend to prefer anti-dumping measures and VERs to safeguard measures?

2. U.S. – Pipe Line (2002)

a. This is a very rich case dealing with a number of critical issues on safeguard measures. Please peruse it.

b. In "Part IV. Introductory Remarks," the Appellate Body raised two important elements of safeguard measures whose implications reverberated through the decision. First, Members have the "right" to employ safeguard measures. Second, such measures must be exercise with the "limit" of the treaty.

c. In "Part V. Adequate Opportunity for Prior Consultation," did the Appellate Body basically criticize the US' "bad faith"?

d. In Part XI, especially regarding the "permissible extent," did the Appellate Body attempt to rely on the general principle of "proportionality"? Note that the Appellate Body invoked customary international law in para. 258.

3. U.S. – Steel Safeguards (2003)

a. Compare the requirement under GATT Article XIX: 1(a) closely with the condition under Safeguard Code Article 2. If the dropping of the language "unforeseen developments" was a negotiated outcome supported by the U.S., would the Appellate Body's interpretation be still legitimate? Or, would it be unacceptable "judicial activism"?

b. Would (Should) the AB's standard of review be equivalent to that of domestic courts reviewing administrative actions?

Supplementary Reading

Peter van den Bossche, The Law and Policy of the World Trade Organization, 2013, 606-647.

Raj Bhala, Modern GATT Law. A Treatise on the General Agreement on Tariffs and Trade, 2013, 1381-1465.

Michael J. Trebilcock et al., The Regulation of International Trade, 4rd ed. 2013, 411-433.

John H. Jackson et al., Legal Problems of International Economic Relation, 6th ed. 2013, 761-830 .

John H. Jackson, The World Trading System, 2nd ed. 1997, 213-228.

I. Introduction

1-1.Overview

http://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm

Safeguard measures

A WTO member may take a "safeguard" action (i.e., restrict imports of a product temporarily) to protect a specific domestic industry from an increase in imports of any product which is causing, or which is threatening to cause, serious injury to the industry.

Safeguard measures were always available under the GATT (Article XIX). However, they were infrequently used, and some governments preferred to protect their industries through "grey area" measures ("voluntary" export restraint arrangements on products such as cars, steel and semiconductors).

The WTO Safeguards Agreement broke new ground in prohibiting "grey area" measures and setting time limits ("sunset clause") on all safeguard actions.

Agreement on Safeguards

http://www.wto.org/english/tratop_e/safeg_e/safeint.htm

Agreement on safeguards

Introduction

The Agreement on Safeguards ("SG Agreement") sets forth the rules for application of safeguard measures pursuant to Article XIX of GATT 1994. Safeguard measures are defined as **"emergency"** actions with respect to **increased imports of particular products**, where such imports have **caused or threaten to cause serious injury** to the importing Member's domestic industry. Such measures, which in broad terms take the form of **suspension of concessions or obligations**, can consist of quantitative import restrictions or of duty increases to higher than bound rates.

Major guiding principles of the Agreement with respect to safeguard measures are that such measures must be **temporary**; that they may be imposed only when **imports are found to cause or threaten serious injury** to a competing domestic industry; that they be applied on a non-selective (i.e., **most-favoured-nation, or "MFN"**, basis; that they be **progressively liberalized** while in effect; and that the Member imposing them must **pay compensation** to the Members whose trade is affected.

The SG Agreement was negotiated in large part because GATT Contracting Parties increasingly had been applying a variety of so-called **"grey area" measures** (bilateral voluntary export restraints, orderly marketing agreements, and similar measures) to limit imports of certain products. These measures were not imposed pursuant to Article XIX, and thus were not subject to multilateral discipline through the GATT, and the legality of such measures under the GATT was doubtful. The Agreement now clearly prohibits such measures, and has specific provisions for eliminating those that were in place at the time the WTO Agreement entered into force.

In its own words, the SG Agreement, which explicitly applies equally to all Members, aims to: (1) clarify and reinforce GATT disciplines, particularly those of Article XIX; (2) re-establish multilateral control over safeguards and eliminate measures that escape such control; and (3) encourage structural adjustment on the part of industries adversely affected by increased imports, thereby enhancing competition in international markets.

Structure of the Agreement

The Agreement consists of 14 articles and one annex. In general terms, it has four main components: **(1) general** provisions (Articles 1 and 2); **(2)** rules governing Members' application of **new safeguard measures** (i.e., those applied after entry into force of WTO Agreement (Articles 3-9)); **(3)** rules pertaining to **pre-existing measures** that were applied before the WTO's entry into force (Articles 10 and 11); and **(4) multilateral surveillance and institutions** (Articles 12-14).

General provisions

Coverage of the Agreement

Article 1 establishes that the SG Agreement is the vehicle through which measures may be applied pursuant to **Article XIX of GATT 1994**. That is, any measure for which the coverage of Article XIX (which allows suspension of GATT concessions and obligations under the defined "emergency" circumstances) is invoked, must be taken in accordance with the provisions of the SG Agreement. The Agreement explicitly **does not apply** to measures taken pursuant to other provisions of GATT 1994, to other Annex 1A Multilateral Trade Agreements, or to protocols and agreements or arrangements concluded within the framework of GATT 1994. (Art. 11.1(c))

Conditions for Application of Safeguard Measures

Article 2 sets forth the conditions (i.e., serious injury or threat thereof caused by increased imports) under which safeguard measures may be applied. It also contains the requirement that such measures be applied on an MFN basis.

Rules governing new safeguard measures (applied after entry into force of WTO Agreement)

Investigative Requirements

New safeguard measures may be applied only **following an investigation** conducted by competent authorities pursuant to **previously published procedures**. Although the Agreement does not contain detailed procedural requirements, it does require reasonable **public notice** of the investigation, and that interested parties (importers, exporters, producers, etc.) be given the **opportunity to present their views** and to respond to the views of others. Among the topics on which views are to be sought is whether or not a safeguard measure would be in the public interest. The relevant authorities are obligated to publish a

report presenting and **explaining their findings on all pertinent issues**, including a demonstration of the relevance of the factors examined. The Agreement also contains specific rules for the handling of confidential information in the context of an investigation.

Factual Basis for Determination of Serious Injury or Threat Thereof

The Agreement defines **"serious injury" as significant impairment in the position of a domestic industry. "Threat of serious injury" is threat that is clearly imminent** as shown by facts, and not based on mere allegation, conjecture or remote possibility. A **"domestic industry"** is defined as the **producers as a whole of the like or directly competitive products** operating within the territory of a Member, **or producers who collectively account for a major proportion** of the total domestic production of those products.

In determining whether serious injury or threat is present, investigating authorities are to **evaluate all relevant factors** having a bearing on the condition of the industry, and are **not to attribute to imports injury caused by other factors**. Factors that must be analyzed are the absolute and relative rate and amount of increase in imports, the market share taken by the increased imports, and changes in level of sales, production, productivity, capacity utilization, profits and losses, and employment of the domestic industry.

Application of Measures

Safeguard measures may only be applied to the extent necessary to **remedy or prevent serious injury and to facilitate adjustment**, within certain limits. If the measure takes the form of a quantitative restriction, the level must not be below the actual import level of the most recent three representative years, unless there is clear justification for doing otherwise. Rules also apply as to how quota shares are to be allocated among supplier countries, as to compensation to Members whose trade is affected, and as to consultations with affected Members.

The **maximum duration of any safeguard measure is four years, unless it is extended** consistent with the Agreement's provisions. In particular, a measure may be extended only if its **continuation is found to be necessary to prevent or remedy serious injury**, and only if evidence shows that the **industry is adjusting**.

The **initial period of application plus any extension normally cannot exceed eight years.** In addition, safeguard measures in place for longer than one year must be **progressively liberalized** at regular intervals during the period of application. If a measure is extended beyond the initial period of application, it can be no more restrictive during this period than it was at the end of the initial period, and it should continue to be liberalized.

Any **measure of more than three years duration must be reviewed at mid-term**. If appropriate based on that review, the Member applying the measure must withdraw it or increase the pace of its liberalization.

Under **critical circumstances**, defined as circumstances where delay would cause damage that would be difficult to repair, **provisional measures may be imposed**. Such measures may be in the form of **tariff increases only**, and may be kept in place for a **maximum of 200 days**. In addition, the period of application of any provisional measure must be included in the total period of application of a safeguard measure.

Repeated application of safeguards with respect to a given product is limited by the Agreement. Ordinarily, a safeguard may not be applied again to a product until a period equal to the duration of the original safeguard has elapsed, so long as the period of non-application is at least two years.

Nonetheless, if a new safeguard measure has a duration of 180 days or less, it may be applied so long as one year has elapsed since the date the original safeguard measure was introduced, and so long as no more than two safeguard measures have been applied on the product during the five years immediately preceding the date of introduction of the new safeguard measure.

Concessions and Other Obligations

In applying a safeguard measure, the **Member must maintain a substantially equivalent level of concessions and other obligations with respect to affected exporting Members**. To do so, any **adequate means of trade compensation** may be agreed with the affected Members. Absent such agreement, the affected exporting Members individually may suspend substantially equivalent concessions and other obligations. This latter right cannot be exercised during the first three years of application of a safeguard measure if the measure is taken based on an absolute increase in imports, and otherwise conforms to the provisions of the Agreement.

Developing Country Members

Developing country Members receive special and differential treatment with respect to other Members' safeguard measures, and with respect to applying their own such measures. A safeguard measure **shall not be applied to low volume imports** from developing country Members, that is, where a single developing country Member's products account for no more than 3 percent of the total subject imports, as long as products originating in those low-import-share developing country Members collectively do not exceed 9 percent of imports.

In applying safeguard measures, developing country Members may **extend the application of a safeguard measure for an extra two years** beyond that normally permitted. In addition, the rules for re-applying safeguard measures with respect to a given product are relaxed for developing country Members.

Rules governing pre-existing measures (applied before the WTO's entry into force)

Pre-existing measures imposed pursuant to GATT Article XIX that were in effect at the time of the WTO Agreement's entry into force are to be terminated no later than eight years after they were first applied, or five years after the entry into force of the WTO Agreement, whichever comes later.

Pre-existing "grey area" measures that were in effect at the time of the WTO's entry into force are to be brought into conformity with the SG Agreement or phased out -- pursuant to timetables to have been presented to the SG Committee by 30 June 1995 -- within four years of the WTO's entry into force (i.e., by December 31, 1998). Although all Members had the right to an exception with respect to a single specific measure, whereby they would have had until December 31, 1999 for the required phase-out, no Member other than the EC (whose single exception is contained in the Annex to the Agreement itself) exercised this option.

Multilateral surveillance and institutions

Multilateral oversight of the use of safeguard measures is conducted through **notification requirements**, as well as through the creation of a **Committee on Safeguards** charged with reviewing safeguard notifications, among other duties.

Members are required to **notify** the Committee of **initiations of investigations** into the existence of serious injury or threat and the reasons therefore; **findings of serious injury or threat** caused by increased imports; and **decisions to apply or extend safeguard measures**. Such notifications are required to contain the relevant information on which the decisions are based.

Members are required, **before applying or extending a safeguard measure**, to provide an **adequate opportunity for consultations** with Members who have substantial interests as exporters of the product. The aims of such consultations shall include review of information as to the facts of the situation, exchanging views on the proposed measures, and reaching an understanding as to maintaining a substantially equivalent level of concessions and obligations.

Provisional measures must be **notified before being applied**, and **consultations** must be initiated immediately after such measures are applied.

The results of consultations, mid-term reviews of measures taken, compensation, and/or suspension of concessions, must be notified immediately to the Council for Trade in Goods through the Safeguards Committee by the Member concerned.

Members are obligated to **notify their own laws, regulations and administrative procedures to the Committee, as well as their own pre-existing Article XIX and grey area measures**. Members also are **entitled to counternotify** other Members' relevant laws and regulations, actions, or measures in force. Members are not obligated to disclose confidential information in their notifications.

The **Committee's role** generally is to **monitor** (and report to the Council for Trade in Goods on) the implementation and operation of the Agreement, to **review Members' notifications**, and to **make findings as to Members' compliance** with respect to the procedural provisions of the Agreement for the application of safeguard measures, to **assist with consultations**, and to **review proposed retaliation.**

Consultations and disputes arising under the Agreement are to be conducted in accordance with Articles XXII and XXIII of GATT 1994 as elaborated by the Dispute Settlement Understanding.

1-2.Volunatary Export Restraints (VERs)

Glossary of Terms

https://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm

Voluntary restraint arrangement, voluntary export restraint, orderly marketing arrangement. Bilateral arrangements whereby an exporting country (government or industry) agrees to reduce or restrict exports without the importing country having to make use of quotas, tariffs or other import controls.

Voluntary Export Restraints on Automobiles (by Daniel K. Benjamin)

http://www.perc.org/articles/voluntary-export-restraints-automobiles

In May 1981, with the American auto industry mired in recession, Japanese car makers agreed to limit exports of passenger cars to the United States. This "voluntary export restraint" (VER) program, initially supported by the Reagan administration, allowed only 1.68 million Japanese cars into the U.S. each year. The cap was raised to 1.85 million cars in 1984, and to 2.30 million in 1985, before the program was terminated in 1994.

Recent research (Berry, Levinsohn, and Pakes 1999) now gives us a clear picture of the all-too-predictable effects of this restriction on free trade: By limiting the supply of cars from Japan, the export restraints raised the prices of Japanese cars. This increased car sales by U.S. firms, thereby hiking their profits. All of this came chiefly at the expense of American auto consumers, particularly those who bought Japanese cars during this period. Overall, Americans as a whole were made worse off due to the introduction of the export restraints.

The key impacts were felt during 1986-1990. Over this period the restraints (in essence, quotas) caused the prices of Japanese cars sold in the United States to average about $1,200 higher (in 1983 dollars), some 14 percent above what they would have been without the restraints.

The higher prices for Japanese cars caused some consumers to defer purchases altogether and others to switch to American autos. In fact, the negative impact on sales of the Japanese automakers completely offset the profit-enhancing effects of higher prices. Hence, Japanese firms were no better off than if unrestrained trade had prevailed.

Matters were different for American firms, however. The consumers who switched to domestic cars tended to be price-sensitive, so the American makers were able to raise prices by only about 1 percent. But with less Japanese competition, sales of American cars increased sharply at a time when U.S. assembly lines had substantial excess capacity. Hence, during the years 1986-90, profits of U.S. automakers jumped about $2 billion *per year* as a result of the VERs--an increase of better than 8 percent.

The big losers were American car buyers, particularly those who (like me) opted to purchase Japanese vehicles even in the face of their higher prices. Overall, American consumers suffered a loss of some $13 billion, measured in 1983 dollars. After accounting for the higher profits of American automakers, the U.S. economy as a whole thus suffered welfare losses totaling some $3 billion due to the restraints on Japanese car exports.

One surprising finding of Berry et al. is that, contrary to prevailing wisdom, the impact of the VER program was important only during the 1986-90 period. The authors find that the export restraints had essentially no impact on observed prices and quantities from 1981 through 1983, and little impact in 1984 and 1985. Apparently, the 1981-82 recession, combined with high interest rates, depressed auto sales so much that the restraints initially did not constrain Japanese sales in the United States. Only beginning in 1986 did the program begin to bite, as economic recovery, declining interest rates, and a sharp drop in gasoline prices spurred new car demand.

These results immediately suggest at least two questions. Since the restraints failed to raise Japanese profits, why were the Japanese manufacturers so anxious to agree to them? The authors suggest that the likely alternative to the program was a U.S.-imposed tariff on Japanese cars--which would have cost Japanese makers more than $11 billion over the 1986-90 period.

If this is true, why didn't the Reagan administration simply impose such a tariff? After all, a tariff would have done as much good for American manufacturers and done consumers no more harm, while also raising government revenues. The answer, I suggest, is that such a tariff--which would have amounted to a huge tax hike--would have complicated negotiations over the massive and politically crucial economy-wide tax cuts the administration was proposing at the same time.

One key long-run consequence of the VER program stems from the provision that any Japanese cars produced in the U.S. were excluded from the limits. Beginning with Honda's Marysville, Ohio, plant in 1982, Japanese makers responded to this provision by investing heavily in U.S. production facilities. By 1990, Nissan, Toyota, Mazda, and Mitsubishi had joined Honda in producing substantial numbers of cars in America. That entry, combined with the recession of 1991, was sufficient to eliminate the effects of the restraints after 1990. More importantly, this Japanese auto manufacturing presence in the U.S. has almost surely made it impossible to exclude Japanese cars during future recessions. The scoundrel in me is thus forced to ask: From whom, then, will the American manufacturers seek protection the next time around?

REFERENCE

Berry, Steven, James Levinsohn, and Ariel Pakes. 1999. Voluntary Export Restraints on Automobiles: Evaluating a Trade Policy. *American Economic Review* 89(3): 400-30.

USTR Press Release (June 6, 2001)

01-34

For Immediate Release Contact: Richard Mills (202) 395-3230

U.S. Trade Representative Zoellick Issues Statement on President Bush's Multilateral Steel Initiative

U.S. Trade Representative Robert B. Zoellick issued the following statement today from Shanghai, where he is attending the Asia Pacific Economic Cooperation (APEC) meeting of Ministers Responsible for Trade:

"President Bush's initiative demonstrates support for the U.S. steel industry, American steel workers, and communities struggling to adjust to damaging distortions in global steel markets. In the face of such difficult conditions, it is important for the Administration to take a comprehensive approach that will move us forward to truly competitive steel markets. We intend to pursue the President's initiative in full conformity with our WTO obligations and our interest in an open, rules based trading system."

Under the administration's initiative, USTR Robert B. Zoellick will request the U.S. International Trade Commission to initiate an investigation under Section 201 of the Trade Act of 1974. In cases where increased imports are found to be a substantial cause of serious injury, Section 201 can give U.S. industries a limited time to adjust. This safeguard has enabled the United States to make strong commitments to open its markets in trade negotiations by helping persuade U.S. industry to accept significant cuts in U.S. tariffs and other market opening measures. Section 201 complies with WTO rules.

During the past two decades, the U.S. steel industry has made significant efforts to restructure. The industry has invested over $50 billion in steel plant modernization, closed dozens of inefficient mills, cut capacity, raised productivity by more than 300 percent, eliminated 330,000 jobs, and invested more than $7 billion in environmental controls, cutting polluting emissions by 90 percent.

In addition to the ongoing challenge of restructuring and modernization, U.S. steel producers face market-distorting practices abroad. Foreign industrial development policies have increased steel capacity well in excess of global market demand.

In order to address these problems, the President has directed Ambassador Zoellick, together with the Secretary of Commerce and the Secretary of the Treasury, to initiate negotiations with other steel producing nations to seek the near-term elimination of inefficient excess capacity in the global steel industry. The President also called for the negotiation of long-term solutions to these challenges.

Together, these efforts, will give U.S. steel producers some breathing room and help enhance the long-term competitiveness of the steel industry in the United States and abroad.

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1-4. The Recent Surge on the Steel Safeguards

https://www.wto.org/english/news_e/news16_e/safe_24oct16_e.htm

WTO: 2016 NEWS ITEMS

24 October 2016
SAFEGUARD MEASURES

Members continue to voice concerns about rising use of safeguards, particularly on steel

A growing number of WTO members voiced concerns about the rising use of safeguard measures, particularly in the steel sector, at a meeting of the WTO's Safeguards Committee on 24 October. These members said that safeguards should only be used in exceptional circumstances, as such measures generally affect all exporters of the targeted product.

Japan, Brazil, Canada, Australia, the United States, Korea, Chinese Taipei, the European Union, Hong Kong (China) and China all voiced concerns about the increasing number of safeguard actions being notified to the committee for review. Many of these members raised the same concerns at the last Safeguards Committee meeting in April.

Members reviewed safeguard investigations involving 26 products, including 17 steel products.

Japan said oversupply in steel due to expansion of capacity in some members had triggered a rise in trade remedy measures globally. Both the United States and Korea said safeguard measures should be used with great caution, especially given their chilling effects on international trade. The EU cited the "skyrocketing" number of safeguards targeting steel imports and urged members to consider more targeted measures, such as anti-dumping duties, to address specific producers causing problems.

Several of the members that intervened acknowledged the right of members to resort to safeguards, but that this trade remedy was unique in being the only one to target "fairly" traded imports (in contrast, anti-dumping and countervailing measures targeted "unfairly" traded imports). Thus, caution was needed, and governments should ensure that any actions were taken in strict accordance with WTO rules.

The Safeguards Committee reviewed notifications of safeguard actions taken by Chile, China, Egypt, India, Indonesia, Jordan, the Kyrgyz Republic, Malaysia, Morocco, the Philippines, South Africa, Ukraine, Viet Nam, Zambia and the Gulf Cooperation Council.

Under the WTO's Safeguards Agreement, a member may restrict imports of a product temporarily (take "safeguard" actions) through higher tariffs or other measures if its domestic industry is seriously injured, or threatened with serious injury, due to a surge in imports. An import surge justifying safeguard action can be a real increase in imports; or it can be an increase relative to the domestic industry's production, even if the import quantity has not increased.

In principle, safeguard measures apply to all imports and not just those from a particular country (developing countries accounting for less than 3% of exports are excluded from a measure). Because safeguards target "fair" trade, under defined circumstances, an exporting country can seek compensation for lost trade through consultations or, if no agreement is reached, it can raise tariffs on exports from the country that is enforcing the safeguard measure.

1-5.Relevant Provisions

Read in the Primary Sources:

GATT Article XIX (Escape Clause)

WTO Agreement on Safeguard, Preamble, Articles 1-14

2. US – Line Pipe (2002)

WORLD TRADE ORGANIZATION

WORLD TRADE ORGANIZATION

WT/DS202/AB/R
15 February 2002
(02-0717)

Original: English

http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members3_e.htm

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

(…)

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.[1] 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".[2] Three Commissioners made a finding of serious injury. Two Commissioners made a finding of threat of serious injury.[3] The affirmative vote of these five Commissioners constituted the majority supporting the "affirmative determination"[4] of the USITC. A single Commissioner made a negative determination that there was neither serious injury nor threat of serious injury. The views of that

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

[2]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.

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

[4]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.

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".[5]

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.[6] 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"[7] was met.[8] 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.[9]

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.[10] 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*[11] (the "USITC Report"). This supplemental notification contained detailed information on the measures recommended by the USITC to the President of the United States.[12] Also on 24 January 2000, the United States and Korea held consultations in Washington, D.C., on the USITC Report.[13]

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.[14]

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[5]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)

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

[7]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."

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

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

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

[11]*Supra*, footnote 2.

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

[13]Panel Report, para. 7.310.

[14]*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").[15] 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.

(…)

9.The Panel was established on 23 October 2000 to consider a complaint by Korea with respect to the line pipe measure.[16] 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*.[17]

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;

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[15] "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.

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

[17] Panel Report, para. 3.1.

– 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. [18]

(…)

III.Issues Raised in this Appeal

(…)

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

[18]Panel Report, para. 8.1.

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;

(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.[19] 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.[20] 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.[21] 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*.

(…)

82.(…) 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.

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

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

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

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? (…) 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 … ."

(…)

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.

(…)

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" [22] 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." [23] 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 point." [24] Therefore, the United States had not complied with its obligations under Article 12.3 of the *Agreement on Safeguards*. [25]

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. [26]

(…)

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*" [27] followed by a Presidential Proclamation of the measure on 18 February 2000. Moreover, according to Korea, there was "no practical possibility" [28] to hold consultations after 11 February 2000.

(…)

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*. [29] (…)

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

[23] *Ibid*.

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

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

[26] Panel Report, para. 7.309.

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

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

[29] 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.

(…)

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.[30]

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.

(…)

106.As we stated in *US – Wheat Gluten*, and as we have here reaffirmed[31], 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*".[32] 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]*"[33] 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.

(…)

108.As we stated in *US – Wheat Gluten*, there must be sufficient time "to allow for the possibility … for a meaningful exchange".[34] 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

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

[31]*Supra*, paras. 99–101.

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

[33]Panel Report, para. 7.314.

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

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.

(…)

110.Finally, the notion of a *meaningful exchange*, as we see it, assumes that the importing Member will enter into consultations in good faith [35] and will take the time appropriate to give due consideration to any comments received from exporting Members before implementing the measure. As always, we must assume that WTO Members seek to carry out their WTO obligations in good faith.

(…)

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.

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

[35] 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)

measure." [36] 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. [37]

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. [38]

(…)

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. [39]

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 … ." [40] 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*.

VIII.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

[36]Panel Report, para. 7.315.

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

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

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

[40]Panel Report, para. 7.319.

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" [41], and that the United States did not fulfill this requirement.

(…)

125.(…) 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. [42]

126.(…) 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]". [43] 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 safeguard duty on imports could not possibly apply to any developing country Member accounting for less than three percent of total imports. [44]

(…)

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

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

[42] *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.

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

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

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*.

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 [45] 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*".[46]

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.[47]

(…)

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."[48]

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[45]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)

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

[47]Panel Report, para. 7.271.

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

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.[49]

(…)

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".[50] (…)

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.[51] *The New Shorter Oxford English Dictionary* recognizes that the word "or" can have an inclusive meaning as well as an exclusive meaning.

(…)

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

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

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

[51]*Supra*, footnote 45, 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.

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.

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. (…)

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.

(…)

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".[52] 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.

(…)

[52]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)

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.

(…)

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*.

IX."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.

(…)

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." [53] 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*." [54] 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". [55]

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. (…)

184.Korea appeals this finding. Korea submits that the Panel imposed a "flawed standard" [56] for the establishment of a *prima facie* case, committed a "serious error" [57] in its treatment of arguments and evidence submitted by the parties, and introduced an "arbitrary and flawed" [58] minimum condition for Korea to establish a *prima facie* case.

(…)

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

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

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

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

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

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

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 [59], 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*." [60]

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:

> 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. (…)

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. [61] (emphasis added)

(…)

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[59]Panel Report, para. 7.171.

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

[61]Panel Report, para. 7.170.

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 [62] 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.

(…)

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 [63], 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 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.

(…)

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

[62]Panel Report, para. 7.170.

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

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 [64] 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.

204.The Panel found that:

[64] 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, para. 179.

> … 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.[65]

(…)

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".[66] 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.[67]

(…)

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.

(…)

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.

(…)

[65]Panel Report, para. 7.290.

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

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

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 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.

(…)

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.

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".[68] 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"[69] at the time of its application. Korea argues that upholding the Panel's findings would "seriously undermine the fundamental discipline"[70] 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".[71]

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. (…)

232.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

[68]Panel Report, para. 7.81.

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

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

[71]*Ibid*.

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.

(…)

B.The Permissible Extent of the Line Pipe Measure

236.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".[72] 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.

237.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.[73] 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.[74] 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.[75]

238.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 increased imports[76], but can cover also the injury caused by other factors.[77] (…)

[72]Panel Report, para. 7.111.

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

[74]Panel Report, para. 7.107.

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

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

[77]Panel Report, para. 7.108.

240.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*.

(…)

244.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 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.

245.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."

246.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.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. (…)

251.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.

(…)

257.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*.

258.We note as well the customary international law rules on state responsibility, to which we also referred in *US – Cotton Yarn*.[78] 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".[79] 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.[80] We observe also that the United States

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

[79]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).

[80]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.

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".[81]

259.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.

260.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".

(…)

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;

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[81]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.

(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".

(…)

3. U.S. – Steel Safeguards (2003)

WORLD TRADE ORGANIZATION

WT/DS248/AB/R
WT/DS249/AB/R
WT/DS251/AB/R
WT/DS252/AB/R
WT/DS253/AB/R
WT/DS254/AB/R
WT/DS258/AB/R
WT/DS259/AB/R
10 November 2003
(03-5966)

Original: English

UNITED STATES – DEFINITIVE SAFEGUARD MEASURES ON IMPORTS OF CERTAIN STEEL PRODUCTS

AB-2003-3

Report of the Appellate Body

(…)

I.Introduction

1.The United States appeals certain issues of law and legal interpretations developed in the Panel Reports, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products* (the "Panel Reports").[82]

2.The Panel was established by the DSB on 3 June 2002, pursuant to a request by the European Communities, to examine the consistency of ten safeguard measures applied by the United States on 20

[82]WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R and Corr.1, 11 July 2003. China, the European Communities, New Zealand, Norway, Switzerland, as well as Brazil, Japan and Korea acting jointly, submit conditional appeals on certain issues not addressed by the Panel.

March 2002 on imports of certain steel products.[83] On 14 June 2002, pursuant to Article 9.1 of the DSU, the DSB referred to the Panel complaints on the same matter brought by Japan and Korea. On 24 June 2002, the DSB, pursuant to Article 9.1 of the DSU, also referred to this single Panel complaints on the same matter submitted by China, Norway, and Switzerland. On 8 July 2002, the DSB, pursuant to Article 9.1 of the DSU, also referred to this single Panel a complaint on the same matter submitted by New Zealand. On 29 July 2002, the DSB, pursuant to Article 9.1 of the DSU, also referred to this single Panel a complaint on the same matter submitted by Brazil.

3.In their requests for the establishment of a panel, the Complaining Parties claimed that the ten safeguard measures applied by the United States on imports of certain steel products were inconsistent with the obligations of the United States contained in Articles 2, 3, 4, 5, 7, 8, 9, and 12 of the *Agreement on Safeguards*, Articles I, II, X, XIII, and XIX of the GATT 1994, as well as Article XVI of the *WTO Agreement.*[84]

4.The Panel issued eight Panel Reports—in the form of one document—that were circulated to the Members of the WTO on 11 July 2003. The Panel concluded, in all of the Panel Reports, that all ten safeguard measures imposed by the United States were inconsistent with the *Agreement on Safeguards* and the GATT 1994.

(…)

6.In addition, the Panel concluded, in the Panel Reports concerning the complaints of China, the European Communities, New Zealand, Norway, and Switzerland, that:

> the application of safeguard measures by the United States on imports of CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, stainless steel rod, and stainless steel wire was inconsistent with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards*, because "the United States failed to provide a reasoned and adequate explanation demonstrating that

[83]Safeguard measures were applied on imports of CCFRS; tin mill products; hot-rolled bar; cold-finished bar; rebar; welded pipe; FFTJ; stainless steel bar; stainless steel rod; and stainless steel wire.

[84]Panel Reports, paras. 3.1–3.8.

'unforeseen developments' had resulted in increased imports causing serious injury to the relevant domestic producers".[85]

(…)

II.Factual Background

12.On 28 June 2001, the USITC initiated a safeguard investigation at the request of the USTR, in order to determine whether certain steel products were being imported into the United States in such increased quantities as to cause or threaten to cause serious injury to the domestic industry producing like or directly competitive products.[86] Pursuant to this investigation, the USITC made affirmative determinations of serious injury to the domestic industry with respect to imports of: CCFRS; hot-rolled bar; cold-finished bar; rebar; FFTJ; stainless steel bar; stainless steel rod; and a determination of threat of serious injury with respect to imports of welded pipe.[87] The USITC made divided determinations with respect to tin mill products; stainless steel wire; stainless steel fittings and flanges; and tool steel.[88] The USITC recommended that tariffs and tariff-rate quotas be imposed for the products for which it made affirmative determinations.[89] Subsequently, following a request from the USTR, the USITC issued supplementary information on the economic analysis of remedy options[90], on unforeseen developments, and an injury determination for imports from all sources other than Canada and Mexico.[91]

13.Based on the USITC determination, the President of the United States imposed definitive safeguard measures on imports of certain steel products pursuant to Proclamation 7529 of 5 March 2002. The Proclamation imposed tariffs ranging from 30 percent to 8 percent on imports of certain carbon flat-rolled

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[85]*Ibid*.

[86]USITC, Investigation No. TA-201-73, Institution and Scheduling of an Investigation under Section 202 of the Trade Act of 1974, United States Federal Register, 3 July 2001 (Volume 66, Number 128), pp. 35267-35268. (Exhibit CC-2 submitted by the Complaining Parties to the Panel)

[87]USITC Report, Vol. I, p. 1 and footnote 1 thereto.

[88]*Ibid*.

[89]*Ibid*., pp. 2 and 3.

[90]USITC supplementary information on the economic analysis of remedy options, 9 January 2002. (Exhibit CC-10 submitted by the Complaining Parties to the Panel)

[91]USITC Second Supplementary Report.

steel, hot-rolled bar, cold-finished bar, rebar, welded pipe, fittings, flanges and tool joints, stainless steel bar, stainless steel rod, tin mill products, and stainless steel wire.[92] The products subject to these safeguard measures were products for which the USITC had made affirmative determinations; with respect to tin mill products and stainless steel wire, for which the USITC had made divided determinations, the President decided to consider the determinations of the groups of commissioners voting in the affirmative with regard to each of these products to be the determination of the USITC.[93] Imports from Canada, Israel, Jordan, and Mexico were excluded from the application of the measures.[94] The measures were imposed for a period of three years and one day[95], and became effective on 20 March 2002.[96]

(…)

V.Unforeseen Developments and Article 3.1 of the *Agreement on Safeguards*

(…)

A.Appropriate Standard of Review for Claims Under Article XIX:1(a) of the GATT 1994

273.At the outset of its analysis, the Panel considered the standard of review that was appropriate for the examination of the claims made by the Complaining Parties relating to "unforeseen developments". After citing our Reports in *Argentina – Footwear (EC)* and in *US – Lamb*, the Panel articulated the standard in the following terms:

[92]Proclamation, paras. 7 and 9. For a more detailed listing of the specific measures imposed, see Panel Reports, para. 1.34.

[93]*Ibid.,* para. 4.

[94]*Ibid.,* para. 11. Imports from developing Members of the WTO, whose shares of total imports were found not to exceed three percent individually, and nine percent collectively, were also exempted from the application of the measures. *Ibid*., para. 12. In addition, the USTR was authorized to exclude particular products pursuant to the procedure set out in the Proclamation. *Ibid.,* clauses (5) and (6). For information on the product specific exclusions granted until 22 August 2002, see Panel Reports, paras. 1.40–1.47.

[95]*Ibid.,* para. 9(b).

[96]*Ibid.,* clause (8).

> … the role of this Panel in the present dispute is not to conduct a *de novo* review of the USITC's determination. Rather, the Panel must examine whether the United States respected the provisions of Article XIX of GATT 1994 and of the Agreement on Safeguards, including Article 3.1. As further developed below, the Panel must examine whether the United States demonstrated in its published report, through a reasoned and adequate explanation, that unforeseen developments and the effects of tariff concessions resulted in increased imports causing or threatening to cause serious injury to the relevant domestic producers.
> In considering whether the United States demonstrated as a matter of fact that unforeseen developments resulted in increased imports causing serious injury, the Panel will also examine, in application of its standard of review, whether the competent authorities "considered all the relevant facts and had adequately explained how the facts supported the determinations that were made.[97] (underlining added; footnotes omitted)

The United States objects to the Panel's reliance on this standard, and argues that, in applying this standard to examine the USITC's conclusions on "unforeseen developments", the Panel "failed to take into account the differences between the unforeseen developments requirement and the Article 2 and 4 conditions for applying a safeguard measure".[98]

274.The United States asserts that we made clear in *Korea – Dairy*, *Argentina – Footwear (EC)*, and *US – Lamb* that the "unforeseen developments" language of Article XIX:1(a) constitutes a "distinct obligation [that] is different from obligations"[99] under Articles 2 and 4 of the *Agreement on Safeguards*. The United States maintains that the Panel "paid no heed"[100] to these differences when it relied on statements in *Argentina – Footwear (EC)* and in *US – Lamb* on the standard of review applicable to

[97]Panel Reports, paras. 10.38–10.39.

[98]United States' appellant's submission, para 15. We note that the United States' challenge is to the Panel's *application* of the relevant standard of review. The United States is not, therefore, alleging that the standard of review, as articulated by the Panel, was, in itself, incorrect. The United States confirmed this understanding in response to questioning at the oral hearing. In addition, the United States stated—for instance, in paragraph 54 of its appellant's submission—that the "Panel correctly noted in its standard of review section that the Appellate Body has found 'that a panel must assess whether a reasoned and adequate explanation has been provided as to how the facts support the determination.'" In paragraph 55 of its appellant's submission, the United States further stated that "the Panel also emphasized correctly that with regard to Articles 2, 3, and 4 and Article XIX, 'the role of the Panel is to 'review' determinations and demonstrations made and reported by an investigating authority,' and not to be the initial fact finder." (footnote omitted)

[99]United States' appellant's submission, para. 77.

[100]*Ibid*., para. 78.

Article 4 of the *Agreement on Safeguards*.[101] According to the United States, "the standard adopted by the Panel … mistakenly reflects concerns relevant to Article 4.2, and disregards concerns relevant to the 'unforeseen developments' requirement under Article XIX:1(a)."[102] The United States thus argues that the "reasoned and adequate explanation test" is "inappropriate" for claims arising under Article XIX of the GATT 1994.[103]

275.We explained in *Argentina – Footwear (EC)* that Article XIX of the GATT 1994 and the *Agreement on Safeguards* "relate to the same thing, namely the application by Members of safeguard measures".[104] We also indicated there our agreement with the statement by the panel in that case that "Article XIX of GATT and the Safeguards Agreement must *a fortiori* be read as representing an *inseparable package* of rights and disciplines which have to be considered in conjunction."[105] In our view, this inseparable relationship between Article XIX of the GATT 1994 and the *Agreement on Safeguards* suggests that the United States' call for a different and separate standard of review for Article XIX is unfounded.

276.We explained 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".[106] More recently, in *US – Line Pipe*, in the context of a claim under Article 4.2(b) of the *Agreement on Safeguards*, we said that the competent authorities must, similarly, provide a "*reasoned and adequate explanation*, that injury caused by factors other than increased imports is not attributed to increased imports".[107] Our findings in those cases did not purport to

[101]*Ibid*., paras. 78–79.

[102]*Ibid*., para. 78.

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

[104]Appellate Body Report, *Argentina – Footwear (EC)*, para. 81.

[105]*Ibid*. (original emphasis)

[106]Appellate Body Report, *US – Lamb*, para. 103. (original emphasis)

[107]Appellate Body Report, *US – Line Pipe*, para. 217. (emphasis added)

address *solely* the standard of review that is appropriate for claims arising under Article 4.2 of the *Agreement on Safeguards*. We see no reason not to apply the same standard generally to the obligations under the *Agreement on Safeguards* as well as to the obligations in Article XIX of the GATT 1994.

277.Moreover, as we said in *US – Lamb*, the existence of "unforeseen developments" is a "pertinent issue of fact and law" under Article 3.1, and "it follows that the published report of the competent authorities, under that Article, must contain a 'finding' or 'reasoned conclusion' on unforeseen developments."[108] Thus, the Panel in the current dispute correctly noted that "the circumstances of unforeseen developments within the meaning of Article XIX:1(a) of GATT 1994 must be demonstrated as a matter of *fact*, together with the conditions mentioned in Article 2.1 of the Agreement on Safeguards, in the report of the competent authority and before a safeguard measure can be applied."[109]

278.In any event, the objection of the United States to the Panel's requirement that competent authorities provide a "reasoned and adequate explanation" for their findings on "unforeseen developments" cannot be reconciled with the obligations of a panel under Article 11 of the DSU, which requires a panel to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". As we said in *Argentina – Footwear (EC)*:

> … for all but one of the covered agreements, Article 11 of the DSU sets forth the appropriate standard of review for panels. The only exception is the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, in which a specific provision, Article 17.6, sets out a special standard of review for disputes arising under that Agreement.[110]

[108]Appellate Body Report, *US – Lamb*, para. 76.

[109]Panel Reports, para. 10.37. (original emphasis; footnote omitted)

[110]Appellate Body Report, *Argentina – Footwear (EC)*, para. 118.

279.We do not see how a panel could examine objectively the consistency of a determination with Article XIX of the GATT 1994 if the competent authority had not set out an explanation supporting its conclusions on "unforeseen developments". Indeed, to enable a panel to determine whether there was compliance with the prerequisites that must be demonstrated before the application of a safeguard measure, the competent authority must provide a "reasoned and adequate explanation" of how the facts support its determination for those prerequisites, including "unforeseen developments" under Article XIX:1(a) of the GATT 1994.

280.For these reasons, we find that the Panel applied the proper standard of review in determining how it should assess the matter before it under Article XIX of the GATT 1994.

(…)

B.Article 3.1 of the Agreement on Safeguards

282.Article 3.1 of the *Agreement on Safeguards* provides, in relevant part, that:

> 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)

To begin, we note that the United States sets out its arguments concerning Article 3.1 in Section III of its appellant's submission, which is entitled "General Errors in the Panel's Findings Under Article 3.1 of the Agreement on Safeguards".[111] Thus, the United States' argument concerning the correct interpretation of Article 3.1 of the *Agreement on Safeguards* is not confined to the Panel's findings on "unforeseen developments". Indeed, we note that the Panel, in addition to finding that the United States acted inconsistently with Article 3.1 with respect to the determination by the competent authority of

[111] In addition to addressing findings that the Panel made in the context of its analysis of "unforeseen developments" (United States' appellant's submission, paras. 58–63), the United States also suggests that the Panel's conclusions on "increased imports" are inconsistent with Article 3.1 in that the Panel required the competent authority to do more than to "present a logical basis for [its] conclusions". (United States' appellant's submission, paras. 59–60)

"unforeseen developments"[112], also found that certain of the USITC's findings on increased imports and causation were inconsistent with Article 3.1.[113]

284. (…)According to the United States, "the Safeguards Agreement does not explicitly require an 'explanation'."[114] The United States rather argues that Article 3.1 of the *Agreement on Safeguards* "implies an explanation only in requiring 'reasoned conclusions on all pertinent issues of fact and law'."[115] (…)

286. We have misgivings about the approach of the United States to ascertaining the meaning of the last sentence of Article 3.1. The requirement of Article 3.1 is that "competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." The meaning of Article 3.1 must be established through an examination of the ordinary meaning of the terms of Article 3.1, read in their context and in the light of the object and purpose of the *Agreement on Safeguards*.[116] (…)

287. (…) Thus, to be a "reasoned" conclusion, the "judgement or statement" must be one which is reached in a connected or logical manner or expressed in a logical form. Article 3.1 further requires that competent authorities must "set forth" the "reasoned conclusion" in their report. The definition of the phrase "set forth" is "give an account of, esp. in order, distinctly, or in detail; expound, relate, narrate, state, describe".[117] Thus, the competent authorities are required by Article 3.1, last sentence, to "give an

[112]Panel Reports, paras. 10.150 and 11.2.

[113]*Ibid*., paras. 10.200, 10.262, 10.419, 10.422, 10.445, 10.469, 10.487, 10.503, 10.536, 10.569, 10.573, and 11.2.

[114]*Ibid*., para. 59.

[115]*Ibid*., para. 60.

[116]Article 3.2 of the DSU; Article 31 of the *Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

[117]*Ibid*., p. 2773.

account of" a "judgement or statement which is reached in a connected or logical manner or expressed in a logical form", "distinctly, or in detail."

288. Panels have a responsibility in WTO dispute settlement to assess whether a competent authority has complied with its obligation under Article 3.1 of the *Agreement on Safeguards* to "set forth" "findings and reasoned conclusions" for their determinations. The European Communities and Norway argue that panels could not fulfill this responsibility if they were left to "deduce for themselves" from the report of that competent authority the "rationale for the determinations from the facts and data contained in the report of the competent authority."[118] We agree.

(…)

291.For these reasons, we conclude that the "present[ation of] a logical basis"[119] as understood by the United States, for the conclusions of the competent authorities, does not fulfill the requirements of Article 3.1, last sentence. They must "set forth" a "reasoned conclusion".

(…)

298.It bears repeating that a panel will not be in a position to assess objectively, as it is required to do under Article 11 of the DSU, whether there has been compliance with the prerequisites that must be present before a safeguard measure can be applied, if a competent authority is not required to provide a "reasoned and adequate explanation" of how the facts support its determination of those prerequisites, including "unforeseen developments" under Article XIX:1(a) of the GATT 1994. A panel must not be left to *wonder* why a safeguard measure has been applied.

(…)

304.In sum, Members may suspend trade concessions temporarily by applying safeguard measures "*only*" in accordance with Article XIX of the GATT 1994 and with the *Agreement on Safeguards*, including Article 3.1 of that Agreement. The last sentence of the latter provision, as elaborated by Article 4.2(c) of that Agreement, requires that:

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[118]European Communities' appellee's submission, para. 48; Norway's appellee's submission, para 75.

[119]United States' appellant's submission, para. 60.

(a) the "competent authorities … publish a report";

(b) the report contain "a detailed analysis of the case";

(c) the report "demonstrat[e] … the relevance of the factors examined";

(d) the report "set[ ] forth findings and reasoned conclusions"; and

(e) the "findings and reasoned conclusions" cover "all pertinent issues of fact and law" prescribed in Article XIX of the GATT 1994 and the relevant provisions of the *Agreement on Safeguards*.

(…)

C.Is it Necessary to Demonstrate for Each Safeguard Measure at Issue that Unforeseen Developments Resulted in Increased Imports?

306.The Panel found that, because Article XIX of the GATT 1994 requires a demonstration that "unforeseen developments" have *resulted* in "increased imports", the report of the investigating authorities must "contain *specific* factual demonstrations of unforeseen developments identified to have resulted in increased imports causing or threatening to cause serious injury to the relevant domestic producers for each safeguard measure at issue."[120]

(…)

312.The United States objects to this finding by arguing that Article XIX does not specify a particular type of analysis, nor does it require any differentiation by the competent authority of the impact of various "unforeseen developments" on *each* product that is subject to the relevant safeguard measures. The United States submits that "[t]o perform such an analysis, the competent authorities would have to identify the effects of each unforeseen development on subsequent increases in imports of a product"[121] and thus "obligate the competent authorities to evaluate unforeseen developments in the same way as

[120]Panel Reports, para. 10.44 (original emphasis; underlining added).

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

imports themselves".[122] According to the United States, this is "manifestly incorrect" because "[w]hile Article XIX:1(a) requires that increased imports be a 'result of' unforeseen developments, in contrast, it requires that those imports 'cause' serious injury."[123]

313.In considering this argument, we turn first to the text of Article XIX:1(a):

> If, as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions, any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the Member shall be free, in respect of <u>such product</u>, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession. (underlining added)

314.The term "such product" in Article XIX:1(a) refers to the product that may be subject to a safeguard measure. That product is, necessarily, *the product* that "is being imported in such increased quantities". Read in its entirety, Article XIX:1(a) clearly requires that safeguard measures be applied to the product that "is being imported in such increased quantities", and that those "increased quantities" are being imported "as a result" of "unforeseen developments".

315.Turning to the term "as a result of" that is also found in Article XIX:1(a), we note that the ordinary meaning of "result" is, as defined in the dictionary, "an effect, issue, or outcome *from* some action, process or design".[124] The increased imports to which this provision refers must therefore be an "effect, or outcome" of the "unforeseen developments". Put differently, the "unforeseen developments" must "result" in increased imports of the product ("such product") that is subject to a safeguard measure.

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[122]*Ibid*.

[123]*Ibid*.

[124]*Shorter Oxford English Dictionary*, 5th ed. W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. II, p. 2555.

316. (…)We, therefore, agree with the Panel that, with respect to the specific products subject to the respective determinations, the competent authorities are required by Article XIX:1(a) of the GATT 1994 to demonstrate that the "unforeseen developments identified … have resulted in increased imports [of the specific products subject to] … each safeguard measure at issue."[125]

(…)

320.The United States suggests that:

> [t]he Panel may have felt that the ITC ought to have issued multiple demonstrations [of unforeseen developments], specific to each product subject to a separate measure, but that did not mean that the Panel could make an across-the-board dismissal of the "plausible" explanation that the ITC provided.[126]

321.However, the Panel did not make an "across-the-board dismissal" of the USITC's "plausible explanations" regarding "unforeseen developments", as the United States claims. Rather, the Panel Reports reveal that the Panel considered whether the "unforeseen developments", on which the USITC's determination relied, resulted in increased imports of the products on which the safeguard measures at issue were applied. The Panel found that the USITC Second Supplementary Report[127] "falls short"[128] in its explanation of how the Asian and Russian financial crises together with the strong United States dollar and economy resulted in increased imports into the United States. The Panel also said that the USITC failed to draw necessary links between market displacements and increased imports to the United States.[129] Furthermore, the Panel pointed out where supporting discussion and data were lacking.[130] The Panel also stated that the USITC's explanation was faulty because it referred to steel production in general

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[125]Panel Reports, para. 10.44. (underlining added) In the same vein, we further note that, as China argues in paragraph 49 of its appellee's submission, the USTR had, in fact, asked the USITC in its letter dated 3 January 2002, to identify "for each affirmative determination … any unforeseen developments that led to the relevant steel products being imported into the United States in such increased quantities as to be a substantial cause of serious injury." (Letter of the USTR to the USITC dated 3 January 2002, question 1). (underlining added)

[126]United States' appellant's submission, para. 83.

[127]It will be recalled that the issue of whether the relevant "unforeseen developments" resulted in increased imports of the products on which the safeguard measures were applied was not addressed in the initial USITC report.

[128]Panel Reports, para. 10.122.

[129]*Ibid*., 10.123, 10.127 and 10.131.

[130]*Ibid*., paras. 10.124–10.125, 10.130–10.131 and 10.145.

and because the explanation did not address how the "unforeseen developments" resulted in increased imports in respect of the specific steel products at issue.[131] In sum, the Panel was of the view that "the complexity of the unforeseen developments pointed to by USITC called for a more elaborate demonstration and supporting data than that provided by the USITC."[132]

(…)

[131]Panel Reports, paras. 10.126 and 10.128.

[132]*Ibid*., para. 10.145.