The Panel will therefore proceed according to the attached Working Procedures and Timetable. Finally, the Panel would like to remind parties that this communication, constituting part of the panel process, is confidential."

VI. THE PANEL'S WORKING PROCEDURES

6.1 The working procedures adopted by the Panel for the present disputes are set out below:

"1. In its proceedings the Panel shall follow the relevant provisions of the DSU. In addition, the following working procedures shall apply.

2. The panel shall meet in closed session. The parties to the dispute, and interested third parties, shall be present at the meetings only when invited by the Panel to appear before it.

3. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the Panel which that Member has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. Before the first substantive meeting of the Panel with the parties, the parties to the dispute shall transmit to the Panel written submissions in which they present the facts of the case and their arguments. Third parties may transmit to the Panel written submissions after the first written submissions of the parties have been submitted.

5. Within seven days following the date for filing a submission, each of the parties and third parties is invited to provide the Panel with an executive summary of their submissions. The executive summaries will be used only for the purpose of assisting the Panel in drafting a concise factual and arguments section of the Panel report to the Members. They shall not in any way serve as a substitute for the submissions of the parties in the Panel's examination of the case. The executive summary to be provided by each party should not exceed 15 pages in length and shall summarise the content of the written submissions. In relation to the executive summaries to be provided by the United States, it is allowed an additional 15 pages to address issues that have been raised in the submissions of one or more of the other parties that are specific to those parties and which are not common to the other parties. The summary to be provided by each third party shall summarize their written submissions, as applicable, and should not exceed 5 pages in length.

6. At its first substantive meeting with the parties, the Panel shall ask the Complaining Parties to present their cases. Subsequently, and still at the same meeting, the United States will be asked to present its point of view. The parties will then be allowed an opportunity for final statements, with the Complaining Parties presenting their statements first.

7. All third parties which have notified their interest in the dispute to the Dispute Settlement Body shall be invited in writing to present their views during a session of the first substantive meeting of the Panel set aside for that purpose. All such third parties may be present during the entirety of this session.

8. Formal rebuttals shall be made at a second substantive meeting of the Panel. The United States shall have the right to take the floor first, to be followed by the Complaining Parties. The parties shall submit, prior to that meeting, written rebuttals and executive summaries to the Panel.

9. The Panel may at any time put questions to the parties and to the third parties and ask them for explanations either in the course of a meeting or in writing. Answers to questions shall be submitted in writing by the date(s) specified by the Panel. Answers to questions after the first meeting shall be submitted in writing, at a date to be determined by the Panel.

10. A party shall submit any request for a preliminary ruling not later than its first submission to the Panel. If the Complaining Parties request such a ruling, the United States shall submit its response to the request in its first submission. If the United States requests such a ruling, the Complaining Parties shall submit their responses to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure will be granted upon a showing of good cause.

11. Parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal submissions, or answers to questions or provided that good cause is shown. In all cases, the other party(ies) shall be accorded a period of time for comment, as appropriate.

12. The parties to the dispute have the right to determine the composition of their own delegations. The parties shall have the responsibility for all members of their delegations and shall ensure that all members of the delegation act in accordance with the rules of the DSU and the Working Procedures of this Panel, particularly in regard to confidentiality of the proceedings.

13. The parties to the dispute and any third party invited to present its views shall make available to the Panel and the parties to the dispute a written version of their oral statements, preferably at the end of the meeting, and in any event not later than the day following the meeting. Parties and third parties are encouraged to provide the Panel and other participants in the meeting with a provisional written version of their oral statements at the time the oral statement is presented.

14. In the interest of full transparency, the presentations, rebuttals and statements shall be made in the presence of the parties. Moreover, each party's written submissions, including responses to questions put by the Panel, shall be made available to the other party or parties.

15. To facilitate the maintenance of the record of the dispute, and to maximize the clarity of submissions, in particular the references to exhibits submitted by parties, parties shall sequentially number their exhibits throughout the course of the

dispute. For example, exhibits submitted by the United States could be numbered USA-1, USA-2, etc. If the last exhibit in connection with the first submission was numbered USA-5, the first exhibit of the next submission thus would be numbered USA-6.

16. Following issuance of the interim report, the parties shall have one week to submit written requests to review precise aspects of the interim report – unless the Panel decides otherwise at the second substantive meeting of the parties and/or to request a further meeting with the Panel. The right to request such a meeting must be exercised no later than at that time. Following receipt of any written requests for review, if no further meeting with the Panel is requested, the parties shall have the opportunity, within 2 weeks, to submit written comments on the other party's written requests for review. Such comments shall be strictly limited to responding to the other party's or parties' written request for review.

17. The following procedures regarding service of documents shall apply:

a. Each party shall serve its submissions directly on the other party. Each party shall, in addition, serve its first written submission on third parties. Each third party shall serve its submissions on the parties and other third parties. Parties and third parties shall confirm, at the time a submission is provided to the Panel, that copies have been served as required.

b. The parties and the third parties shall provide their written submissions to the Dispute Settlement Registrar by 5:30 p.m. on the deadlines established by the Panel and by 5:00 p.m. if the deadline falls on a Friday. If, due to exceptional circumstances, it is not possible for submissions to be provided to the Registrar by the times stipulated, parties should agree otherwise with the Secretary to the Panel, Ms Dariel De Sousa. The parties and the third parties shall provide the Panel with 10 paper copies of their written submissions. All these copies must be filed with the Dispute Settlement Registrar, Mr. Ferdinand Ferranco (Office 3154).

c. Ten copies of all submissions (oral and written), exhibits and other documents relating to this dispute must be submitted to the Panel through the WTO Secretariat when the original documents are filed with the Secretariat.

d. At the time they provide paper copies of their submissions, the parties and third parties shall also provide the Panel with an electronic copy of the submissions on a diskette or as an e-mail attachment, in a format compatible with the Secretariat's software (e-mail to the Dispute Settlement Registrar at DSregistry@wto.org, with a copy to the Secretary to the Panel, Dariel De Sousa at dariel.desousa@wto.org)."

VII. ARGUMENTS OF THE PARTIES

7.1 The following sections summarize the arguments made by the European Communities, Japan, Korea, China, Switzerland, Norway, New Zealand, Brazil and the United States. These parties all presented their arguments in different ways. In order to avoid repetition and for the convenience of the Panel, the complainants, at the first and second substantive meetings, divided the oral presentation of the different aspects of this case amongst themselves. Accordingly, some arguments are attributed to the complainants generally while the detail of individual complainants' arguments is set out in their

submissions and answers to questions. Further, the list of complainants to which other arguments are attributed is not necessarily exhaustive.

A. CONDITION OF THE US STEEL INDUSTRY

1. The complainants' assessment of the US domestic steel industry

(a) Main characteristics of the US steel industry

7.2 Brazil argues that the United States' steel industry is marked by contradictions and contrasts in performance and prospects. Brazil notes that, in the year 2000, there were 78 steel producers in the United States with raw steel capacity, as well as a lesser number of steel processors with no raw steel making capacity of their own.[122] Japan, New Zealand and Brazil note that, in that same year, the United States industry produced 112 million tons of raw steel, the industry's highest level over the past 10 years and a 27% increase over 1991.[123] Japan and Brazil further note that a 9% dip in capacity between 1991 and 1994 was completely erased by over 20 million tons of new capacity brought on line between 1994 and 2000, representing an increase of over 18%.[124] Japan and New Zealand submit that this increase made the United States the third-largest steel-producing nation in the world.[125] Brazil continues that imports of CCFRS products, including slab, hot-rolled, cold-rolled and coated products, where the United States' industry capacity was most heavily invested, peaked in 1998 and declined in 1999 and 2000.[126]

7.3 Brazil argues that, yet, the performance of the United States' steel industry declined, even with the retreat of imports[127], revealing an industry that is weak, fragmented, and saddled with substantial inefficient and/or antiquated capacity well in excess of demand. More importantly, a closer look at industry data shows an industry split between two primary segments and nearing the end of a fundamental shift in production technology and market power. These two industry segments are best defined according to their production processes and input, i.e., the integrated segment and the minimill segment.[128] The complainants explain that integrated producers – of which there were 13 in 2000 – smelt iron ore using coke in a blast furnace to produce molten iron, which is subsequently poured into either an open-hearth furnace or a basic oxygen furnace. The hot metal is processed into steel when oxygen is blown into the metal bath. Minimill producers – of which there were 65 in 2000 – produce molten steel by melting scrap or scrap substitutes (e.g. direct-reduced iron, hot-briquetted iron and iron carbide) in an electric arc furnace, thereby missing the initial smelting stage.[129]

(b) History of the US steel industry

7.4 According to the European Communities, to properly understand the current situation of the United States integrated steel producers, one must return to the post-World War II period.[130]

---

[122] Brazil's first written submission, para. 57.
[123] Japan's first written submission, para. 54; New Zealand's first written submission, para.2.17; Brazil's first written submission, para. 57.
[124] Japan's first written submission, para. 54; Brazil's first written submission, para. 57.
[125] Japan's first written submission, para. 54; New Zealand's first written submission, para. 2.17, quoting USITC Report, Vol. II, OVERVIEW–25.
[126] Brazil's first written submission, para. 57.
[127] USITC Report, Vol. II at OVERVIEW 25 (Exhibit CC-6) at FLAT 16-21(Exhibit CC-6).
[128] Brazil's first written submission, paras. 58-59.
[129] USITC Report Vol. II at OVERVIEW 7-8, 9-10 (Exhibit CC-6).
[130] European Communities' first written submission, para. 33.

7.5 The European Communities submits that the United States' steel industry was one of the few, if not the only, substantial steel industry left intact following World War II. In the post-war construction boom, demand for steel rocketed and the industry expanded capacity. Rather than convert to Basic Oxygen Furnaces (BOF) technology, the United States steel industry simply expanded its relatively less efficient Open Hearth Furnaces, which had been in service since the late 19th century. In the mid-to-late 1950s, the steel industries labour relations deteriorated. During this period, the steel worker's unions threatened to strike unless major pay increases were agreed to. This culminated in the 116 day strike in 1959 in which all steel capacity in the United States was closed, and led to higher then inflation pay increases throughout the 1960's.[131]

7.6 The European Communities submits that the 1960s also saw the re-emergence of other countries as major exporters. Japanese and European companies, using the most recent BOF technology, started exporting to the United States, benefiting from their advanced technology to offer better prices.[132]

7.7 According to the European Communities, the response of the integrated United States producers was immediate and effective: import protection. Using the threat of the imposition of quantitative restrictions, the United States Government negotiated VRAs with the major exporters to the United States market.[133] These came into force in 1969, and remained in place until 1974.[134] Korea further submits that the United States historically protected its market through a variety of mechanisms, including a myriad of anti-dumping and countervailing duty orders against various steel products from numerous countries.[135] The European Communities submits that a pattern was born. Rather than innovate and compete (made more difficult by difficult labour relations), the United States steel industry sought import protection.[136]

7.8 Korea argues that by 2000, there were 138 anti-dumping and countervailing duty orders or suspension agreements in place against various steel products from various countries.[137] Finished steel products subject to anti-dumping and countervailing duties orders, safeguard actions, or pending investigations by the United States in year 2000 accounted for 39% of total imports of finished steel from all countries.[138]

(c) Evolution of the US steel industry

7.9 According to the European Communities, in the 1970s and 1980s, integrated mills could take comfort from the fact that technology constrained minimills to the low-quality product end of the market.[139] The first minimills began producing the least sophisticated kinds of long products (such as concrete reinforcing bars) in the 1960s. In the 1970s, minimills diversified into more sophisticated long products (wire rods and structural shapes), coming to dominate the long products market by the

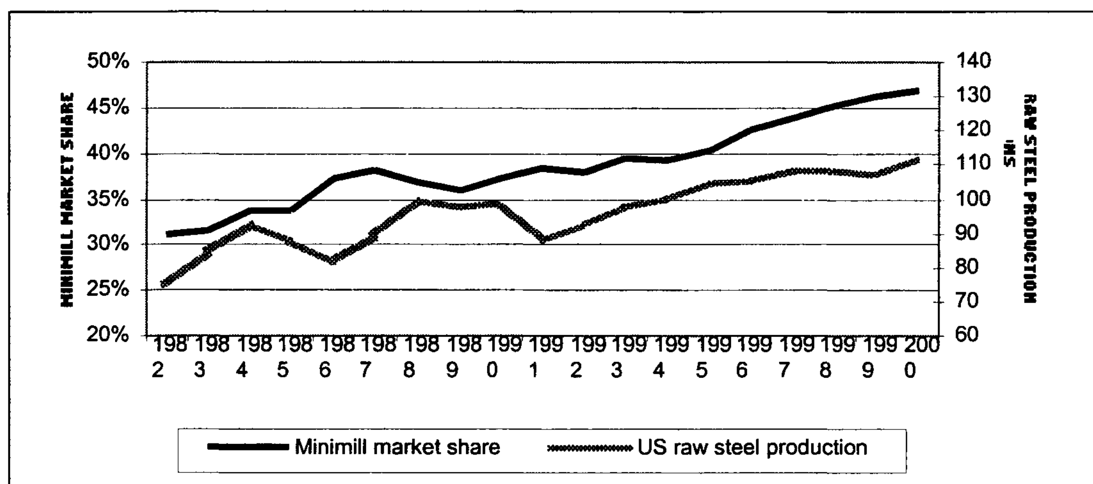
[131] European Communities' first written submission, para. 33.
[132] European Communities' first written submission, para. 34.
[133] European Communities' first written submission, para. 35.
[134] European Communities' first written submission, para. 35.
[135] Korea's first written submission, para. 9.
[136] European Communities' first written submission, para. 35.
[137] USITC Report, Vol. II, Table OVERVIEW-1, p. OVERVIEW-3-6 (Exhibit CC-6).
[138] Respondents' Joint Prehearing Framework Brief, Inv. No. TA-201-73 (11 September 2001) ("Respondents' Joint Framework Brief"), Exhibit 3 (Exhibit CC-50).
[139] Tornell, "Rational Atrophy: the United States steel industry", p. 14, Exhibit CC-61.

1990s. The European Communities submits that the USITC found that the minimill share of United States raw steel production increased substantially during the 1990s.[140] [141]

7.10 The European Communities further submits that advances in technology have meant that minimills can now produce high quality cold-rolled, plate and coated steel in direct competition with integrated producers.[142] By 1998, domestic minimills had a total production capacity of 49 million tonnes, including 2 millions tonnes of cold-rolled steel capacity, 17 million tonnes of new hot-rolled steel capacity and 4 million tonnes of new plate capacity.[143] This capacity came on line just as the price of scrap (the essential raw material for minimills) dropped by 40% following the Asian financial crisis.[144] [145]

7.11 Similarly, Brazil notes that in the last decade, the United States' industry has witnessed major increases of more than 50% in the amount of raw steel produced by minimill producers. Meanwhile, the amount of raw steel produced by integrated mills remained relatively constant over the same period.[146] Brazil argues that data reported by the USITC indicate that minimill producers constituted 47% of all raw steel production in 2000, up from 38.4% in 1991. Increases in United States' raw steel production were commensurate with increases in United States' minimill share of that production. Japan and Brazil refer to the following figures:[147]

Chart 1: United States Minimill Share of United States Raw Steel Production[148]



[140] USITC Report, Vol. II, p. OVERVIEW-26, Figure OVERVIEW-9. The precise data have not been provided, so the figures used are estimates based on the USITC's table.

[141] European Communities' first written submission, para. 37

[142] USITC Report, Vol. I, p. 50.

[143] Barringer, "Paying the Price for Big Steel", p. 252, Exhibit CC-61.

[144] Barringer, "Paying the Price for Big Steel", p. 6, Exhibit CC-61.

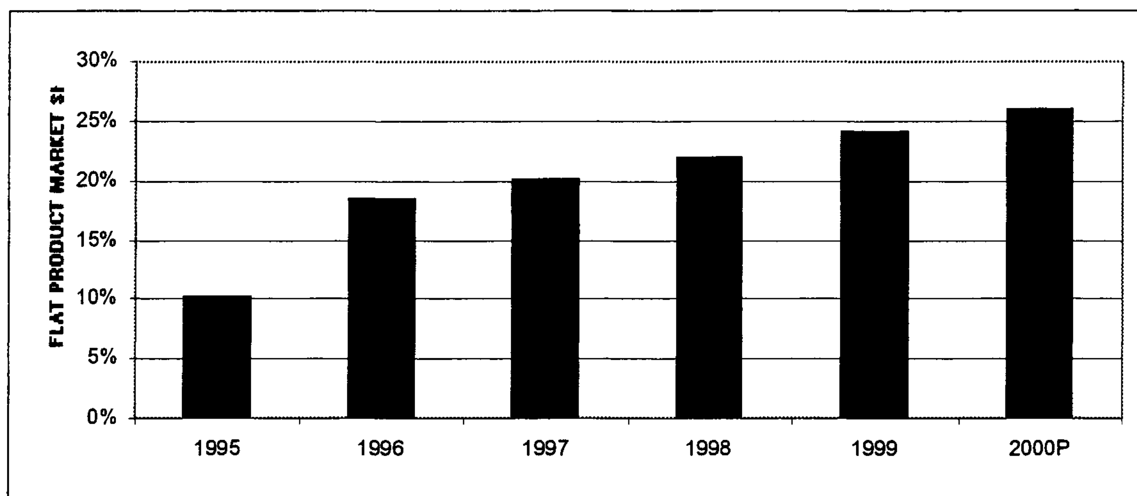
[145] European Communities' first written submission, para. 38.

[146] USITC Report Vol. II at OVERVIEW 20 (Exhibit CC-6).

[147] Japan's first written submission, para. 59; Brazil's first written submission, para. 60.

[148] USITC Report Vol. II at OVERVIEW 25-26, Figure OVERVIEW 9, citing AISI, "Annual Statistical Report", 2000 (Exhibit CC-6). The USITC chart listed production between 1991 and 2000. Additional data from 1990 ed. of the "Annual Statistical Report", provided in this chart (Exhibit CC-62).

Chart 2: United States Minimill Share of United States Flat Product Production[149]



7.12 Japan and Brazil note that, according to the USITC, this minimill expansion was the result of "heavy investment in new, greenfield electric arc furnace plants and in capacity increases in existing plants".[150] The USITC record reveals no comparable investment made by integrated mills. Rather, the record reflects an integrated industry mainly shutting down raw steel capacity in the face of rising maintenance and environmental costs, and minimill competition, while squeezing as much production as possible out of fewer and fewer steel facilities.[151] [152]

7.13 Japan and Brazil further argue that well before the initiation of the United States' safeguards action, steady expansion in United States' minimill capacity had left minimills in complete control of domestic long product production. With long products effectively eliminated from the integrated industry product line, integrated producers turned to the only remaining product line where they enjoyed any advantage over their minimill competitors – CCFRS. Japan and Brazil submit that, however, the CCFRS advantage was short-lived. By the late 1980s, electric arc furnace technology coupled with thin-slab casting provided minimills with an entrée into the integrated segment's last mainstay.[153] [154]

7.14 Japan and Brazil continue that with the adoption of thin-slab casting, United States minimills would soon produce hot-rolled flat products. Production would later extend to higher value-added products including cold-rolled and coated sheet, all at the expense of integrated producers. In fact, the USITC's period of investigation captured the most prolific period of minimill expansion. Japan and Brazil illustrate by noting that Nucor installed the first thin-slab minimill capable of producing flat products in 1989, with an initial capacity of just 1 million tons.[155] Other mills would follow, with

---

[149] Donald F. Barnett, "Double Ought-Naught", Presentation at World Steel Dynamics / American Metal Market Steel Survival Strategies XV, June 19-21, 2000 at Table 3, cited in Joint Prehearing Brief of Respondents: Product Group G01, Slab, September 11, 2001 at 18, Figure 1 (Exhibit CC-51).

[150] USITC Report Vol.II. at OVERVIEW-20 (Exhibit CC-6).

[151] For instance, Joint Prehearing Brief of Respondents: Product Group, G01, Slab Steel, 11 September 2001 at 31-41, 60-65 and Exhibits 3, 5, and 6 (Exhibit CC-51).

[152] Japan's first written submission, para. 60; Brazil's first written submission, para. 61.

[153] USITC Report Vol. II at OVERVIEW 20 (Exhibit CC-6).

[154] Japan's first written submission, para. 57; Brazil's first written submission, para. 62.

[155] Charles Yost, "Thin-Slab Casting / Flat Rolling: New Technology To Benefit United States Steel Industry", Industry Trade and Technology Review, USITC Pub. 3004 (October 1996) at 27 (Exhibit CC-66), cited in Respondents' Joint Prehearing Framework Brief, Sept. 11, 2001 at 57. This USITC Report provided a

minimill share of United States' flat product production increasing from just 10% in 1995 to 26% by 2000.[156] [157]

(d) Relative competitiveness of integrated producers and minimills

7.15 According to the European Communities and New Zealand, the USITC Report fails to emphasize that differences in inputs and production methods have had a significant impact on the competitiveness of minimills over integrated producers. New Zealand submits that in 1998, minimills enjoyed an 18.4% cost advantage over integrated firms producing sheet steel. By 2000, this cost advantage had increased to 21.8%.[158] Consequently, minimills were able to undercut integrated producers in the market and gained in market share.[159]

7.16 Japan and Brazil add that although the respondent submissions painstakingly documented and established the reasons for this fundamental shift and expansion in minimill production, they were largely ignored by the USITC. Japan and Brazil also point out that in an article covering the proliferation of thin-slab minimills published as early as 1996, the USITC reported findings by industry experts that between 3 and 6 million tons of integrated capacity would have to close because of the escalating costs of running such plants.[160] Japan and Brazil submit that, simply put, minimills enjoyed and continue to enjoy substantial cost advantages over integrated mills for myriad reasons.[161] [162] [163]

7.17 The European Communities and New Zealand submit that there are a number of differences in production inputs that enable minimills to produce steel at lower cost. First, the price of scrap tends to be cheaper than iron ore and coal. In 1998, a lowering of the domestic price of scrap due to a falling off of exports from the United States meant that minimills' scrap costs fell by 40%.[164] [165]

7.18 The European Communities and New Zealand also submit that since minimills miss out the stage where iron ore is smelted in a blast furnace, they are less labour intensive than integrated production. On average, minimills use 0.44 hours per ton of steel produced whereas integrated

---

detailed analysis of on thin-slab casting in 1996 covering Nucor's commercial initiation of the technology in 1990, adoption by others, and the competitive effects of thin-slab technology.

[156] Donald F. Barnett, "Double Ought-Naught", Presentation at World Steel Dynamics / American Metal Market Steel Survival Strategies XV, June 19-21, 2000 at Table 3, cited in Joint Prehearing Brief of Respondents: Product Group G01, Slab, September 11, 2001 at 18, Figure 1 (Exhibit CC-51).

[157] Japan's first written submission, para. 58, Brazil's first written submission, para. 63.

[158] Crandall, p. 2 (Exhibit CC-61).

[159] European Communities' first written submission, para. 39; New Zealand's first written submission, para. 2.20.

[160] Charles Yost, "Thin-Slab Casting / Flat Rolling: New Technology To Benefit United States Steel Industry", Industry Trade and Technology Review, USITC Pub. 3004 (October 1996) at 31, n. 16 (Exhibit CC-66).

[161] Joint Prehearing Brief of Respondents: Product Group, G01, Slab Steel, Sept. 11, 2001 at 31-41 (Exhibit CC-51). Indeed, it was the testimony of executives from Nucor Steel, the largest minimill CCFRS producer, that it was their duty to shareholders to exploit this advantage. Hearing Transcript (Injury) at 1014 (Exhibit CC-58).

[162] Joint Prehearing Brief of Respondents: Product Group G01, Slab, Sept. 11, 2001 at 31-38 (Exhibit CC-51).

[163] Japan's first written submission, para. 62; Brazil's first written submission, para. 65.

[164] Barringer and Pierce, Executive Summary, p. 6 (Exhibit CC-61).

[165] European Communities' first written submission, para. 40; New Zealand's first written submission, para. 2.21

producers use 2.86 hours for each ton.[166] Nucor's first thin-slab minimill producing flat products had labour productivity of more than four times that of the most efficient integrated plants.[167] [168]

7.19 In addition, New Zealand submits that missing out the blast furnace stage means that minimills also require less energy. This means that the profitability of minimills is less affected by energy price rises.[169]

7.20 According to the European Communities and New Zealand, minimills tend to be smaller than the plants of integrated producers allowing them to benefit from economies of scale. The basic oxygen furnaces used by integrated producers must produce three million tons of steel per year to be economically viable whereas minimills can be viable at less than one million tons per year.[170] Thus, in periods of lower demand, minimills are more likely to continue to be profitable. Their smaller size allows minimills to locate nearer to their markets and to scrap sources lowering transport costs for both inputs and products.[171] By contrast, integrated producers traditionally locate near sources of iron ore and coal, or a deep-water port.[172]

7.21 New Zealand further submits that minimills can be built more cheaply and more quickly than integrated mills. They require less capital than is needed for new integrated facilities, and can be completed in two years or less.[173] In fact, the cost of constructing a hot-rolling mill of US$4-5 billion per integrated mill can be compared with the cost of US$400-500 million per minimill.[174] It is not surprising therefore that no new integrated production facilities have been built in the United States since the late 1970s.[175]

7.22 According to New Zealand, labour costs have also had an impact on the relative competitiveness of minimills and integrated producers. In the post-war period, integrated producers suffered from poor industrial relations, with strikes being threatened yearly. For many years, wages were negotiated between the United Steelworkers of America and the major integrated steel producers for the entire industry. This is reflected in the premium of the steelworkers wage relative to the manufacturing average. Between 1997 and 2001 alone, total compensation rose 9% from US$34.78 to US$37.91 per hour.[176] By comparison, the manufacturing average was US$24.30 per hour.[177] By contrast, minimills tend to have separate contracts with lower wages.[178] [179] Japan and Brazil agree that labour costs and productivity were superior among mills, with leading United States minimills needing as little as 0.33 man hours to produce a ton of steel compared to 4.1 man hours or even more

[166] Barringer and Pierce, p. 256 (Exhibit CC-61).

[167] Tornell, p. 14 (Exhibit CC-61).

[168] European Communities' first written submission, para. 41; New Zealand's first written submission, para. 2.22.

[169] New Zealand's first written submission, para. 2.22.

[170] Tornell, p. 14 (Exhibit CC-61).

[171] Tornell, p. 14 (Exhibit CC-61).

[172] European Communities' first written submission, para. 42; New Zealand's first written submission, para. 2.23.

[173] Crandall, p. 11 (Exhibit CC-61).

[174] Barringer and Pierce, p. 255 (Exhibit CC-61).

[175] New Zealand's first written submission, para. 2.24.

[176] Hufbauer and Goodrich, p. 1 (Exhibit CC-61).

[177] Hufbauer and Goodrich, p. 1 (Exhibit CC-61).

[178] Hall, Christopher "Steel Phoenix: The Fall and Rise of the United States Steel Industry" (New York, 1997), p. 46 (Exhibit CC-61).

[179] European Communities' first written submission, para. 43; New Zealand's first written submission, para. 2.25

at some integrated mills. Many United States integrated producers were also found to be operating small, inefficient blast furnaces incapable of achieving economies of scale in the current competitive environment. Maintenance and repair costs for integrated producers dwarf those of minimills. Finally, minimills enjoyed much lower market entry costs, equating to only US$200 per annual ton of greenfield production capacity compared to US$1,000 per annual ton for integrated mills according to the USITC's own findings.[180] [181]

7.23 According to New Zealand, integrated producers also face "legacy costs". In the past, accounting rules allowed integrated steel companies to provide generous retirement and health benefits without having to deduct the future costs from current profits. In exchange for these benefits, unions accepted smaller hourly raises. However, retired steelworkers began to outnumber employees. Legacy costs in 2001 were estimated to be between US$30 and US$65 per ton of steel produced by integrated mills and totalling across the industry between US$1.7 and US$3.6 billion.[182] [183]

7.24 However, Japan and Brazil note that not all integrated mills resigned themselves to these severe competitive handicaps. At the opening of the USITC's period of investigation, some integrated mills had already made or were in the process of making tough restructuring decisions in order to compete more effectively. This led to the adoption of new business models to reduce production costs and/or vacate markets dominated by minimill producers.[184]

7.25 Japan and Brazil further posit that, ultimately, for a number of integrated mills, the only real long term solution is consolidation leading to a rationalization of capacity. Industry executives repeatedly cited the need for such consolidation during the remedy phase of the USITC's investigation. Yet this approach also presents problems for the industry. Brazil reiterates that high legacy costs, particularly post-employment health care and insurance benefits, discourage potential merger and acquisition moves. The USITC itself noted the huge liabilities and uncertainty involved.[185] No rational company would want to merge with or acquire an integrated mill with such liabilities, if doing so meant assuming these liabilities.[186]

(e) Impact of competition between minimills and integrated producers

7.26 New Zealand argues that since modern minimill products are now of a quality similar to the products made by integrated producers, purchasing decisions tend to be increasingly dominated by price.[187] Minimills are far more able to compete on price and remain profitable than are integrated producers and, as a result, have been able to increase their market share.[188]

7.27 New Zealand submits that, in fact, minimills have entirely pushed integrated producers out of the markets for lower-quality steel products such as concrete rebar, wire rod and H-beams. Between

[180] See Joint Prehearing Brief of Respondents: Product Group G01, Slab, 11 September 2001, at 31-38 (Exhibit CC-51).
[181] Japan's first written submission, para. 63; Brazil's first written submission, para. 66.
[182] Hufbauer, Gary Clyde and Goodrich, Ben, "Steel: Big Problems, Better Solutions" (International Economics Policy Briefs No. 01-9. July 2001, p. 12 (http://www.iie.com/policy briefs/news01-9.htm) (Exhibit CC-61).
[183] European Communities' first written submission, para.44; New Zealand's first written submission, para. 2.26.
[184] Japan's first written submission, para 64; Brazil's first written submission, para. 67.
[185] USITC Report Vol. II at Overview 34-35 (Exhibit CC-6).
[186] Japan's first written submission, para. 67; Brazil's first written submission, para. 70.
[187] USITC Report, Vol II, Table FLAT-64 at FLAT-56.
[188] New Zealand's first written submission, para. 2.27.

1970 and 1989, demand for steel in the United States declined 22% yet minimills increased their share of steel production from 15% in 1970 to 37% in 1989.[189] Production on a large scale of high-quality steel products by minimills began during the period of investigation.[190] By 1998, domestic minimills had a total production capacity of 49 million tons, including two million tons of cold-rolled steel capacity, 17 million tons of new hot-rolled steel capacity and four million tons of new plate capacity.[191] The minimill share of domestic raw steel production reached 47.5% in 2001 and is continuing to rise.[192] [193]

7.28 According to Japan, New Zealand and Brazil, entering the USITC's period of investigation in 1996, the United States steel industry was facing an inevitable collision between new minimill capacity and older, less efficient, integrated capacity. Confronted with competition from expanding low-cost minimills, the integrated mills continued a long-standing practice of sacrificing profitability for size and tonnage.[194] The result was a substantial net addition to overall capacity well in excess of the market's ability to absorb the surplus.[195] In this regard, Japan and Brazil make reference to the following table:[196]

Table 1: Extent of Excess Capacity

Product	Change in 1996-2000 Domestic Capacity	Change in 1996-2000 Apparent Consumption	Additional Capacity in Excess of Growth in Demand
Flat-slabs	8,141,789	3,075,527	5,066,262
Flat-plate	3,160,108	-699,713	3,859,821
Flat-hot-rolled	9,759,734	6,591,707	3,168,027
Flat-cold-rolled	5,626,340	3,584,555	2,041,785
Flat-coated	5,549,240	3,229,450	2,319,790

7.29 Japan and Brazil contend that even the USITC is prepared to acknowledge a "significant incentive to maximize the use of steel making assets, which can affect producer's pricing behavior".[197] Yet the problems inherent in the capacity and demand trends within the industry over the period of investigation did not immediately arise, despite rising import levels. Surging United States consumption, stronger prices and high capacity utilization from 1996 through the first half of 1998 provided a short-term buffer. As demand flattened in late 1998 and 1999, however, domestic capacity continued to increase and the disparities between new minimill and old integrated capacity became increasingly apparent and market disruptive. The outcome was predictable. Marginal integrated

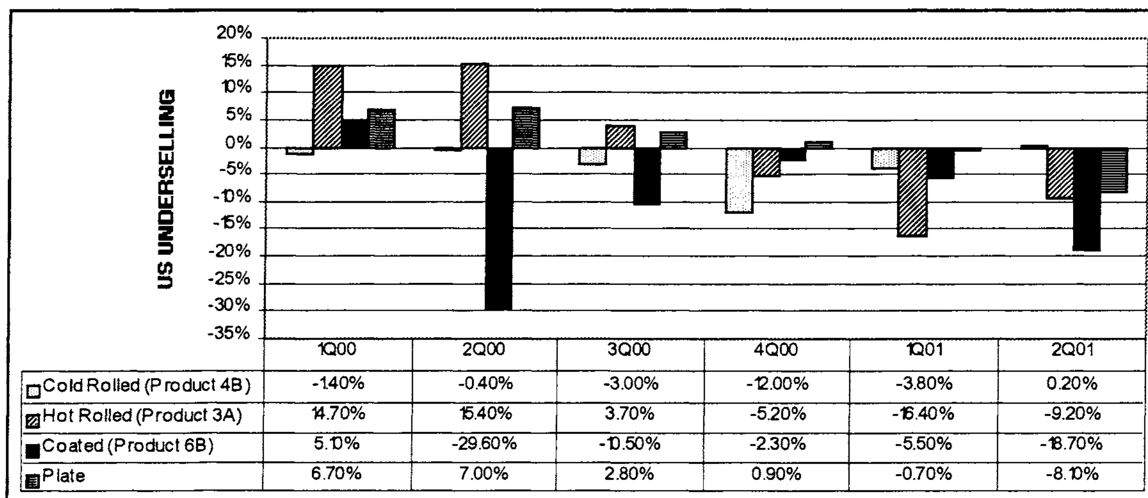
[189] Tornell, p. 4 (Exhibit CC-61).
[190] USITC Report Vol. I, p. 50 (Exhibit CC-61).
[191] Barringer and Pierce, p. 252 (Exhibit CC-61).
[192] Steel Manufacturers Association website: http://www.steelnet.org (Exhibit CC-61).
[193] New Zealand's first written submission, para. 2.28.
[194] Japanese Respondents' Prehearing Remedy Brief; General Issues (Flat-Rolled Products), 29 October 2001 at 16-19 (citing various industry experts on the capacity phenomenon) (Exhibit CC-56).
[195] Japan's first written submission, para. 68; New Zealand's first written submission, para. 2.29; Brazil's first written submission, para. 71.
[196] Japan's first written submission, para. 68; Brazil's first written submission, para. 71.
[197] USITC Report Vol. I at 63 (Exhibit CC-6).

firms attempting to maintain inefficient capacity fought more aggressively and desperately for sales, cutting prices to maintain volume and generate cash flow.[198]

7.30 In New Zealand's view, from mid-2000, the long-term struggle for market share between minimills and integrated producers was temporarily overshadowed by a substantial fall off in demand for steel in the United States. This had an impact on both types of producers. The fall in demand for steel reflected the general slow-down in the United States economy at the time. With the United States economy moving into recession in 2001, output of important steel-using sectors such as the automotive and fabricated metal products sectors contracted. These negative demand developments resulted in a 15% decline in apparent consumption of certain flat steel products during the first six months of 2001 compared with the comparable period in 2000.[199] As a consequence of lower demand, the domestic price of CCFRS products declined by 13%.[200] [201]

7.31 Brazil contends further that although the USITC still found that imports, not increased domestic capacity, led pricing downward[202], the data simply do not support the USITC's assessment. For example, as illustrated in Chart 3 below, the product-specific pricing data for the largest tonnage of plate, hot-rolled, cold-rolled and coated products all show the domestic industry underselling imports in most cases by the end of 2000 and the first two quarters of 2001. The USITC data seemingly reveals an industry sensitive to import declines rather than import increases. Domestic price underselling was at its greatest when imports were at their lowest. Brazil notes that what is missing from this equation is the presence of tremendous United States capacity overhang and its impact on the market.[203]

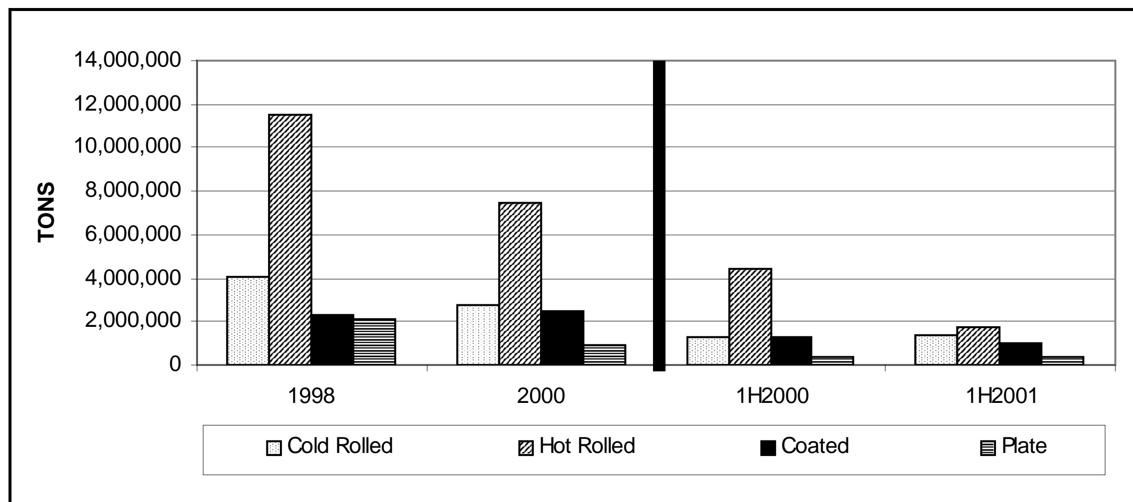
Chart 3: Underselling by United States Industry[204]



	1Q00	2Q00	3Q00	4Q00	1Q01	2Q01
Cold Rolled (Product 4B)	-1.40%	-0.40%	-3.00%	-12.00%	-3.80%	0.20%
Hot Rolled (Product 3A)	14.70%	15.40%	3.70%	-5.20%	-16.40%	-9.20%
Coated (Product 6B)	5.10%	-29.60%	-10.50%	-2.30%	-5.50%	-18.70%
Plate	6.70%	7.00%	2.80%	0.90%	-0.70%	-8.10%

[198] Japan's first written submission, para. 69; Brazil's first written submission, para.72.
[199] USITC Report, Vol. II, Table FLAT-51 to 54 and 56.
[200] USITC Report, Vol. I, p. 61.
[201] New Zealand's first written submission, para. 2.30.
[202] USITC Report Vol. I at 63-64 (Exhibit CC-6).
[203] Brazil's first written submission, para. 74.
[204] USITC Report Vol. II at FLAT 64-68, non-NAFTA pricing (Exhibit CC-6).

Chart 4: United States Imports of Flat Products[205]



7.32 New Zealand notes that, by the close of 2000, the domestic industry price collapse was exacerbated with substantial integrated capacity finally falling into bankruptcy. Some 11 million tons of additional CCFRS steel capacity entered Chapter 11.[206] Freed from their debt burdens, these mills plunged deeper into the pricing battle with minimills in the pursuit of cash flow. New Zealand submits that, again, with no decline in domestic capacity in sight, underselling increased and prices fell.[207]

7.33 New Zealand argues that a final respite for the domestic industry was not to be realized until the major impediment retarding the industry's recovery was removed: inefficient domestic raw steel capacity. In December 2001, LTV Steel finally ceased all operations after producing for a full year under Chapter 11. With the closure of LTV's 8 million tons of capacity, the market immediately responded. In 2002 prices for cold rolled steel, for example, improved from US$310 per ton in January to US$320 in February and US$370 in March.[208] [209] [210]

(f) Conclusions

7.34 The European Communities, Switzerland and New Zealand conclude that the state of the United States' steel industry reflects the transition of the industry to modern, more efficient production techniques. They submit that due to savings on inputs, energy, labour and transport costs, new efficient minimills are able to undercut integrated producers on price while providing a product of equal quality. The increase in capacity growth in the United States market is perhaps the most significant factor that emerges, and far outstrips any increase in imports. The excess capacity

[205] Ibid., at FLAT 9-11, 13 (Exhibit CC-6) and ANNEX A.

[206] USITC Report, Vol. II at OVERVIEW 40-41.

[207] New Zealand's first written submission, para. 2.31.

[208] Purchasing Magazine, "Transaction Pricing Service", First Quarter 2002 (Cold Rolled Steel) (Exhibit CC-65).

[209] Jennifer Scott Cimperman, Rivals See Steel Sector Better Off Minus LTV, The Plain Dealer (Feb. 15, 2002) (Exhibit CC-64).

[210] New Zealand's first written submission, para. 2.32.

exacerbates price depression caused by intra-industry competition and falling demand as a result of the 2001 recession in the United States.[211]

7.35 Japan and Brazil also conclude that the United States industry is an industry in transition. One part of the industry, the low-cost minimills, is rapidly increasing capacity and capturing market share. In the face of this competition, some integrated mills have successfully adopted models which allow them to remain competitive, including concentrating resources in higher value-added products that minimills cannot produce. Other integrated mills, however, have maintained capacity and attempted to compete with the minimills, often because of the high legacy costs associated with shutting down facilities. This has fuelled intra-industry competition and put downward pressure on prices.[212]

2. The United States' assessment of its domestic steel industry

7.36 In response to the complainants' assessment of the United States' steel industry, the United States submits that, by the fall of 2001, the United States' steel industry was in a severe crisis caused by record levels of low-priced imports that began in 1998.[213]

7.37 The United States submits that, from December 1997 through to October 2001, 25 steel producers in the United States filed for protection under Chapter 11 of the United States bankruptcy law. These firms accounted for 30% of United States' crude steelmaking capacity.[214] These bankruptcies accelerated job losses in the industry and total employment in the sector fell to the lowest levels in decades.[215]

7.38 The United States argues that even steel producers that avoided bankruptcy experienced declining profits and other indicators of financial performance as they lost market share to low-priced imports. Per unit costs for both integrated and minimill producers increased as overall production volume and capacity utilization declined. The overall performance of the domestic industry deteriorated to the extent that it was no longer able to meet existing financial obligations or fund the investments that were necessary for it to compete with imports.[216]

7.39 According to the United States, prior to the Asian crisis, the United States industry had performed comparatively well and had been undergoing a continuous process of restructuring. In the decade prior to 1998 the industry had invested billions of dollars in the upgrading of existing facilities and the construction of new efficient capacity, while permanently closing inefficient facilities. As a result of these investments, by 2000, more than 97% of steel produced in the United States used the continuous-cast method of production, as opposed to only 76% in 1991. Labor productivity increased as total employment in the steel industry declined by 18.5% between 1989 and 1999.[217] Overall, the investments and restructuring efforts made during these years increased United States firms' competitiveness by improving quality and productivity and lowering costs.[218] [219]

---

[211] European Communities' first written submission, para. 75; New Zealand's first written submission, para. 2.36.
[212] Japan's first written submission, para. 73; Brazil's first written submission, para. 77.
[213] United States' first written submission, para. 16.
[214] USITC Report pp. OVERVIEW-11 and OVERVIEW-25.
[215] United States' first written submission, para. 17.
[216] United States' first written submission, para. 18.
[217] USITC Report, p. OVERVIEW-29.
[218] USITC Report, p. OVERVIEW-20.
[219] United States' first written submission, para. 19.

7.40 The United States submits that the magnitude of the crisis can be seen by examining the record of the investigation of the CCFRS industry. In 1996 and 1997 the domestic CCFRS industry earned reasonable operating profits and made substantial capital investments in a growing domestic market. However, domestic prices began to fall markedly beginning in 1998, and were at much lower levels in 1999 and 2000 than earlier in the period investigated by the USITC. At the same time, domestic capacity utilization rates also fell significantly. As a result, industry profits turned to substantial annual operating losses.[220] [221]

7.41 The United States argues that the injury suffered by the domestic industries was unquestionably serious. With respect to the CCFRS industry, for example, capacity utilization fell by 10 percentage points in the period of investigation[222]; the AUV of commercial shipments fell almost US$100 per short ton[223]; operating income dropped from 6.1% in 1997 to an operating loss of 11.5% by the first half of 2001[224]; and capital expenditures fell by 35% from 1996 to 2000.[225] Industry giants like Bethlehem Steel Corporation declared bankruptcy, and LTV Corporation, one of the largest steelmakers in the United States, was forced out of business altogether. Similarly, with respect to the domestic industry producing hot-rolled bar, net commercial sales fell by 1.1 million per short ton during the period of investigation[226]; average unit sales values fell by over US$60 per short ton[227]; operating income went from US$213.4 million in 1997 to a loss of US$89.0 million in the first half of 2001[228]; and three hot-rolled bar production facilities were completely shut down. Similar examples could be repeated for every industry for which the USITC made an affirmative determination.[229]

7.42 The United States further contends that perhaps the most extraordinary fact about these developments is that they occurred at a time of generally very strong demand. The USITC found, for example, that "[b]y any measure, the period of investigation saw significant growth in United States demand for certain carbon flat-rolled steel".[230] Similarly, "[t]he record indicates strong demand [for hot-rolled bar] during the period examined, with apparent United States consumption of hot-rolled bar increasing during every full year but one of the period".[231] To give yet another example, the USITC found that United States' apparent consumption of rebar increased 48.1% from 1996 to 2000.[232] Thus, rather than suffering unprecedented injury, domestic steelmakers generally would have been expected to perform well during the relevant period.[233]

7.43 The United States asserts that the fact that they did not is clearly attributable to imports. With regard to CCFRS products, for example, imports increased 37.5% from 1996 to 1998, and remained at historically high levels in 1999 and 2000[234]; the AUV of these imports was consistently US$60 per short ton to US$110 per short ton below that of the domestic like product[235]; and import prices fell to

[220] USITC Report, pp. C-2 to C-7.
[221] United States' first written submission, para. 20.
[222] Steel, Inv. No. TA-201-73, USITC Pub. 3479, p. 51 (December 2001) ("USITC Report").
[223] USITC Report, p. 53.
[224] USITC Report, p. 53.
[225] USITC Report, p. 54.
[226] USITC Report, p. 93.
[227] USITC Report, p. 93.
[228] USITC Report, p. 94.
[229] United States' second written submission, para. 11.
[230] USITC Report, p. 56.
[231] USITC Report, p. 95.
[232] USITC Report, p. 112.
[233] United States' second written submission, para. 12.
[234] USITC Report, p. 50.
[235] USITC Report, p. 61.

extraordinary lows after 1998 – i.e., during the exact period in which the domestic industry suffered serious injury. In general, the years 1998 – 2000 saw the highest levels of steel imports in history – imports which, for many products, were sold at prices that were literally unsustainable and that were demonstrably ruinous to domestic industries.[236]

B. LEGAL AND ANALYTICAL FRAMEWORK

1. Standard of interpretation

7.44 The European Communities, Korea, China, Switzerland and Norway recall the Appellate Body's holding that "when construing the prerequisites for taking [safeguard] actions, their extraordinary nature must be taken into account".[237] The Appellate Body clarified that safeguard measures may only be resorted to "in an extraordinary emergency situation".[238] [239]

7.45 The United States submits that the interpretative approach of a panel in assessing claims under the Agreement on Safeguards and Article XIX of the GATT 1994 is the same as in a dispute arising under the other covered agreements. According to the United States, Article 3.2 of the DSU requires the Panel to interpret the Agreement on Safeguards and Article XIX "in accordance with customary rules of interpretation of public international law". Within this framework, the "fundamental rule of treaty interpretation" is "that a treaty shall be interpreted in good faith in accordance with the ordinary meaning of its terms, in their context and in light of the object and purpose of the treaty".[240] As the Appellate Body has recognized, these standards apply even if a provision is characterized as an "exception":[241]

> "[M]erely characterizing a treaty provision as an 'exception' does not by itself justify a 'stricter' or 'narrower' interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation."[242]

7.46 However, in the United States' view, the complainants propose that a special standard of interpretation applies to the provisions of the Agreement on Safeguards that "when construing the prerequisites for taking [safeguard] actions, their extraordinary nature must be taken into account".[243] The United States submits that, in some instances, they characterize this standard as requiring a "strict" or "narrow" construction of the terms of the Agreement on Safeguards.[244] To support their approach to construction of the Agreement, the complainants cite the Appellate Body's statement in *US – Line Pipe* that:

---

[236] United States' second written submission, para. 13.

[237] Appellate Body Report, *US – Line Pipe*, para. 81. *See* also Appellate Body Report, *Argentina – Footwear (EC)*, para. 94.

[238] Appellate Body Report, *US – Line Pipe*, para. 82.

[239] European Communities' first written submission, paras. 197-198; Korea's first written submission, para. 27; China's first written submission, paras. 148-149; Switzerland's first written submission, paras. 183-184; Norway's first written submission, para. 188.

[240] Appellate Body Report, *US – Line Pipe*, para. 244.

[241] United States' first written submission, paras. 44-47.

[242] Appellate Body Report, *EC – Hormones*, para. 104.

[243] European Communities' first written submission, para. 86, quoting *US – Line Pipe*, para. 81.

[244] Japan's first written submission, para. 84; China's first written submission, para. 47; Norway's first written submission, para. 47.

> "[I]t is essential to keep in mind that a safeguard action is a 'fair' trade remedy. The application of a safeguard measure does not depend upon 'unfair' trade actions, as is the case with anti-dumping or countervailing measures. Thus, the import restrictions that are imposed on products of exporting Members when a safeguard measures is taken must be seen, as we have said, as extraordinary. And, when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account."[245]

7.47 The United States submits that, as an initial point, the complainants' reading of this passage ascribes to the *US – Line Pipe* report precisely the approach to treaty interpretation that the Appellate Body condemned in *EC – Hormones* – basing the rigour of interpretation of a covered agreement on whether it pertains to an "extraordinary" measure. The Appellate Body's report in *US – Line Pipe* nowhere says that it is contradicting the approach correctly articulated in *EC – Hormones* and should not be read as departing from that approach. Indeed, using the classifications of the Appellate Body, a tariff would be an example of a measure that applies to "fair" trade, but there has never been any indication that a tariff should be viewed as an "extraordinary" measure requiring a different interpretative approach for those provisions dealing with tariffs. The United States submits that, in addition, the complainants' interpretation is based on a provision taken out of context. They fail to mention that after making the statements that complainants have cited, the Appellate Body went on to recognize that there were counterbalancing considerations in interpreting the Agreement on Safeguards:

> "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.
>
> 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. . . . 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*."[246]

7.48 Thus, according to the United States, the Appellate Body recognized that the "extraordinary nature" of the remedy is not the sole, or even the predominant consideration under the Agreement on Safeguards. The object and purpose of the Agreement is to provide an effective remedy to a domestic industry facing the situation described in the Agreement.[247] The United States submits that to the extent that the "extraordinary nature" of the remedy is relevant, the procedural and substantive

[245] Appellate Body Report, *US – Line Pipe*, para. 81.

[246] Appellate Body Report, *US – Line Pipe*, paras. 82-83.

[247] The Appellate Body has recognized this as the objective of the Agreement on Safeguards since its earliest reports. For example, in *Argentina – Footwear (EC)*, para. 94, it found:

> The object and purpose of Article XIX is, quite simply, to allow a Member to readjust temporarily the balance in the level of concessions between that Member and other exporting Members when it is faced with "unexpected" and, thus, "unforeseen" circumstances which lead to the product "being imported" in "such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products.

standard of the agreements already take all concerns into account. The United States submits that, thus, the complainants are wrong and the Panel need not take special account of the "extraordinary nature" of a safeguard remedy, as the text of the Agreement on Safeguards itself addresses that issue.[248]

7.49 The European Communities objects to the United States statement that "the panel need not take special account of the 'extraordinary nature of the safeguard remedy'[249]". This statement directly contradicts the statement of the Appellate Body that: "when construing the prerequisites for taking such [safeguard] action, their extraordinary nature must be taken into account".[250] The fact that the burden on the United States to justify its safeguard measures may appear to be very high, does not justify an indulgent approach by the Panel. The United States has chosen to impose general safeguard measures against a vast range of complex products in circumstances where the problems of the United States domestic industries do not seem at all due to increased imports. It is hardly surprising that the task of justifying such measures appears exceedingly difficult.[251]

7.50 Korea responds that the United States' position in the instant case, including the determinations of the USITC, is fundamentally based on an erroneous interpretation of the object and purpose of the Agreement on Safeguards. Safeguard measures are extraordinary and temporary measures permitted in emergency situations against fairly traded imports. The Agreement on Safeguards explicitly provides that it is intended to re-establish multilateral control over safeguards. Therefore, the purpose of the Agreement on Safeguards is to provide a framework within which safeguard measures can be applied if extraordinary circumstances are demonstrated. Korea submits that the Agreement certainly was not intended to give a free reign to protectionist impulses. The substantive provisions of the Agreement on Safeguards employ wording which highlights the exceptional nature of the safeguards measures such as "only if" (Article 2.1), "only following" (Article 3.1), "shall not be made unless" (Article 4.2(b)), and "only to the extent necessary" (Article 5.1). In *US – Line Pipe*, the Appellate Body quoted extensively from its previous analysis in *Argentina – Footwear (EC)* concerning the "extraordinary nature" of safeguard measures and emphasizing that "when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account".[252] It is only after re-affirming the extraordinary nature of the safeguard measures that the Appellate Body acknowledges that if, in fact, such an emergency situation exists, the Agreement on Safeguards provides the opportunity for Members to resort to effective remedies to protect domestic industries. Korea submits that, thus, the selective quotation of the Appellate Body's decision in *US – Line Pipe*[253] confirms that the United States has not grasped the "natural tension" which is guiding the Appellate Body's reasoning in the multitude of findings against the United States in safeguards investigations. The United States quotes the Appellate Body's language, "*raison d'être* of Article XIX of the GATT 1994 and the Agreement on Safeguards…", from *US – Line Pipe*, when the actual language of the Appellate Body was "part of *raison d'être* of Article XIX of the GATT 1994 and the Agreement on Safeguards …" Korea submits that the United States seems to have deliberately omitted the phrase "part of" to wrongfully assert that the whole and only purpose of the Agreement on Safeguards is to protect the domestic industry. Indeed, by quoting the Appellate Body out of context, the United States ignores the "natural tension" between "defining the appropriate and legitimate scope of the right to apply safeguard measures and ... ensuring that safeguard measures are

[248] United States' first written submission, paras. 48-52.
[249] United States' first written submission, para. 52.
[250] Appellate Body Report, *US – Lamb*.
[251] European Communities' second written submission, paras. 35-37.
[252] Appellate Body Report, *US – Line Pipe*, para. 81, quoting Appellate Body Report, *Argentina – Footwear (EC)*, para. 94.
[253] Appellate Body Report, *US – Line Pipe*, para. 83.

not applied against 'fair trade' beyond what is necessary to provide extraordinary and temporary relief".[254] The means by which "the legitimate scope" of safeguard measures is defined and the means by which "measures are not applied against 'fair trade' beyond what is necessary"[255] is the same: strict adherence to the provisions of the Agreement on Safeguards including those provisions which require a finding of like product, increased imports, serious injury, and causation. It is apparent that an overly broad definition of any of the terms of the Agreement on Safeguards, would lead directly to upsetting that calculated balance of the Agreement. Korea submits that the United States is attempting to interpret the provisions of the Agreement on Safeguards in a manner consistent with US law. Korea argues that this is the reverse of the correct analysis. The USITC's reasoning regarding like product had nothing to do with its interpretation of the purpose of the Agreement on Safeguards.[256]

7.51 The United States responds that the complainants have advanced interpretations of the Agreement on Safeguards and Article XIX of the GATT 1994 that would effectively render these agreements unworkable. According to the United States, both are part of the carefully negotiated balance of concessions that produced the WTO Agreement. The interpretations advanced by the complainants would upset this balance. They would undermine Members' confidence in the WTO rules-based system and could, consequently, make Members less willing to undertake new obligations or grant new concessions. The United States submits that the Panel should decline the complainants' invitation to write the Agreement on Safeguards out of existence, and instead interpret the text as instructed in the DSU, giving the terms their ordinary meaning, in their context and in light of the object and purpose of the Agreement.[257]

7.52 The United States submits that from the inception of the GATT in 1947, the availability of safeguard relief (incorporated in Article XIX) was considered to be a critical component of the international system of rules-based trade. One of the primary motives for the inclusion of a safeguard provision was the conviction that the existence of a "safety valve" would facilitate trade concessions.[258] The negotiating history of the Agreement on Safeguards shows that it was not intended to change this objective. According to the United States, rather, the negotiators sought to stop the proliferation of the so-called "grey area measures" and to encourage WTO Members to instead employ open, transparent and established procedures in considering temporary import relief. The United States argues that, thus, the Agreement on Safeguards reflects a carefully balanced bargain – a bargain that the parties relied upon in establishing and becoming Members of the WTO. The United States submits that the Agreement on Safeguards must be interpreted and applied based on the ordinary meaning of its terms, in their context and in light of the object and purpose of the Agreement, namely to permit temporary safeguard measures in appropriate circumstances, and to encourage the use of this mechanism rather than the non-transparent measures that had previously proliferated.[259]

2. Standard of review

7.53 The European Communities, Norway and Switzerland submit[260] that under the Agreement on Safeguards, domestic authorities have a duty to demonstrate, at the time they take safeguard measures,

---

[254] Appellate Body Report, *US – Line Pipe*, para. 83.
[255] Appellate Body Report, *US – Line Pipe*, para. 83.
[256] Korea's second written submission, paras. 1-9.
[257] United States' second written submission, paras. 1-2.
[258] K. Dam, *The GATT: Law and International Economic Organization* 99 (1970) (Exhibit US-87).
[259] United States' second written submission, paras. 3-9.
[260] The legal issues raised in this section are also addressed by the parties in several of the sections related to specific claims.

and through a reasoned and adequate explanation (that is, in their report or equivalent), that the legal conditions for the adoption of such measures are met. They submit that domestic authorities are under a duty to evaluate all facts before them or that should have been before them in accordance with the WTO safeguards regime.[261] This broad obligation of the domestic authorities is paralleled by the review that panels are called upon to exercise on safeguard measures. The Appellate Body held that a panel reviewing safeguard measures shall verify whether the domestic authorities "had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination".[262] [263]

7.54 With regard to the proper method of analysis that the Panel should follow, Japan and New Zealand recall that the Agreement on Safeguards is silent as to the appropriate standard of review. However, the standard set forth in Article 11 of the DSU always applies. Article 11 provides that "a panel should 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".[264]

7.55 The European Communities, Japan, Switzerland, Norway and New Zealand recall that, although panels are not expected to carry out a *de novo* review of the evidence or to substitute their own conclusions for those of the competent authorities, the Appellate Body emphasized that panels may not simply *accept* the conclusions of that authority:

> "[A] panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate only if the panel critically examines that explanation, in depth, and in the light of the facts before the panel. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some alternative explanation of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation."[265] [266]

7.56 Japan submits that it is confident that the Panel will conduct all the appropriate enquiries and evaluations to discharge its duty of making an "objective assessment of the facts" within the meaning of Article 11 of the DSU. According to Japan, upon doing so, the Panel will discover myriad violations of obligations covered by the Agreement on Safeguards and GATT 1994.[267] New Zealand asserts that it is the task of the Panel to examine that data and reasoning and the explanations offered by the USITC. From that examination, New Zealand submits that it will be clear that the United States has failed to comply with its obligations under GATT 1994 and the Agreement on Safeguards.[268] China states that it fully agrees with the arguments made by other co-complainants

---

[261] Panel Report, *Korea – Dairy*, paras. 7.30-31, 7.54.

[262] Appellate Body Report, *Argentina – Footwear (EC)*, para. 121.

[263] European Communities' first written submission, paras. 109-110; Norway's first written submission, paras. 95-96; Switzerland's first written submission, paras. 97-98.

[264] Japan's first written submission, para. 75; New Zealand's 's first written submission, para. 4.3.

[265] Appellate Body Report, *US – Lamb*, para. 106. This was most recently confirmed in the Appellate Body Report, *US – Cotton Yarn*, paras. 72-74.

[266] European Communities' first written submission, para. 111; Japan's first written submission, para. 76; Switzerland's first written submission, paras. 99; Norway's first written submission, para. 97; New Zealand's first written submission, para. 4.4.

[267] Japan's first written submission, para. 77.

[268] New Zealand's first written submission, para. 4.5.

with regard to the key aspects that panels are called upon to analyse in reviewing a safeguard measure.[269]

7.57 In the light of the foregoing, the European Communities, Norway and Switzerland consider that this Panel can find that the US determinations before it are inconsistent with the Agreement on Safeguards (and that the US measures are without legal basis)[270] on the following fundamental grounds:

(a) they are based on a methodology that does not comply with the standards set forth by the Agreement on Safeguards.

(b) the facts relied upon to support the conclusions do not, in light of the complexities inherent in the data, meet the substantive standards of the Agreement on Safeguards; or, the competent authorities do not provide a reasoned and adequate explanation of how they met those substantive standards. The latter flaw arises either because the USITC's record does not provide all the information necessary to show that the conditions for imposing the safeguards were met, or because the facts included in the USITC Report simply do not justify the conclusions drawn by the USITC.

7.58 The United States argues that there is no special interpretive approach applicable to claims arising under the Agreement on Safeguards. Just as in any other dispute, Article 11 of the DSU instructs the Panel to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements ... ." The United States submits that the standard of review to be applied in safeguards cases is well-established. In *Korea – Dairy* and *Argentina – Footwear (EC)*, the panels specifically rejected the notion that panels may review *de novo* the determination made by the domestic investigating authority.[271] Rather, as articulated by the panel in *Argentina – Footwear (EC)*:[272]

> "[O]ur review will be limited to an objective assessment, pursuant to Article 11 of the DSU, of whether the domestic authority has considered all relevant facts, including an examination of each factor listed in Article 4.2(a), of whether the published report on the investigation contains adequate explanation of how the facts support the determination made, and consequently of whether the determination made is consistent with Argentina's obligations under the Safeguards Agreement."[273]

7.59 The United States asserts that the complainants' arguments reflect a misunderstanding of the standard of review. A great deal of their argumentation simply presents another view of the facts, rather than showing that the findings made by the USITC or the decision by the United States to apply a safeguard measure was in any way inconsistent with the Agreement on Safeguards or Article XIX. The United States submits that such argumentation improperly seeks to have the Panel make its own *de novo* interpretation of the record.[274]

---

[269] China's first written submission, para. 81.
[270] Appellate Body Report, *US – Lamb,* para. 73.
[271] *Korea – Dairy,* para. 7.30; *Argentina – Footwear (EC),* para. 8.117.
[272] United States' first written submission, para. 44
[273] Panel Report, *Argentina – Footwear (EC)*, para. 8.124.
[274] United States' first written submission, paras. 44-47.

3. Burden of proof

7.60 New Zealand submits that the basic rule regarding burden of proof is that "the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof".[275] Thus, as the Panel pointed out in *Korea – Dairy*, "it is for the claimant to establish a prima facie case of violation of the Agreement on Safeguards and then it is for the respondent to refute that case".[276] New Zealand accordingly believes that, in adopting safeguard measures against certain carbon flat-rolled steel products, the United States failed to discharge its obligations under GATT 1994 and the Agreement on Safeguards.[277]

7.61 The United States contends that it fully complied with its obligations under the WTO Agreement in applying the steel safeguard measures. The United States submits that under the WTO Agreement, the complainants bear the burden of proof to demonstrate an inconsistency. Unless they meet that burden with regard to a particular safeguard measure, there would be no basis for finding that measure to be inconsistent with the WTO Agreement.[278] According to the United States, none of the complainants have met their burden to establish a prima facie case with respect to the claims contained in its panel request. They each rely in large measure on unfounded assertions advanced without supporting evidence or legal grounding. In *US – Wool Shirts and Blouses,* the Appellate Body noted that "a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim".[279] Addressing the same question in the context of a safeguard measure, the *Korea – Dairy* Panel found that "[a]s a matter of law the burden of proof rests with the European Communities, as complainant, and does not shift during the panel process".[280] The *Korea – Dairy* Panel also noted that it fell to the European Communities, as the complainant, to submit a prima facie case of violation of the Agreement on Safeguards.[281] That panel concluded further that once the European Communities made its prima facie case, it was for Korea (the responding party in that dispute) to present its own evidence and arguments showing that it had complied with the requirements of the Agreement on Safeguards at the time of its determination.[282] The *Korea – Dairy* Panel then concluded that "[a]t the end of this process, it is for the Panel to weigh and assess the evidence and arguments submitted by both parties in order to reach conclusions on whether the European Communities claims are well-founded".[283] [284]

7.62 In response, the complainants state that they do not contest that they have the burden of making a prima facie case that the United States' safeguard measures are inconsistent with the standards of the Agreement on Safeguards. However, they argue that the real question is: what are the requirements of the Agreement on Safeguards and what needs to be shown to establish that they

---

[275] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

[276] Panel Report, *Korea – Dairy*, para 7.24.

[277] New Zealand's first written submission, paras. 4.1-4.2.

[278] Panel Report, *US – Cotton Yarn*, para. 7.23, "In this line, we consider that Pakistan, the complaining party, bears the burden of proof for establishing a prima facie case that the subject transitional safeguard measure is in violation of Article 6."

[279] *US – Wool Shirts and Blouses*, para. IV.

[280] Panel Report, *Korea – Dairy*, para. 7.24.

[281] Panel Report, *Korea – Dairy*, para. 7.24. As the Appellate Body has noted, a prima facie case is "one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the prima facie case." *EC – Hormones,* para. 104.

[282] Panel Report, *Korea – Dairy*, para. 7.24.

[283] Panel Report, *Korea – Dairy*, para. 7.24.

[284] United States' first written submission, paras. 41-43.

have not been respected?[285] According to the European Communities, in discussing what it means to make a prima facie case, it is necessary to take into account that the arguments of the complainants can be distinguished into a number of categories that require different kinds of proof or demonstration: first, there are methodological arguments – that the United States did not follow an approach compatible with the Agreement on Safeguards and thus could not have reached sound conclusions; second, that a number of findings are mistaken; and third, that a number of findings are not supported by a reasoned and adequate explanation.[286]

7.63 In relation to the first category, the European Communities recalls that the complainants are not attacking the methodologies used by the USITC *per se* but are simply pointing out that the methods of analysis and reasoning used by the USITC in making its various findings and determinations are in many cases not apt to ensure that the conditions of the Agreement on Safeguards are satisfied. Accordingly, the corresponding findings and determinations are flawed or at least not supported by a reasoned and adequate explanation. In these cases, it is not necessary to examine what would be the outcome of an investigation that used a correct methodology. That would require conducting a "*de novo* interpretation of the record". In relation to the second category of cases, the European Communities submits that it is clear that a prima facie factual demonstration is required that the finding is incorrect. This can be based on evidence in the USITC Report and other documents that form part of the report or its supplements, or on information that the USITC should have obtained but did not.[287] The third category of arguments, like the first, simply requires a logical demonstration that the determinations do not satisfy the requirement of a reasoned and adequate explanation. The European Communities submits that this may include invoking an alternative explanation that the USITC has not considered or has wrongly rejected. Another means of demonstrating that the USITC has not provided a reasoned and adequate explanation is to point out that the report does not contain the information needed to support the findings that the USITC claimed to make. In this connection, the European Communities also points out that the United States has sought in a number of instances to refute the arguments of the complainants by relying on information that was not included in the Report. The European Communities submits that since the obligation was to provide a reasoned and adequate explanation in the report, the presentation of new evidence by the United States cannot be accepted but, in fact, simply serves to demonstrate that the evidence was wrongly omitted from the report.[288]

4. Methodologies

7.64 The complainants submit that general methodological flaws permeate many parts of the USITC Report throughout all product categories. The European Communities, Norway and Switzerland state that they confine themselves to such methodological flaws while pointing to some of the most glaring mistakes in the individual determinations relating to some of the products.[289]

7.65 The United States submits that the complainants have not demonstrated that any methodology of the USITC is inconsistent with the Agreement on Safeguards. In reaching its determinations regarding serious injury and threat of serious injury, the USITC applied a number of long-standing methodologies for organizing and analysing the information before it. The USITC analysis of each of

---

[285] European Communities' first oral statement "Scope and Standard of Review" on behalf of the complainants, para. 1.

[286] European Communities' second written submission, para. 29.

[287] Panel Report, *Korea – Dairy*, paras. 7.30, 7.31 and 7.54.

[288] European Communities' second written submission, paras. 30-33.

[289] European Communities' first written submission, paras. 112-113; Norway's first written submission, paras. 98-99; Switzerland's first written submission, para. 100.

the like products under investigation was neutral, unbiased, and not chosen to achieve a particular result. In the context of these methodologies, the USITC made findings of fact and determinations that satisfied both the domestic legal requirements and US obligations under the Agreement on Safeguards and GATT 1994. The Panel in *US – Line Pipe* recognized that an examination of the WTO consistency of methodologies used in reaching a serious injury determination will differ from an examination of factual issues.[290] In that dispute, the panel evaluated both sets of issues in upholding the USITC's conclusions as to increased imports. With regard to the methodologies, the panel performed:

> "[A]n objective assessment ... of whether the methodology selected is unbiased and objective, such that its application permits an adequate, reasoned and reasonable explanation of how the facts in the record before the USITC support the determination made with respect to increased imports."[291]

7.66 The United States submits that, significantly, the Panel inquired whether the methodology permitted results consistent with the terms of the Agreement on Safeguards, not whether it mandated or invariably produced such results. The panel then upheld the USITC's practice of considering five full calendar years of data and two comparable interim periods because:

> "[F]irst, the Agreement contains no specific rules as to the length of the period of investigation; second, the period selected by the USITC *allows* it to focus on the recent imports; and third, the period selected by the USITC is sufficiently long to *allow* conclusions to be drawn regarding the existence of increased imports."[292]

7.67 The Panel then continued on "to review the USITC's findings on absolute and relative import increases *in light of that methodology*".[293] The United States submits that this approach reflects that a methodology is one step in a competent authority's analytical process. A consistent methodology can help the competent authorities to organize or analyse the facts of the case, and ensure that the results are neutral and unbiased. However, use of a methodology is just one way of implementing the obligations contained in the Agreement on Safeguards or domestic law, and one that is not required by the Agreement. Thus, a Member is free to use methodologies as part of its analysis or to try to find methodologies that will ensure compliance in every case.[294]

7.68 In response to the United States' assertion that the complainants have not demonstrated that any methodology of the USITC is inconsistent with the Agreement on Safeguards, China makes the following clarification: rather than claiming that the USITC applied a methodology that is inconsistent with the Agreement on Safeguards, China's claim is based on the fact that, in order to make its different findings, the United States authorities applied methodologies that could not lead to determinations consistent with the Agreement on Safeguards as well as other provisions of the WTO Agreement. Therefore, the application of these methodologies led to determinations that were necessarily flawed and could not meet the requirements of the Agreement on Safeguards.[295]

7.69 The United States finally submits that the complainants challenge several of the methodologies employed by the USITC on the grounds that they do not "comply with" the standards

---

[290] Panel Report, *US – Line Pipe*, para. 7.192.
[291] Panel Report, *US – Line Pipe*, para. 7.194.
[292] Panel Report, *US – Line Pipe*, para. 7.201 (emphasis added).
[293] Panel Report, *US – Line Pipe*, para. 7.205 (emphasis in original).
[294] United States' first written submission, paras. 53-56.
[295] China's second written submission, paras. 4-5.

set out in the Agreement on Safeguards or Article XIX of GATT 1994.[296] The United States submits the methodologies, as such, do not bear the burden of complying with WTO obligations. The relevant inquiry for purposes of the Agreement on Safeguards is whether the competent authorities have conducted an investigation and made a determination that satisfies a Member's WTO obligations. Methodologies are a tool that can assist in the investigation but, according to the United States, complainants have not indicated any reference in the Agreement on Safeguards to methodologies nor to obligations that apply specifically to methodologies. In this regard, past panels and the Appellate Body considering United States' safeguard measures have consistently recognized that the findings of the USITC can comply with the obligations under the Agreement even if the methodology, taken alone, does not incorporate every single one of the relevant criteria.[297] The United States adds that the Panel should disregard arguments by the complainants that certain practices and methodologies applied by the USITC are, as a general rule, inconsistent with WTO rules. The United States submits that the complainants have not challenged these practices – nor could they.[298]

7.70 The complainants agree with the United States that there is no special standard of review for safeguard measures in the sense that Article 11 of the DSU applies.[299] However, despite this statement, the United States is in fact arguing for a special standard of review. It does this in the first instance by bandying in a misleading manner the emotive expression "*de novo*". For the complainants, it is clear that the Panel should not attempt to conduct a *de novo* investigation – that is it should not seek to determine whether the application of safeguard measures for the benefit of the United States' steel industry was warranted, as if it were itself an investigating authority. Rather, the Panel should only examine whether the United States correctly applied the Agreement on Safeguards when it imposed such measures. The basic obligation of the United States under the Agreement on Safeguards was to conduct a proper investigation and to fully justify and explain what it had done. To this end Article 3.1 of the Agreement on Safeguards requires that "the competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law". The Appellate Body has clarified that domestic authorities have a duty to demonstrate, at the time they take a safeguard measure, through a reasoned and adequate explanation, that the legal conditions for the adoption of such measure are met. The Appellate Body held that a panel reviewing a safeguard measure shall verify whether the domestic authorities had examined all the relevant facts and had provided a reasoned and adequate explanation of how the facts established during the investigation support the determinations that have been made.[300] This is a substantive obligation and whether it has been respected or not has to be determined by a panel applying the standard review set out in Article 11 of the DSU – that is an objective assessment of the matter before it, including an objective assessment of the facts of the case. The United States, however, misuses the expression "*de novo*" when it states that panels may not review "*de novo*" determinations[301] and must not "make its own *de novo* interpretation of the record".[302] It is a *de novo investigation* that the Panel must not make. The Panel would, however, be failing in its obligation under Article 11 of the DSU if it did not review (*de novo* or otherwise) whether the US had complied with the Agreement on Safeguards and in particular whether the competent authority had carried out all necessary analyses, had set out "reasoned conclusions reached on all pertinent issues of law and fact" and thus had provided a reasoned and adequate explanation of how the facts of the investigation support its determinations.

---

[296] European Communities' first written submission, paras. 112 and 464; Norway's first written submission, paras. 98-99; Switzerland's first written submission, para. 100.
[297] United States' first written submission, para. 57.
[298] United States' first oral statement, para. 18.
[299] *See*, on this point, the discussion in section VII.B.2 above.
[300] Appellate Body Report, *Argentina – Footwear (EC)*, para. 121.
[301] United States' first written submission, para. 44.
[302] United States' first written submission, para. 45

Since the Panel is not to conduct a *de novo* investigation, it can only examine, on the basis of the investigation report it has before it, what the United States has investigated and how it has come to its conclusions (or "determinations" as they are called). That is, it must review whether the competent authority asked the right questions and carried out an appropriate analysis. That is, say the complainants, what they mean when they say that the Panel should examine whether the "methodologies" used by the United States were correct.[303]

7.71 The complainants further submit that by arguing that the methodology used does not matter, and that it needs to be proved that the conclusion of a safeguard investigation is incorrect, the United States is in fact asking the Panel to examine what would be the outcome of the investigation if a correct methodology and analysis had been applied. This would require the Panel to conduct a *de novo* investigation, which is precisely what the complainants agree the Panel should not do. All the Panel can do is review whether the investigating authority has examined all the facts and has provided a reasoned and adequate explanation for its determinations (and that this explanation makes sense). If the report explains that a wrong methodology has been applied – that is a methodology that does not ensure that the conditions of the Agreement on Safeguards are satisfied – then there can be no such reasoned and adequate explanation. Thus, a methodology that does not comply with the Agreement on Safeguards (for example, that only some of the injury factors will be considered) will be in violation of the Agreement on Safeguards. Equally, the application of an incompatible methodology will lead to the measure at issue being incompatible with the Agreement on Safeguards. The complainants submit that if it is determined that a correct methodology has been applied, however, the Panel still needs to progress to the next step – examining whether the facts actually support the determinations made.[304]

7.72 The complainants, therefore, submit that the Panel is not asked to examine the accuracy of the data included in the USITC Report. The essential issues raised in this proceeding are that: (i) the USITC Report is not complete, i.e., it does not contain all the information necessary to show that the conditions for imposing the safeguard measures were met; and (ii) the facts included in the USITC Report do not justify the conclusions drawn by the USITC.[305]

7.73 The United States recalls that the complainants in this dispute have challenged the application of the United States' safeguards law with regard to ten specific steel products. No claim has been made that any aspect of the United States' safeguards law or practice is on its face inconsistent with WTO obligations. As the application of the United States' safeguards law took the form of ten separate safeguards measures, each of these measures, therefore, must be considered separately by the Panel to determine whether each was applied consistently with WTO rules. Accordingly, the complainants bear the burden of proof to establish a prima facie case that each of these ten measures is inconsistent with the United States' WTO obligations. This requires a presentation of how, given the unique set of facts pertaining to each of the ten products, the United States' safeguard measures were in fact inconsistent with US WTO obligations. It is not enough for complainants to challenge the general methodologies used by the USITC in investigating the impact of increased imports on each of the ten domestic industries identified. Article 2.1 of the Agreement on Safeguards requires a fact-based determination as to each of the conditions for imposing a safeguards measure. Methodologies provide a framework for analysing the facts of a given case. They are not a substitute

[303] European Communities' first oral statement "Scope and Standard of Review" on behalf of the complainants, paras. 3-10.

[304] European Communities' first oral statement "Scope and Standard of Review" on behalf of the complainants, paras. 13-16.

[305] European Communities' first oral statement "Standard and Scope of Review" on behalf of the complainants, para. 27.

for that analysis, and cannot by themselves guarantee compliance with WTO obligations. Thus, regardless of the general methodologies employed, the complainants must demonstrate separately with respect to each measure how the facts cited by the USITC with respect to that product and industry do not satisfy the conditions set forth in Article 2.1.[306]

7.74 Moreover, the United States submits that, to the extent the Panel finds it useful to explore the particular methodologies employed by the USITC in each of the ten safeguards investigations at issue, the proper inquiry is whether a methodology permits results consistent with the terms of the Agreement on Safeguards. This is clear from the approach taken by the Panel in *US – Line Pipe*[307] and is directly at odds with the position taken by the European Communities that the critical question was whether the methodologies employed by the USITC "ensure that the conditions set out in the Agreement on Safeguards and the GATT are satisfied".[308] Thus, the *US – Line Pipe* Panel recognized that, so long as a methodology permits an analysis of the facts consistent with the terms of the Agreement on Safeguards, the methodology is permissible. Regardless of the conclusion as to the methodology, a panel must then consider whether the complainant has demonstrated that the factual findings resulting from the application of the methodology are inconsistent with the obligations provided for in the Agreement on Safeguards. Under the European Communities' approach a methodology that allowed the competent authorities to comply with WTO rules, but could also be applied in a manner that did not comply, would be a *per se* breach. Thus, even if an injury determination complied fully with the Agreement on Safeguards, it would have to be rejected by a panel simply because it employed methodologies that in a hypothetical case could produce a result contrary to the Agreement. Thus, while the European Communities challenged the USITC determinations and resulting safeguard measures, its arguments on methodology would require the Panel to disregard what the USITC and the United States' Government actually did. In addition, the European Communities standard would hold "methodologies" to a stricter standard of WTO consistency than the legislation under which those methodologies are applied. Under the DSU, legislation as such may be found inconsistent with WTO rules only if it mandates a Member to take action inconsistent with those rules. In contrast, legislation that grants a Member discretion either to comply or not comply with WTO rules is not as such WTO-inconsistent.[309] This would be an absurd result, as it would allow Members to challenge the discretionary methodologies arising out of discretionary legislation on their face when they are not permitted to so challenge the underlying legislation. Therefore, it is incumbent upon the Panel to separately evaluate each unique set of facts pertaining to each of the ten safeguard measures in question. For example, even if the Panel were to determine that a methodology used by the USITC might permit a conclusion that is inconsistent with a provision of the Agreement on Safeguards, the Panel would still have to determine whether each of the USITC's determinations for each of the ten products that was based on that methodology was in fact inconsistent with the Agreement on Safeguards. Anything less would be fundamentally unfair to Members seeking to avail themselves of their rights under Article XIX.[310]

7.75 According to the United States, the complainants only rarely deal with the facts of each of the ten safeguard measures at issue, and instead complain that various methodologies used by the USITC are inconsistent with the Agreement on Safeguards. A review of the arguments presented demonstrates that the complainants have not met their burden of proof to establish that the

---

[306] United States' second written submission, paras. 14-16.

[307] Panel Report, *US – Line Pipe*, para. 7.194.

[308] European Communities' first oral statement "Scope and Standard of Review" on behalf of the complainants, para. 12.

[309] Appellate Body Report, *US – 1916 Act*, para. 88; Panel Report, *US – Section 129(c)(1) URAA*, paras. 6.22-6.33.

[310] United States' second written submission, paras. 17-23.

methodologies applied by the USITC did not permit a reasoned analysis, much less that they actually resulted in factual determinations inconsistent with the Agreement on Safeguards.[311]

7.76 The complainants respond that the Appellate Body has confirmed recently in its report in *US – Countervailing Measures on Certain EC Products* that it is possible for methodologies – or methods as it prefers to call them – to be held to be *per se* or "as such" inconsistent with WTO obligations.[312] However, the complainants have not chosen in this case to request any findings relating to United States' safeguards law or general practice. All parties agree that this dispute relates to ten safeguard measures imposed by the United States on various bundles of steel products. That the complainants are not attacking the methodologies of the USITC *per se* means that they are simply attacking the methods of analysis actually used in this case – not necessarily the methodologies that the USITC traditionally uses. The United States would have the Panel hold that it can apply whatever method of analysis it pleases in a safeguard investigation and the burden is on the complainants to "demonstrate separately with respect to each measure how the facts cited by the USITC with respect to that product and industry do not satisfy the conditions set forth in Article 2.1".[313] This would require the Panel itself to apply the Agreement on Safeguards to the various facts scattered about the USITC Report in order to establish whether or not safeguard measures would be justified for each of the products (or rather product bundles) on which the United States has imposed them. In other words, the United States is asking the panel to conduct a *de novo* review. This is not the Panel's task, on the contrary, if methods of analysis have been applied that do not ensure that the conditions set out in the Agreement on Safeguards and the GATT are satisfied, it must hold the resulting safeguard measures to be inconsistent with those agreements. The complainants disagree with the proposition that "the proper enquiry is whether a methodology permits results consistent with the terms of the safeguard agreement"[314] which means that a panel must accept the use of a methodology that may – by accident – allow a finding to be made that could be considered to be that which would result from a correct application of the Agreement on Safeguards. WTO Members may only impose safeguard measures if all the conditions set out in the Agreement on Safeguards and the GATT 1994 are met and competent authorities must conduct an adequate investigation to ensure – and demonstrate – that these conditions are met. An investigation will only be adequate if the competent authority addresses the right questions and examines the correct conditions. A panel reviewing a safeguard measure must judge whether the determinations are correct by examining the explanation contained in the report. Where this reveals that the competent authority has misunderstood the conditions for applying safeguard measures or has not addressed the right questions, it will be impossible for the panel to be sure that the conditions are satisfied. That is what the complainants mean when they say that the methodology does not ensure a correct conclusion. In such a case, the complainants submit, a panel must find a violation. Indeed, the very fact that it is not possible to be sure that the result is consistent means that there is not a reasoned and adequate explanation. The support the United States seeks in an analogy with the distinction between discretionary and mandatory measures – a theory according to which a discretionary measure of a WTO Member cannot be held *per se* inconsistent with the WTO Agreement if it also permits action consistent with WTO obligations – is misguided.[315] The complainants are not making *per se* claims against United States' safeguards law or general practice. It is indeed not clear that the USITC is required to apply the contested methodologies in all cases. However, the methodologies have been applied in the present case and therefore the conclusions drawn are either insufficient to satisfy the conditions of the Agreement on Safeguards or the

[311] United States' second written submission, para. 24.
[312] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, paras. 86 and 162.
[313] United States' second written submission, para. 16.
[314] United States' second written submission, para. 17.
[315] United States' second written submission, para. 21.

application of these methodologies means that there is no reasoned and adequate explanation as to why the conditions of the Agreement on Safeguards are fulfilled.[316]

5. Duty to explain – substantive versus procedural obligations

7.77 The United States submits that Article 3.1, third sentence, and Article 4.2(c) of the Agreement on Safeguards require a report reflecting the investigation by the competent authorities, and do not impose an "open-ended and unlimited duty" to explain. Article 3.1, third sentence, and Article 4.2(c) describe the obligation of the competent authorities to publish a report on the investigation. Together, they require that the competent authorities provide "their findings and reasoned conclusions reached on all pertinent issues of fact and law", along with "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined". These requirements focus on the competent authorities and their investigation. The competent authorities must publish their findings and reasoned conclusions – not those that the Panel or one of the complainants might have made. The United States submits that the competent authorities must demonstrate the relevance of the factors examined – not those that the Panel or the complainants would have examined and that this analysis must appear in the report. If the report, as in the case of the USITC Report, contains narrative views and separate data tables, both must be considered in evaluating whether the report has satisfied the obligations.[317]

7.78 The United States notes that several of the complainants argue that the omission of a fact, a citation, or an argument renders the USITC Report inconsistent with Article 3.1 or Article 4.2(c).[318] However, Articles 3.1 and 4.2(c) do not impose a burden of investigative or explanatory perfection that no competent authority could meet. The United States argues that, for example, if an error or omission does not cast doubt on a particular conclusion, that conclusion is still "reasoned" and, thus, consistent with Article 3.1. Similarly, if the competent authorities are silent on a particular issue of fact or law that is not pertinent, they have still complied with Article 3.1. The United States notes in this regard that the Appellate Body has found that Article 3.1 requires a "reasoned and *adequate* explanation".[319] The Appellate Body reached a similar conclusion in *US – Lamb*, in which it recalled its description of the proper causation analysis in *US – Wheat Gluten* and stated:

> "[T]hese three steps simply describe a logical process for complying with the obligations relating to causation set forth in Article 4.2(b). These steps are not legal 'tests' mandated by the text of the *Agreement on Safeguards*, nor is it imperative that each step be the subject of a separate finding or a reasoned conclusion by the competent authorities."[320]

7.79 The United States points out that, in their submissions on specific legal claims, several of the complainants argue that the USITC did not address alternative explanations of the facts.[321] They point to the Appellate Body's statement that:

> "[A] panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the

[316] European Communities' second oral statement "Scope and Standard of Review" on behalf of the complainants, paras. 4-14.
[317] United States' first written submission, paras. 58-62.
[318] European Communities' first written submission, para. 256.
[319] Appellate Body Report, *US – Line Pipe*, para. 216 (emphasis added).
[320] Appellate Body Report, *US – Lamb*, para. 178.
[321] European Communities' first written submission, para. 256.

> competent authorities' explanation does not seem adequate in the light of that alternative explanation.[322]

However, according to the United States, they have disregarded that this consideration applies only if there is an alternative explanation that is "plausible" and the competent authorities' explanation is inadequate in light of that alternative view. As the party asserting the affirmative of a claim, complainants bear the burden of proof to demonstrate that their particular alternative explanations are both "plausible" and demonstrate that the USITC explanation is inadequate".[323] [324]

7.80 The complainants disagree with the United States' contention that it cannot be expected to have an "open-ended and unlimited" obligation to explain and cannot be expected to examine all "plausible explanations". The complainants submit that the United States chose to open a safeguard investigation into an enormous range of complex industrial products. The difficulty of the enterprise on which it embarked cannot excuse a failure to comply with the Agreement on Safeguards. They argue that in order to show that the United States has failed to consider all alternative plausible explanations, the complainants have the burden of proving that these alternative plausible explanations exist.[325] The complainants submit that they have done this. They argue that the fact that the USITC may not have thought of them, and did not consider them, does not save the United States' safeguard measures from being found inconsistent with its WTO obligations.[326]

7.81 The complainants also assert that the United States was under an obligation to publish a report setting out its determinations and its reasoned and adequate explanation. Therefore, it cannot now attempt to rely on information outside the USITC Report to justify its measure. They argue that, nonetheless, the United States seeks to do so on numerous occasions. The complainants submit that if it needs to rely on information from outside of the USITC Report, then surely that proves that the USITC Report did not contain a reasoned and adequate explanation. They argue that the fact that some of this information may have been confidential does not excuse a failure to provide an adequate and reasoned explanation. The complainants note that the Appellate Body has held that a competent authority does not meet the substantive standards of Article 2.1 and 4.2(a) if it does not provide an adequate and reasoned explanation of its findings. Article 3.1 obliges a competent authority to publish a report. The reasoned and adequate explanation must, therefore, be public. The complainants argue that it was possible to provide this explanation by indexing data or by using some other non-confidential format and that the United States is wrong to claim that it did not need to do so.[327] [328]

7.82 The complainants submit further that the Appellate Body has made clear that competent authorities are in fact under a duty to evaluate all facts before them or that should have been before them in accordance with the Agreement on Safeguards.[329] Indeed, the Appellate Body has found that because competent authorities "are themselves obliged, in some circumstances, to go beyond the arguments of the interested parties in reaching their own determinations, so too, we believe, panels are not limited to the arguments submitted by the interested parties to the competent authorities in

[322] Appellate Body Report, *US – Lamb*, para. 106.
[323] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 17.
[324] United States' first written submission, paras. 58-62.
[325] United States' first written submission, para. 62.
[326] European Communities' first oral statement "Scope and Standard of Review" on behalf of the complainants, paras. 17-18.
[327] United States' first written submission, para. 1325.
[328] European Communities' first oral statement "Scope and Standard of Review" on behalf of the complainants, paras. 20-22.
[329] Panel Report, *Korea – Dairy*, paras. 7.30, 7.31 and 7.54.

reviewing those determinations".[330] The complainants submit that the only limit is evidence that was not in existence at the time the domestic authorities made their decision.[331] [332]

7.83 According to the United States, the complainants confuse substantive and procedural obligations imposed by the Agreement on Safeguards by improperly concluding that a failure to explain a determination adequately is sufficient to establish a prima facie case of inconsistency with a substantive obligation. For example, in response to a question posed by the United States, several complainants assert that the failure to explain a like product determination adequately would establish a prima facie case of inconsistency with Article 2.1.[333] This argument fundamentally misstates the burden imposed on complainants under the DSU. Article 2.1 is a substantive provision. It establishes the substantive conditions that must be met prior to the imposition of a safeguard measure: imports in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. Article 2.1 does not impose an obligation to explain why one product is deemed to be like another. The obligation to explain the competent authorities' determinations, including the obligation to explain the like product determination, is set forth separately in Article 3.1. While a prima facie case that the competent authorities have failed to explain some aspect of a safeguards determination adequately may support a claimed inconsistency with Article 3.1, it would not support a separate claimed inconsistency with Article 2.1. A procedural violation does not automatically establish a substantive violation. Each claim must be separately proven on its own merits. Thus, to the extent that the complainants rely on a prima facie case of a failure to explain a determination as the basis for their allegation of a substantive violation under Article 2.1, the complainants cannot be considered to have met their burden of proof with respect to the alleged substantive violation.[334]

7.84 According to the complainants, the Appellate Body has made clear that a competent authority must give reasoned and adequate explanations for all its findings and determinations. For the complainants it is obvious that these findings must make sense – and not be counterintuitive.[335] The United States is wrong to argue that the failure to provide a reasoned and adequate explanation cannot be a basis for even a prima facie case of violation of Article 2.1.[336] The Appellate Body has explained in *US – Lamb* that:

> "[A] panel's application of the appropriate standard of review of the competent authorities' determination has two aspects. First, a panel must review whether the competent authorities have, as a *formal* matter, evaluated *all relevant factors* and, second, a panel must review whether those authorities have, as a *substantive* matter, provided a *reasoned and adequate explanation* of how the facts support their determinations."[337]

7.85 Although the Appellate Body was referring to Article 4.2 when it made that remark, the complainants submit that the same principle applies to the conditions in Article 2 of the Agreement on

[330] Appellate Body Report, *US – Lamb,* para. 114.
[331] Appellate Body Report, *US – Cotton Yarn*, para. 77.
[332] European Communities' first oral statement "Scope and Standard of Review" on behalf of the complainants, paras. 20-22.
[333] European Communities', Korea's and Norway's written reply to United States' question No. 1 at the first substantive meeting.
[334] United States' second written submission, paras. 33-35.
[335] European Communities' second oral statement "Scope and Standard of Review" on behalf of the complainants, para. 2.
[336] United States' second written submission, paras. 33 to 35.
[337] Appellate Body Report, *US – Lamb*, para. 141.

Safeguards, which sets out the basic conditions for the application of safeguard measures. The requirements of Article 2.1, such as the identification of an imported product and increased imports, are preconditions for the application of the requirements of Article 4.2 and so the former must, therefore, also contain the substantive requirement of a reasoned and adequate explanation. This conclusion is supported by the fact that the Appellate Body has held in *US – Lamb* that there is also an obligation to demonstrate in the report of the competent authorities the existence of unforeseen developments.[338] Just as a failure to establish unforeseen developments in the report would "sever the 'logical connection'" between this circumstance and the other conditions, so also will a failure properly to identify the imported products in the report sever the "logical connection" with the remaining requirements of the Agreement on Safeguards.[339] This result is also dictated by the object and purpose of the Agreement on Safeguards, which is essentially to "clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX "Emergency Action on Imports of Particular Products", to re-establish multilateral control over safeguards". Multilateral control over safeguard measures cannot be ensured on the basis of the "trust the competent authority" approach of the United States. A panel cannot conduct a *de novo* investigation; all it can do is to assess whether the measure is justified – that is, whether it is fully and adequately reasoned. If there is no obligation to provide a reasoned and adequate explanation for each finding, there is no basis on which a panel can make such a finding. Thus the obligation to provide a reasoned and adequate explanation is a fundamental principle underlying the whole of the Agreement on Safeguards. If it is not provided in the report of the competent authority, it must be provided in another way.[340]

7.86 The European Communities adds that there is both a procedural requirement for the competent authorities to publish a report and a substantive obligation to provide a reasoned and adequate explanation in the report demonstrating that the conditions for the imposition of a safeguard measure are satisfied. It is not sufficient in meeting the substantive obligation to demonstrate that these conditions are met before a dispute settlement panel.[341] The reasons are that, first, Article 2.1 of the Agreement on Safeguards provides that "[a] Member may apply a safeguard measure to a product only if that Member has determined, *pursuant to the provisions set out below …*" The "provisions set out below" include of course Article 3.1 and this makes respect of this provision a substantive obligation. Second, it is inherent in the notion of "determination" that there be full consideration of all the facts and arguments and a reasoned and adequate explanation of how all the requirements for imposing the measure have been met.[342]

7.87 Japan considers that if a reasoned and adequate explanation is missing, it would lead to both a violation of Article 3.1 (procedural) and Article 2.1 (substantive). Providing such an explanation is part of the Member's obligation in order to acquire the right to apply a safeguard measure. Article 2.1 of the Agreement on Safeguards provides that "[a] Member may apply a safeguards measure only if that Member has determined, *pursuant to the provisions set out below*," (emphasis added), and the "provisions set out below" includes Article 3.1. A plain textual reading of the Agreement would therefore not support the United States' contention. The Appellate Body supports this view. In paragraph 236 of its report in *US – Line Pipe*, the Appellate Body stated: "[c]ompliance with Article 3.1, 4.2(b), and 4.2(c) of the Agreement on Safeguards should have the incidental effect of providing sufficient justification for a measure, and as we will explain, should also provide a benchmark against which the permissible extent of the measures should be determined." The

---

[338] Ibid., para. 75.

[339] Ibid., para. 72.

[340] European Communities' second oral statement "Scope and Standard of Review" on behalf of the complainants, paras. 20-26.

[341] Appellate Body Report, *US – Lamb*, para. 141.

[342] European Communities' written reply to Panel question No. 1 at the second substantive meeting.

Appellate Body has also suggested in the context of the parallelism issue that part of complying with substantive provisions of the Agreement is the need to provide "a reasoned and adequate explanation that establishes explicitly" that imports have "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."[343] [344]

7.88 Korea disagrees with the United States' artificial distinction that a failure to adequately explain a determination has no relationship to a substantive violation. As the Appellate Body stated in *US – Lamb*, the fulfilment of the three conditions for safeguard relief set out in Article 2.1 of the Agreement on Safeguards (and Article XIX.1.a of the GATT 1994) must be published in the report of the competent authorities as required by Article 3.1.[345] Failure to do so would result in a violation of Article 3.1. In that same decision, the Appellate Body treated the failure of the USITC to adequately consider and explain how the facts supported its determination on pricing trends in its threat of injury analysis as a substantive violation of Article 4.2(a).[346] Korea also disagrees with the United States' suggestion that complainants "confuse" substantial and procedural obligations by basing their case solely on the failure to explain the decision.[347] The failure of the United States to adequately explain its reasoning follows from and is independent of the other substantive errors committed by the United States (e.g., the lumping together of disparate flat-rolled and pipe products into single like products; the failure to properly analyse the increased imports requirement; the failure to separate out other causes of injury and attributing injury caused by those other factors to imports; and the failure to limit the measure to the extent necessary).[348]

7.89 Norway argues that the failure to explain a determination adequately is normally a clear sign that the substantive obligation in the other relevant Articles has been violated. As such, the failure to explain adequately under Article 3.1 confirms the establishment of a prima facie case of violation of the other substantive obligation. With the associated failure to explain the determination adequately, the United States must be considered to have failed to rebut the prima facie case established by the complainants.[349] The United States would seem to be arguing that it can uphold its measures, even though it violated Article 3.1, if it can convince the Panel that the requirements of Articles 2.1, 4 and 5 are nevertheless fulfilled. This is not the case. The publication of a report in accordance with Article 3.1 is a *sine qua non* for the imposition of safeguards. Giving such explanations is part of a Member's obligations that must be satisfied in order to acquire the right to apply a safeguard.

7.90 New Zealand also disagrees with the assertion made by the United States. Article 2.1 of the Agreement on Safeguards contains the substantive obligation that a safeguard measure can only be applied where a Member has "determined, pursuant to the provisions set out below" in the Agreement, that the conditions justifying a safeguard measure have been met. The Appellate Body in *US – Lamb* has said that in examining a claim under Article 4.2, for example, a panel must review whether the competent authority has, "as a *substantive* matter, provided a *reasoned and adequate explanation* of how the facts support their determinations".[350]

---

[343] Appellate Body Report, *US – Line Pipe*, para 188.
[344] Japan's written reply to Panel question No. 1 at the second substantive meeting.
[345] Appellate Body Report, *US – Lamb*, paras. 72 and 76.
[346] Appellate Body Report, *US – Lamb*, para. 141; *see* also para. 103 and paras. 60-61.
[347] United States' second written submission, para. 33 and footnote. 41.
[348] Korea's written reply to Panel question No. 1 at the second substantive meeting.
[349] Norway's written reply to Panel question No. 1 at the second substantive meeting.
[350] New Zealand's written reply to Panel question No. 1 at the second substantive meeting, citing Appellate Body Report, *US – Lamb*, para. 141 (emphasis in the original). See also para. 103.

7.91 According to Brazil, the only reason for the requirement in Article 3.1 that the competent authorities set forth their "findings and reasoned conclusions" is to enable Members and, in the case of dispute settlement, panels and the Appellate Body to evaluate whether the Member imposing safeguard measures has met its substantive obligations. As stated by the Appellate Body in *Argentina – Footwear (EC)*, the purpose of a panel is to determine whether "authorities … considered all of the relevant facts and … adequately explained how the facts supported the determinations that were made".[351] The authorities, in effect, must provide justification for the measure in the form of "a reasoned and adequate explanation". The absence of a reasoned and adequate explanation in the form of findings and reasoned conclusions constitutes a violation of Article 3.1. However, the imposition of safeguard measures without adequately explaining how the facts supported the determinations consistent with the requirements of the Agreement on Safeguards, is a substantive violation because the competent authorities have imposed safeguard measures without adequately justifying the action. The substantive violation can be based on the total absence of a justification, an inadequate justification, or a justification not supported by objective evidence.[352]

7.92 The United States responds that the text of Article 2.1 of the Agreement on Safeguards in no way suggests the complainants' interpretation. Moreover, the Appellate Body standard on which they rely was grounded in specific language in Article 4.2(a) that does not appear in Article 2.1. Therefore, the complainants are wrong to assert that the absence of the "findings and reasoned conclusions" required under Article 3.1 would also establish a prima facie inconsistency with the substantive obligation that the product in question is being imported in such increased quantities and under such conditions as to cause serious injury. Article 2 is entitled "Conditions." Its first paragraph requires that the measure be taken "pursuant to the provisions set out below." It then lays out the substantive requirements for application of a safeguard measure, while its second paragraph requires application of such measures without regard to the source of the imports. None of these substantive provisions requires a Member to provide an explanation of how the facts of the case satisfy these obligations. The reference to "provisions set out below" merely reiterates the obligation to comply with those provisions. It does not suggest that failure to comply with them somehow constitutes a breach of the other elements of Article 2.1. In the European Communities' view, the Article 4.2 "substantive" obligation to explain, which it seeks to import into Article 2.1, arises from the Appellate Body's statement in *US – Lamb* quoted by the European Communities.[353] However, the European Communities omitted from its quotation that the Appellate Body's statement starts: "[w]e have already said that, in examining a claim under Article 4.2 of the Agreement on Safeguards, a panel's application of the appropriate standard of review …". This emphasizes that the Appellate Body's reasoning applies to a panel's analysis of compliance with Article 4.2. Nothing in the passage suggests that it applies to other provisions of the Agreement. Second, the text of Article 4.2 demonstrates that the obligation to explain arises under subparagraph (c), which requires the competent authorities to publish "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined." The term "factors" clearly refers back to the "relevant *factors* of an objective and quantifiable nature having a bearing on the situation of that industry" under Article 4.2(a). Thus, the Appellate Body's conclusion as to the explanatory requirements "under Article 4.2" as a whole reflects the explicit requirements of subparagraph (c). It does not suggest that the substantive obligations under paragraph (a) somehow give rise to an autonomous requirement to explain. Indeed, to interpret Article 2.1 or 4.2(a) by itself to impose such a requirement would render Articles 3.1 and 4.2(c) redundant, in direct contravention of the principle of effectiveness in treaty interpretation.[354] The terms of the Agreement on Safeguards themselves

[351] Appellate Body Report, *Argentina – Footwear (EC)*, para. 121.
[352] Brazil's written reply to Panel question No. 1 at the second substantive meeting.
[353] *See* paragraph 7.84 above.
[354] Appellate Body Report, *Argentina – Footwear (EC)*, para. 88, footnote 76.

establish how Members achieve the goals in the preamble. In the last sentence of Article 3.1 and in Article 4.2(c), these terms require the competent authorities to provide a report setting out their findings and reasoned conclusions on all pertinent issues of fact and law, along with a detailed analysis of the case. These provisions delineate a Member's obligations to explain its determination regarding serious injury – there is no need to impute such an obligation into other provisions of the Agreement.[355]

7.93 The United States stresses that it has never disputed that the competent authorities must provide a reasoned and adequate explanation of their findings. They must, and if they fail to do so, a Member will have failed to comply with Article 3.1 or Article 4.2(c). However, such a failure to explain does not automatically entail a conclusion that the resulting measure is itself inconsistent with other provisions of the Agreement on Safeguards, including the substantive obligations under Article 2.1. Indeed, a more robust explanation could well demonstrate the consistency of the measure with WTO rules.[356] The Appellate Body Report in *US – Countervailing Measures Concerning Certain EC Products* demonstrates the fallacy of the European Communities' view that a methodology is inconsistent with the covered agreements if it is "not apt to ensure that the conditions of the Agreement on Safeguards are satisfied."[357] The Appellate Body examined the "same person" methodology to determine whether it "*does not permit* the investigating authority to satisfy all the prerequisites stated in the *SCM Agreement*."[358] Thus, the question was not whether the methodology as such guaranteed consistency with WTO rules, but whether the framework of that methodology allowed an outcome consistent with the Agreement. In this dispute, the United States has shown that the methodologies employed by the USITC are not, as such, within the terms of reference of the Panel. Moreover, should the Panel decide to evaluate methodologies "as such", the United States has shown that each of the "contested methodologies" identified by complainants – the USITC's analyses of like product, increased imports, and causation[359] – as a general matter facilitated, and at the very least allowed*,* findings consistent with Article XIX and the Agreement on Safeguards. The determinations and the supporting views of the Commissioners demonstrate that they did so with regard to each of the ten imported steel products.[360]

6. Judicial economy

7.94 Korea submits that the Panel should reach all issues on which review is sought to assure a full resolution of the dispute. As Article 3.3 of the DSU stipulates, the prompt settlement of disputes is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members. For prompt settlement of the present dispute, it is essential for the Panel to make a finding on all the claims made by Korea and other co-complainants in the present proceedings. Korea argues that judicial economy, exercised loosely, would not lead to dispute

---

[355] United States' written reply to Panel question No. 1 at the second substantive meeting.

[356] Statements made by the Appellate Body in *US – Wheat Gluten*, support this view. The Appellate Body stated that "a claim under Article 4.2(a) might not relate at the same time to both aspects of the review envisaged here, but only to one of these aspects. For instance, the claim may be that, although the competent authorities evaluated all relevant factors, their explanation is either not reasoned or not adequate." Appellate Body Report, *US – Wheat Gluten*, para. 103, footnote 61. Thus, the Appellate Body recognized that a Member might comply with a particular obligation even if it did not provide a reasoned and adequate explanation of *how* it did so.

[357] European Communities' second written submission, para. 30.

[358] Appellate Body Report, *US – Countervailing Measures Concerning Certain EC Products*, para. 147 (emphasis added).

[359] European Communities' second oral statement "Scope and Standard of Review" on behalf of the complainants, para. 15.

[360] United States' written reply to Panel question No. 1 at the second substantive meeting.

resolution but to dispute prolongation. The Appellate Body in *US – Lamb* reached all claims regarding threat of serious injury despite finding a flaw in the like product determination of the United States.[361] Similarly, in *US – Line Pipe*, the panel reached the challenges to the safeguard measure even though the serious injury investigation was found not to be in compliance with the Agreement on Safeguards.[362] Korea submits that, in particular, it is important for the Panel to make findings both for the investigation conducted by the USITC and the safeguard measure imposed by the President of the United States. As the Appellate Body held in *US – Line Pipe*, there are two separate and distinct inquiries in a safeguard case: "*first*, is there a right to apply a safeguard measure? And, *second*, if so, has that right been exercised … within the limits set out in the treaty?"[363] Korea notes that both are being challenged in this Panel appeal.[364]

7.95 Japan notes that none of the claims it has pursued in this case are dependent on any other claims. They all stand on their own. Nonetheless, if the Panel agrees with Japan that the grouping by the United States of slab, plate, hot-rolled, cold rolled, and corrosion resistant into a single like product is inconsistent with WTO obligations, then it is necessarily also true that each of the other elements of the US decision to impose safeguards on these flat-rolled products is also inconsistent with WTO obligations. That being said, Japan encourages the Panel to address each of the other claims that have been made in this case, so as to prevent the United States from repeating in the future the same methodological mistakes it made in this case (many of which have already been identified as problematic by the Appellate Body in previous cases).[365]

C. UNFORESEEN DEVELOPMENTS

1. Introduction

7.96 The European Communities, China, Switzerland, Norway and New Zealand claim that the USITC Report was issued without examining the issue of unforeseen developments.[366] They submit that the USITC's Second Supplementary Report, should it be acceptable, did not provide adequate reasoning for a series of reasons. They claim that the United States' demonstration in support of its safeguard measures suffers from a lack of adequate demonstration of "unforeseen developments". More particularly, New Zealand, argues that the USITC has failed to demonstrate the existence of unforeseen developments as a matter of fact; the developments that it relies on have not resulted in increased imports into the United States or they are not related to the relevant tariff concession; no reasoned conclusions were provided; and no opportunity was provided to third parties to present evidence and their views on the issue of unforeseen developments.[367] For all of these reasons, they claim that the United States has failed to comply with the provisions of both Article 3.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

7.97 In response, the United States claims that consistent with its obligations under GATT 1994 Article XIX and Article 3.1 of the Agreement on Safeguards, the USITC identified the unforeseen developments that resulted in the ten steel products being imported in such increased quantities and under such conditions as to cause serious injury or the threat thereof to the domestic industries

[361] Appellate Body Report, *US – Lamb*, para. 121.
[362] Panel Report, *US – Line Pipe*, paras. 7.15 and 8.1.
[363] Appellate Body Report, *US – Line Pipe*, para. 84 (emphasis in original).
[364] Korea's first written submission, paras. 16-18.
[365] Japan's second written submission, para. 3.
[366] European Communities' first written submission, paras. 122-123; China's first written submission, para. 86; Norway's first written submission, paras. 110-111; New Zealand's first written submission, para. 4.11; Switzerland's first written submission, paras. 109-110.
[367] New Zealand's first written submission, para. 4.29.

producing like products.[368] The USITC's demonstration of unforeseen developments showed the sequential relationship implied by Article XIX between trade concessions, unforeseen developments, and imports in such quantities and under such conditions as to cause serious injury. The conditions which caused injury were a result of unforeseen developments.[369]

7.98 For the United States, each of the events cited by the USITC is an unforeseen development under Article XIX. The financial crises that engulfed South East Asia were unforeseen by economists right up to the time the crises began. The financial crises that hit the countries which were republics in the former USSR were also unforeseen. According to the United States, the crises had an unforeseen, radical, and lasting effect on the level of exports from those countries.[370] The continued strength of the US market at a time when most other markets were contracting, along with the persistent appreciation of the US dollar, were also unforeseen developments which made the US market an especially attractive one for imports displaced from other markets as a result of the financial crises in South East Asia and the former USSR republics.[371] The United States submits that each of these developments was unforeseen, as was the simultaneous occurrence or confluence of such events.[372]

2. The requirements of Article XIX:1(a) of GATT 1994 and Article 3.1 of the Agreement on Safeguards

(a) Introduction

7.99 The complainants argue that safeguard measures constitute "emergency action" and are only to be imposed when the alleged increase in imports arises out of unforeseen developments.[373] They contend that safeguard measures must be justified by "unforeseen developments" and unforeseen developments must be demonstrated as a matter of fact[374], before the safeguard measure is applied.[375] Otherwise, third parties will not have an opportunity to present evidence and their views, as required by Article 3.1 of the Agreement on Safeguards.[376] They also argue that the demonstration of unforeseen developments must be made in the same report of the competent authorities.[377] Moreover, unforeseen developments must have "led to" or be the "result of" a product being imported in such increased quantities and under such conditions as to cause, or threaten to cause, serious injury to domestic producers.[378] The competent authorities, in this case the USITC, have a duty to demonstrate through a reasoned and adequate explanation that these legal conditions for adoption of such measures

---

[368] United States' first written submission, para. 925.
[369] United States' first oral statement, para. 71.
[370] United States' first oral statement, para. 72.
[371] United States' first written submission, paras. 972-976.
[372] United States' first oral statement, para. 72.
[373] European Communities' first written submission, para. 116; Switzerland's first written submission, para. 105; Norway's first written submission, para. 104; China's first written submission, para. 83; New Zealand's first written submission, para. 4.6.
[374] Appellate Body Report, *US – Lamb*, para. 106; Appellate Body Report, *US – Cotton Yarn*, paras. 72-74.
[375] Appellate Body Report, *US – Lamb*, para. 72.
[376] Switzerland does not make a claim pursuant to Article 3.1 of the Agreement on Safeguards.
[377] Switzerland's first oral statement on behalf of the complainants, para. 6; see also European Communities', China's and Switzerland's written replies to Panel question No. 15 at the first substantive meeting and Norway's second written submission, para. 21.
[378] European Communities' first written submission, paras. 120 and 176-178; China's first written submission, paras. 84 and 123-125; Norway's first written submission, paras. 108 and 164-166; New Zealand's first written submission, para. 4.29; Switzerland's first written submission, paras. 106-108 and 163.

are met. The European Communities, Norway and New Zealand add that the requirement of "unforeseen developments" is coupled with another condition, namely, that the importation also be due to "the effect of the obligations incurred by a contracting party under this Agreement".[379]

7.100 In the United States' opinion, Article XIX requirements are different from the requirements under Articles 2 and 4 of the Agreement on Safeguards. This was recognized by the Appellate Body, which described unforeseen developments as a "*circumstance* which must be demonstrated as a matter of fact", as opposed to the "independent *conditions* for the application of a safeguard measure". According to the United States, the term "unforeseen developments" covers any change that is unexpected. The quantities of imports or the conditions must be "as a result of" unforeseen developments, but need not be caused by these developments. Moreover, Article XIX indicates that there should be a sequential relationship of trade concessions, followed by unforeseen developments and then serious injury, but it does not require that the unforeseen developments be contemporaneous with the imports, or immediately precede the imports.[380] Finally, the United States is of the opinion that neither the Agreement on Safeguards nor Article XIX requires that unforeseen developments be limited to, or even directly related to, the particular products or products under investigation.[381]

(b) Legal standard

7.101 For all of the complainants, the legal standard that is used to determine what constitutes an unforeseen development is, at least in part, subjective. In the opinion of the European Communities and China, the standard is probably relatively subjective in the sense that it need not be proven that the unforeseen development was impossible to predict. However, expectations of States are the expectations of those who govern them and their opinions and actions are public knowledge. Accordingly, the unexpectedness of a development is something that can be demonstrated.[382] Norway agrees that the standard is not entirely objective, as it depends on the particularities of each case. Norway adds, however, that it is not the subjective beliefs of the negotiators of the concession that is relevant, rather that the situation demonstrates certain generally accepted elements of unexpectedness, as seen from a "bonus pater familias". Therefore, the unexpectedness of a development is something that can be demonstrated.[383] New Zealand points to the *US – Fur Felt Hats* case, which stated that unforeseen developments are "developments occurring after the negotiations of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated".[384] In New Zealand's opinion, the standard can be seen as having a subjective element. At the same time, in order to ensure that the requirement is not rendered inutile, it must be susceptible to demonstration on an objective basis. This requires the investigating authority to explain (by way of an adequate and reasoned conclusion) why a particular development was "unforeseen". Accordingly, a mere assertion that a development was "unforeseen" will not be sufficient to meet the standard.[385] Finally, Switzerland argues that there are no objective standards of what is unforeseen, and that it depends on the particular case.[386]

---

[379] European Communities' first written submission, para. 121, Norway's first written submission, paras. 109; New Zealand's first written submission, para. 4.22.

[380] United States' first written submission, paras. 925, 926, 932 and 935.

[381] United States' first oral statement, para. 70.

[382] European Communities' and China's written reply to Panel question No. 13 at the first substantive meeting.

[383] Norway's written reply to Panel question No. 13 at the first substantive meeting.

[384] *US – Fur Felt Hats*, para. 9.

[385] New Zealand's written reply to Panel question No. 13 at the first substantive meeting.

[386] Switzerland's written reply to Panel question No. 13 at the first substantive meeting.

7.102 The United States argues that the Appellate Body has construed "unforeseen" as synonymous with "unexpected" rather than with "unforeseeable".[387] The Panel in *US – Lamb* found the distinction drawn by the Appellate Body between *unforeseen* and *unforeseeable* to be important. For that panel, the former term implies a lesser threshold than the latter one. The appropriate focus is on what was actually "foreseen" rather than theoretically "foreseeable".[388] For the United States, the term "unforeseen developments" covers any change that the negotiators of the Contracting Party did not foresee when they undertook obligations or tariff concessions with regard to that product subject to the measure.[389]

(c) What amounts to "unforeseen developments"?

7.103 According to the European Communities, China, Switzerland, and Norway the USITC's explanation relies on the following chain of circumstances. The Asian and Russian crises led to reduction of consumption in selected steel products in selected countries at certain times; the United States economy and steel consumption remained robust, or increased; the United States dollar appreciated against selected other currencies; so that as currency depreciations and economic contractions disrupted other markets, the share of steel imports to the United States market allegedly increased. The complainants contend that none of these events constituted unforeseen developments, nor did any combination of them.[390]

7.104 The United States argues that each of the events cited by the USITC is an unforeseen development under Article XIX. According to the United States, the USITC found that the unforeseen developments consisted not merely of continued growth in demand in the United States market for steel products, but rather the continued growth in that market while other markets contracted or stagnated, making the United States market an especially attractive one for steel products displaced from other markets.[391] The USITC found that it was the confluence and unusual persistence of these events, such as the continued growth in the United States economy while other economies stagnated or contracted, and persistent, widespread currency appreciation, that made these developments unforeseen.[392] The United States submits that the financial crises that engulfed South East Asia and the depth and length of the financial crises of the former USSR republics were unforeseen and had unforeseen, radical, and lasting effects on the level of steel exports from those countries. The continued strength of the US market at a time when most other markets were contracting and the persistent appreciation of the US dollar, were also unforeseen developments which made the US market especially attractive for imports displaced from other markets as a result of the financial crises in South East Asia and the former USSR republics. Each of these developments was unforeseen, as was simultaneous occurrence of such events.[393]

---

[387] United States' first written submission, para. 927, citing Appellate Body Report, *Korea – Dairy*, para. 84.

[388] United States' written reply to Panel question No. 13 at the first substantive meeting, citing Panel Report, *US – Lamb*, para. 7.22.

[389] United States' first written submission, para. 926.

[390] European Communities' first written submission, para. 142; Switzerland's second written submission, paras. 26-37; Norway's first written submission, para. 130; China's first written submission, para. 88, citing the USITC Second Supplementary Report, Attachment I, pp. 3 to 4 (Exhibit CC-11).

[391] United States' first written submission, para. 971, citing USITC Second Supplementary Report, p.3.

[392] United States' first written submission, paras. 972 and 976, citing USITC Second Supplementary Report, p.1; USITC Report, Table OVERVIEW-16.

[393] United States' first oral statement, para. 72.

(i) The Russian and Asian crises

7.105 The complainants argue that the developments mentioned by the United States were not "unforeseen" because they were not unexpected.[394] Unforeseen developments that result in increased imports from a non-WTO member cannot satisfy the requirements of Article XIX. Where an unforeseen development relates to a non-WTO country, any resulting increased imports from the country cannot be said to have resulted from a tariff concession or other WTO obligation.[395] The United States was free to restrict the exports of steel products from most of the steel-producing former USSR republics into the United States, and indeed, the United States did take measures not regulated by the WTO Agreement to deal with the problems caused by the Russian crisis.[396]

7.106 In the opinion of the European Communities and Norway, unforeseen developments must be coupled with effects due to the obligations incurred by a contracting party under the GATT 1994. This comes from the language of Article XIX:1(a), which provides that increased imports must be "a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions".[397] New Zealand adds that the concept of "unforeseen developments" is devoid of any meaning if it is considered in isolation from the relevant tariff concessions that in the absence of safeguard action would permit increased imports to enter at bound rates.[398]

7.107 The complainants agree that if the Russian crisis had resulted in increased imports into the United States from other WTO Members then there would indeed be "relevant tariff concessions" to consider. However, the USITC did not proceed on this basis, nor did it make such a demonstration.[399] The USITC argues solely that decreased consumption in the former Soviet Union led to increased imports into the United States from the former USSR republics, a premise that has no relevance under GATT 1994 Article XIX:1(a).[400]

7.108 The United States argues, on the other hand, that the Russian crisis is relevant because of both the increase in direct imports from Russia and the displacement of third-country shipments into the United States market.[401] According to the United States, the USITC's demonstration of unforeseen developments showed the sequential relationship between trade concessions, unforeseen developments and imports. In its opinion, there is no requirement that the finding of "unforeseen developments" be "coupled with" the effect of the obligations, including tariff concessions, incurred under GATT 1994.[402] WTO panels and the Appellate Body have interpreted "unforeseen developments" without reference to the "effect of the obligations" provision.[403] Moreover,

---

[394] Switzerland's first oral statement, delivered on behalf of all complainants, para. 15.

[395] The European Communities', China's, Switzerland's, New Zealand's and Norway's written replies to Panel question No. 8 at the first substantive meeting.

[396] Switzerland's first oral statement on behalf of the complainants, para. 18; European Communities' written reply to Panel question 8 at the first substantive meeting.

[397] European Communities' first written submission, para. 144; Norway's first written submission, para. 132.

[398] New Zealand's first written submission, para. 4.22.

[399] The European Communities', China's, Switzerland's, New Zealand's and Norway's written replies to Panel question 6 at the first substantive meeting.

[400] New Zealand's first written submission, para. 4.24.

[401] United States' written reply to Panel question No. 6 at the first substantive meeting.

[402] United States' first oral statement, para. 70.

[403] United States' first written submission, para. 946, citing Panel Report, *US – Lamb* paras. 7.4-7.45; Appellate Body Report, *US – Line Pipe*, paras. 7.293-7.300; Appellate Body Report, *Argentina – Footwear (EC)*, para. 91; Appellate Body Report, *Korea – Dairy*, para. 84.

Article XIX:1(a) imposes no requirement that an unforeseen development originate in the economy of a WTO member, and factually, the USITC did not limit itself to an increase in imports from non-WTO members.[404]

7.109 Finally, the European Communities argues that even if the Asian and Russian crises had had an effect on imports for some of the products concerned, this happened between 1997 and 1999. This is seen in the first instance in the period covered by the data referred to in the Second Supplementary Report of the USITC and secondly by the import peaks on which the USITC relies as "increased imports", which also date from this period. Thus, even if the Asian and Russian crises did cause or contribute to the import peaks around 1998, the effects of these alleged unforeseen developments had disappeared by the time the safeguard investigation was conducted. The USITC Report nowhere attempts to demonstrate that the alleged unforeseen developments of 1996 and 1997 were continuing to have an effect in 2001 or indeed could be presumed to continue to have an effect during the period of application of the safeguard measures. On the contrary the data on increased imports shows marked peaks in 1997 to 1998 and return to normality thereafter and demonstrates that the alleged unforeseen developments were not having any relevant effect on imports during the period of investigation.[405]

7.110 For the United States, it is not necessary that unforeseen developments continue to have an effect up until the recent past. It adds that in the course of the steel investigation, producers and exporters from various complainants admitted as much, stating that "[t]here can be a reasonable time lag in between the unforeseen development and the increase in imports leading to serious injury ... the time it takes for market participants to react to certain forces may be much longer. Beyond the simple supply and demand forces at play, various business cycles may influence business decisions and either exacerbate or dampen the change in trade flows".[406] In fact, there is no requirement that unforeseen developments be "recent". As long as they occurred after the relevant tariff concession and resulted in increased imports, that is sufficient to meet Article XIX requirements.[407]

(ii) The Strength of the US economy and the appreciation of the US dollar

7.111 The European Communities, China, Switzerland and Norway submit that the "robustness" of the United States market cannot be considered an "unforeseen development" by the United States, because United States economic policy was likely conducted with this objective.[408] The European Communities states that the argument that a successful economic development, in accordance with its policy, is "unforeseen" is preposterous.[409] The complainants argue that, besides, the growth of the United States' economy started in 1990, well before the Uruguay Round, so it must have been foreseen.[410] Most fundamentally as regards the US dollar appreciation, a change in the value of a currency such as the US dollar cannot be accepted as an unforeseen development.[411]

---

[404] United States' first written submission, paras. 941-942.
[405] European Communities' second written submission, paras. 72-74.
[406] Joint Respondents' Posthearing Brief: Flat-Rolled Products, Oct. 1, 2001, Vol. II at p.23 (Exhibit US-74).
[407] United States' written reply to Panel question No. 14 at the first substantive meeting.
[408] European Communities' first written submission, para. 150; Switzerland's first written submission, para. 136; Norway's first written submission, para. 138; China's first written submission, para. 100.
[409] European Communities' first written submission, para. 150.
[410] Switzerland's first oral statement, delivered by on behalf of all complainants, para. 19.
[411] European Communities' first written submission, para. 152; Switzerland's first written submission, para. 138; Norway's first written submission, para. 140; China's first written submission, para. 101.

7.112 According to the European Communities, China and Norway, exchange-rate developments are foreseeable in two main senses. First, it is foreseeable that the exchange rate between two currencies that are not fixed will change over time. Second, it is foreseeable that the exchange rate of a currency of a country with a robust economy and low inflation (such as the United States in the 1990s) will rise over time compared with the currency of a country with a weak economy and high inflation rate (such as Russia).[412] For them, the value of the dollar in relation to other currencies has regularly changed by significant amounts since the collapse of the Bretton Woods system of fixed exchange rates in 1971. Such changes can no longer be considered to be "unforeseen" but it must, on the contrary, be considered to be quite expected that the dollar would not remain stable vis-à-vis other currencies.[413]

7.113 The United States responds that the robustness of the US dollar was a development which combined with the other developments, namely, the currency crises in Asia and the former USSR and the continued growth in steel demand in the United States market as other markets declined, to produce the increased volume of imports.[414] In its opinion, nothing in Article XIX prevents the continued strength of a market or the persistent appreciation of a currency while other markets contracted or stagnated and currencies depreciated from constituting an unforeseen development. The period under investigation saw persistent and widespread appreciation of the US dollar against virtually all other major currencies.[415] The United States argues that the fact that exchange rates change over time could be described as foreseeable, but not necessarily foreseen. Particular exchange rate developments, such as an unusually rapid or severe change in rates, are not likely to have been foreseen at the time of a particular concession. It argues that the complainants have presented no evidence that the currency disruptions that occurred prior to the import surges were in fact foreseen by anyone, much less that those events were foreseen by any negotiator from the United States during the Uruguay Round.[416]

7.114 In counter-response, the European Communities, Norway and Switzerland, challenge the notion that such favourable developments are capable of being considered unforeseen developments when this term is considered in its context of Article XIX. Unforeseen developments within the meaning of Article XIX are unfavourable developments or shocks to the system that are susceptible to lead to adverse consequences. They submit that such is not the case of the "robustness" of the United States economy and the strength of the US dollar.[417]

7.115 The United States responds that in *US – Fur Felt Hats*, the unforeseen development was a shift in fashion to a different sort of hat. That shift in fashion was presumably unfavourable to the industries making the less-fashionable hats, but that shift could probably not be described as "unfavourable" in any broader sense. *US – Fur Felt Hats* supports the conclusion that an unforeseen development may be a development that could be described as neutral or even positive in general terms, but which results in a change in trade patterns that proves injurious to a particular industry.[418]

[412] European Communities', China's, and Norway's written replies to Panel question No. 10 at the first substantive meeting.
[413] Switzerland's first oral statement, delivered on behalf of all complainants, para. 19.
[414] United States' written reply to Panel question No. 18 at the first substantive meeting.
[415] United States' first written submission, paras. 972-973, citing USITC Second Supplementary Report, p.1; USITC Report, Table OVERVIEW-16.
[416] United States' written reply to Panel question No. 10 at the first substantive meeting.
[417] European Communities' second written submission, para. 56; Norway's second written submission, para. 40; Switzerland's second written submission, para. 31.
[418] United States' second oral statement, para. 106.

(iii) Macroeconomic events

7.116 The European Communities, China, Switzerland, and Norway also argue that since the Russian and Asian crises were macroeconomic events, it is not evident that they specifically affected the steel products on which safeguard measures were imposed. These events could just as much constitute unforeseen developments to justify safeguard measures in almost any sector of the economy in any Member of the WTO.[419] The European Communities, China, Switzerland, Norway, and New Zealand do not exclude that a macroeconomic event could be relevant as an unforeseen development but they submit that this in no way obviates the need for an investigating authority to demonstrate that such events have resulted in increased imports.[420] Nevertheless, according to the European Communities, China and Norway, the ups and downs of the economic cycle (which are often referred to as crises) cannot be considered to be unexpected, even if the precise time at which they occur in a given country cannot be predicted.[421] According to Switzerland and New Zealand, whether a crisis was foreseen or not can only be determined on a case-by-case basis.[422] According to China, macroeconomic events may only constitute unforeseen developments when it is demonstrated that they have a direct relationship with the increasing level of importation of products in the country concerned.[423]

7.117 The United States believes that a macroeconomic event, like any other event, can constitute an unforeseen development, which can justify the imposition of safeguards relief in response.[424] The relevant test under Article XIX is not what is foreseeable but what is unforeseen, and while a class of events may be foreseeable, a particular crisis could be unforeseen for purposes of Article XIX.[425]

(d) "as a result of unforeseen developments"

(i) Logical connection to increased imports and conditions as to cause or threaten serious injury

7.118 The European Communities, China, Switzerland and Norway agree that there must be a "causal link" between the unforeseen "developments" and the increase in imports that allegedly causes or threatens to cause injury. For them, the term "as a result" clearly expresses this requirement.[426] They submit that according to the Appellate Body in *US – Lamb,* "the existence of unforeseen developments is a prerequisite that must be demonstrated … in order for a safeguards measure to apply".[427]

7.119 New Zealand recalls that in *Argentina – Footwear (EC)*, the Appellate Body stated that the "as a result of" language in Article XIX:1(a) underlines the need for a "logical connection" between

---

[419] European Communities' first written submission, para. 147; Switzerland's first written submission, para. 133; Norway's first written submission, para. 135; China's first written submission, para. 99.

[420] The European Communities', China's, Switzerland's, New Zealand's and Norway's written replies to Panel question No. 4 at the first substantive meeting.

[421] Norway's, European Communities' and China's written replies to Panel question No. 9 at the first substantive meeting.

[422] Switzerland's and New Zealand's written replies to Panel question No. 9 at the first substantive meeting.

[423] China's second written submission, paras. 19.

[424] United States' first written submission, para. 939.

[425] United States' written reply to Panel questions Nos. 9 and 10 at the first substantive meeting.

[426] See the written replies of the European Communities, China, and Norway to Panel question No. 2 at the first substantive meeting.

[427] Switzerland's first oral statement on behalf of the complainants, para. 13; Switzerland's second written submission, para. 20.

such developments and the increased imports which a Member is seeking to address through safeguard action. It adds that it is important not to reduce the "unforeseen developments" requirement to an inutility in that all an investigating authority would need to do would be to point to supposed "unforeseen developments" without any attempt to relate these developments to the circumstances of increased imports that they considered justified safeguard action. The term "unforeseen developments" is effectively robbed of any meaning if considered in isolation from the issue of resulting "increased imports".[428] According to New Zealand, the demonstration of "unforeseen developments" requires that the investigating authority explain how these developments are linked to the "increased imports" it relies on for the imposition of a safeguard measure.[429]

7.120 In Norway's view, the reason why the Appellate Body made reference to a "logical connection" instead of a direct causal link is because it may not always be feasible to establish a direct correlation between the magnitude of the "unforeseen development" and the exact increase of imports or seriousness of the other conditions.[430] Norway is of the view that a logical connection is needed between unforeseen developments and all three conditions that need to be fulfilled for the imposition of a safeguard measure.[431]

7.121 The European Communities and China contend that the requirements for the imposition of safeguard measures can be considered as being situated in a "logical continuum". This logical continuum commences with a tariff concession (or the acceptance of another WTO obligation). The first crucial step is the arrival of an unforeseen development. This unforeseen development must result in the "such increased imports" and the "under such conditions" referred to in Article XIX of the GATT 1994 and Article 2.1 of the Agreement on Safeguards. The increased imports must, in turn, cause the serious injury in the sense of Article 4.1(a) of the Agreement on Safeguards – which are also expressed in a continuum of factors starting with increased imports and loss of market share and progressing through effects on sales, production and finally unemployment. They conclude that it is correct that there must be a link between the unforeseen developments and the serious injury but this is an indirect multi-stage link rather than a direct link of cause and effect.[432]

7.122 According to the European Communities and China, there should be a logical continuum between the unexpected events claimed to be the "unforeseen developments", their effects on increased imports and the condition under which this increase has occurred, for each of the specific products subject to the safeguard investigation. It might be the case that several distinct elements might be invoked to form the "unforeseen developments" (such as the Asian crisis, the former USSR crisis, the robustness of the United States economy and the strength of the US currency). In these circumstances, there would be no specific requirement to establish a link between the various elements claimed to constitute the "unforeseen developments". They submit that, however, there would be a requirement to establish a logical connection to demonstrate that each of these various elements have resulted in increased imports with respect to each of the specific products under investigation.[433] By way of example, China suggests that if a financial crisis occurs constituting an unforeseen development, it will only allow the imposition of safeguard measures on certain products A, B and C if these developments, separately and independently, result in increased imports for

[428] New Zealand's written reply to Panel question No. 2 at the first substantive meeting.
[429] New Zealand's written reply to Panel question No. 3 at the first substantive meeting.
[430] Norway's written reply to Panel question No. 2 at the first substantive meeting.
[431] Norway's written reply to Panel question No. 3 at the first substantive meeting.
[432] European Communities' and China's written replies to Panel question No. 3 at the first substantive meeting.
[433] European Communities' and China's written replies to Panel question No. 143 at the first substantive meeting.

product A, for product B and for product C.[434] Switzerland and Norway interpret the requirement as necessitating a determination that each individual development resulted in increased imports regarding each specific product.[435]

7.123 The United States responds that if more than one unforeseen development has caused increased imports, Article XIX does not require that there be any link between the various unforeseen developments, only that each of the unforeseen developments "result in" increased imports under such conditions as to cause injury to the domestic industry.[436]

7.124 As to the meaning of "as a result of", the United States argues that the ordinary meaning of "result" is the "effect, consequence, issue, or outcome of some action, process, or design".[437] Thus, the use of "as a result of" indicates that one thing is the "effect, consequence, issue, or outcome" of another. In the case of Article XIX:1, these words indicate that importation of a product in such quantities and under such conditions as to cause serious injury must be the effect, consequence, issue or outcome of unforeseen developments. A showing that a product is being imported in such quantities and under such conditions as to cause serious injury as a result of unforeseen developments by itself establishes a logical connection between the first and second clauses of Article XIX:1 (a). In other words, "as a result of" describes the link between unforeseen developments on the one hand and, on the other hand, imports in such quantities and under such conditions as to cause serious injury. There is no need for a further demonstration or explanation.[438]

7.125 For the United States, this approach conforms more closely to the text of Article XIX:1 and the reports of the Appellate Body than does the alternative view that "as a result of" indicates that there must be a "causal link" between unforeseen developments and the increase in imports. Article XIX:1 requires that serious injury be "caused" by imports in such increased quantities and under such conditions, but that these conditions be "as a result of" of unforeseen developments. The use of different terms for these relationships indicates that the drafters of the GATT 1994 intended that the relationships be different. However, the European Communities' interpretation would treat them as the same – "causal link" is the term used in Article 4.2(b) of the Agreement on Safeguards to describe the relationship between increased imports and serious injury.[439]

7.126 In addition, the United States argues that the Appellate Body has recognized that the first and second clauses of Article XIX:1 have different meanings. It characterized "as a result of unforeseen developments" as a "circumstance" that must be "demonstrated". In contrast, it characterized the requirement to establish that imports in such quantities and under such conditions as to cause serious injury, as "contain[ing] the three conditions for the application of safeguard measures".[440] The European Communities' view that there must be a "causal link" between unforeseen developments and imports in such quantities and under such conditions as to cause serious injury disregards the differences that the Appellate Body noted in the text.[441]

7.127 The United States is of the opinion that in this case, the "logical connection" between the unforeseen developments identified by the USITC and the injury-causing increased imports is clear.

[434] China's written reply to Panel question No. 2 at the second substantive meeting.

[435] Switzerland's written reply to Panel question No. 143 at the first substantive meeting; Norway's and Switzerland's written replies to Panel question No. 2 at the second substantive meeting.

[436] United States' written reply to Panel question No. 143 at the first substantive meeting.

[437] The New Shorter Oxford English Dictionary, p. 2570.

[438] United States' written reply to Panel question No. 2 at the first substantive meeting.

[439] United States' written reply to Panel question No. 2 at the first substantive meeting.

[440] Appellate Body Report, *Argentina – Footwear (EC)*, para. 92.

[441] United States' written reply to Panel question No. 2 at the first substantive meeting.

The USITC determined that, after the beginning of the Asian and Russian financial crises, unusually large volumes of foreign steel production were displaced, and the US market – in which demand remained strong – became the destination for a significant portion of the displaced foreign production.[442]

7.128 The United States suggests that the interpretation offered by the Panel in *US – Lamb* should be followed:

> "The phrase concerning 'unforeseen developments' in Article XIX:1 is grammatically linked to both 'in such increased quantities' and 'under such conditions'. Rather than implying a two-step causation, we view this structure as meaning that while 'unforeseen developments' are distinct from increases in imports *per se*, it may be sufficient for a showing of the existence of this "factual circumstance" that 'unforeseen developments' have caused increased imports to enter "under such conditions" and to such an extent as to cause serious injury or threat thereof."[443]

7.129 This analysis recognizes that "in such increased quantities" and "under such conditions" are independent conditions, either or both of which may be the result of unforeseen developments. Thus, a competent authority could satisfy Article XIX by demonstrating that the unforeseen developments resulted in the injurious conditions rather than the increase in imports *per se*. [444]

7.130 In counter-response, New Zealand argues that although the United States has finally accepted with reluctance that an "unforeseen developments" requirement exists, it seeks to interpret it in a way that empties it of any meaning.[445] The United States oversimplifies the requirements of Article XIX:1(a) when it argues that any "unexpected event" can qualify as an "unforeseen development". Among other things, the Article requires that the unforeseen development, in combination with the negotiated tariff concession, result in an increase in imports of the product concerned.[446] The United States may be correct that the words "cause" or "causation" in relation to increased imports are not explicitly found in the first phrase of Article XIX:1(a), but its attempt to equate "as a result" with "a sequential relationship" is simply an attempt to deny the necessary logical connection that exists between unforeseen developments and the increase in imports.[447] Finally, New Zealand points out that even the USTR considered the term "as a result" to have substantive content, since its request to the USITC for further information asks it to identify the "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 or threat thereof".[448]

7.131 Norway and Switzerland argue that the United States has misread the Panel's decision in *US – Lamb*, since the Panel there did not reject the fundamental link between unforeseen developments and the increased imports. In their opinion, the Panel merely rejected the argument that a demonstration of "unforeseen developments" would also require that increased imports had caused serious injury.[449] The logical connection that exists between unforeseen developments and increased imports is a close connection, as marked by the words "is being imported", in the present tense. Thus, the United States

[442] United States' written reply to Panel question No. 2 at the first substantive meeting.
[443] United States' first written submission, para. 933, citing Panel Report, *US – Lamb*, para. 7.16.
[444] United States' first written submission, para. 933.
[445] New Zealand's second written submission, para. 3.2.
[446] New Zealand's second written submission, para. 3.6.
[447] New Zealand's second written submission, para. 3.8.
[448] New Zealand's second written submission, para. 3.9.
[449] Norway's second written submission, para. 28; Switzerland's second written submission, para. 20.

misinterprets Article XIX:1(a) when it states that there is no requirement that unforeseen developments immediately precede the imports or that they be recent.[450]

7.132 Likewise, China finds it hard to understand how the United States can argue that quantities of imports or the conditions must be "a result of" unforeseen developments, but need not be caused by those developments. In China's opinion, the term "as a result" also refers to the notion of causality. The grammatical distinction that the United States tries to make is totally artificial and does not find any support in the terms of Article XIX or in the case law.[451]

7.133 The United States argues that the complainants continue to misunderstand the United States' position on the degree of relation that must exist between unforeseen developments and increased imports. In the opinion of the United States, the complainants' quarrel is more properly with the drafters of Article XIX, who chose the phrase "as a result of", before proceeding to use "cause" to describe the relationship between increased imports and serious injury. In this context, those different words must have different meanings, and the United States' position is that the degree of relation between unforeseen developments and increased imports must necessarily be something different, and something less, than the "causal nexus" implied by the word "cause".[452]

(ii) Logical connection to concession

7.134 The European Communities, Switzerland and Norway argue that the requirement of "unforeseen developments" is coupled with another condition, namely, that the importation also be due to "the effect of the obligations incurred by a contracting party under this Agreement". This comes from the language of Article XIX:1(a), which provides that increased imports must be "a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions … ."[453] They, therefore, argue that unforeseen developments and the relevant tariff concessions must result in increased imports.[454]

7.135 Likewise, New Zealand argues that there has to be a relationship between the increased imports resulting from unforeseen developments and relevant tariff concessions. New Zealand cites the Appellate Body in *Argentina – Footwear (EC)*, where it stated that the phrase "as a result of unforeseen developments and of the obligations incurred by a Member" is linked grammatically to the verb phrase "is being imported".[455] Thus, according to New Zealand, the United States argument, that as a result of the Russian crisis increased imports from Russia entered the United States, is irrelevant. The United States has no GATT tariff or other obligations that obliged it to permit imports from Russia.[456] It also points to the Appellate Body's *Korea – Dairy* decision, which acknowledged that the specific purpose of the safeguard measure is to grant temporary relief in a situation where the combined effect of a tariff concession and a development not foreseen when that concession was granted is that serious injury is caused or threatened to the importing Member's domestic industry. As the Appellate Body stated in that decision, "the object and purpose of Article XIX is to allow a Member to re-adjust temporarily the balance in the level of concessions between that Member and

[450] Norway's second written submission, paras. 30 and 33.
[451] China's second written submission, paras. 11-17.
[452] United States' second oral statement, para. 107.
[453] European Communities' first written submission, para. 144; Norway's first written submission, para. 132; Switzerland's first written submission, para. 130.
[454] European Communities' written reply to Panel question No. 3 at the second substantive meeting; Norway's second written submission, para. 42; China argues that a logical connection must exist between the unforeseen developments and the relevant tariff concession, see China's second written submission, paras. 23.
[455] Appellate Body Report, *Argentina – Footwear (EC),* para 92
[456] New Zealand's written reply to Panel question No. 3 at the second substantive meeting.

other exporting Members".[457] New Zealand concludes that for a Member to avail itself of a remedy designed to address unexpected effects of a tariff concession, where there is no tariff concession, is an abuse of that remedy. To accept that a Member may do so undermines the careful balance of rights and obligations expressed in Article XIX.[458]

7.136 In the opinion of the United States, there is no requirement that the finding of "unforeseen developments" be "coupled with" the effect of the obligations, including tariff concessions, incurred under GATT 1994.[459] It points out that WTO panels and the Appellate Body have interpreted "unforeseen developments" without reference to the "effect of the obligations" provision.[460] Article XIX:1(a) imposes no requirement that an unforeseen development originate in the economy of a WTO Member.[461]

7.137 The United States argues further that there is no linkage between consideration of the unforeseen developments and "the effect of the relevant obligations incurred by a contracting party under this Agreement, including tariff concessions".[462] It claims that the logical connection called for by the Appellate Body in *Argentina – Footwear (EC)* is not between tariff concessions and unforeseen developments, but between unforeseen developments and increased imports. Therefore, if a Member has shown that imports in such increased quantities and under such conditions as to cause serious injury are the "result of" unforeseen developments, Article XIX:1(a) does not require a separate finding of a "logical connection" between such imports and the tariff concession identified for the product.[463] The USITC identified a particular tariff concession in its discussion of unforeseen developments and identified the increase in imports expected at the time of the concession.[464]

7.138 For New Zealand, the United States' view that GATT 1994 Article XIX does not require that the imports resulting from unforeseen developments be linked to tariff concessions is surprising in view of what the United States itself has submitted: "The common-sense logic behind [GATT XIX] was that, in the absence of such a provision, trade negotiators may decline to make reciprocal trade concessions". The logic is that negotiators will be prepared to make trade concessions if they know that if the unexpected happens, concessions can be temporarily withdrawn. What they have in mind in such a reciprocal relationship is the possibility of the unexpected resulting in increased imports from the countries to which such concessions have been made, not from a non-WTO Member with whom they are free to deal as they wish. In short, it was not Russia that the WTO negotiators had in mind when they considered temporary relief from import surges; rather it was other WTO Members to whom tariff concessions were made.[465]

7.139 The United States responds that a more persuasive interpretation exists to settle the issue of whether Article XIX only covers imports from WTO Members. In its opinion, Article XIX certainly does not explicitly limit "increased quantities" of imports to imports from Member countries only.

---

[457] New Zealand's second written submission, para. 3.19, citing Appellate Body Report, *Korea – Dairy*, paras. 86-87.

[458] New Zealand's second written submission, para. 3.19.

[459] United States' first oral statement, para. 70.

[460] United States' first written submission, para. 946, citing Panel Report, *US – Lamb,* paras. 7.4-7.45; Appellate Body Report, *US – Line Pipe*, paras. 7.293-7.300; Appellate Body Report, *Argentina – Footwear (EC)*, para. 91; Appellate Body Report, *Korea – Dairy*, para. 84.

[461] United States' first written submission, para. 941.

[462] United States' second written submission, para. 177; United States' written reply to Panel question No. 3 at the second substantive meeting.

[463] United States' written reply to Panel question No. 3 at the second substantive meeting.

[464] USITC Second Supplementary Report, pp. 1-2.

[465] New Zealand's second oral statement, para. 6.

Article XIX:1(a) indicates that imports must have increased "as a result of unforeseen developments and of the effect of the obligations incurred ... under this Agreement". In considering the phrase "of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions" the Appellate Body found that "this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions".[466] The Appellate Body went on to find that "unforeseen developments" and "obligations incurred" are "certain *circumstances* which must be demonstrated as a matter of fact". By describing "unforeseen developments" and "tariff concessions" as "circumstances", plural, rather than a single "circumstance", the Appellate Body indicates that these are separate, independent occurrences. The United States submits that despite the lengthy discussion of this provision, the Appellate Body never indicated that any particular linkage had to exist between the unforeseen developments and the tariff concessions. Nor did the Appellate Body indicate that each circumstance had to have an equal effect, or indeed any effect, on all imports. The Appellate Body has thus construed Article XIX:1(a) as requiring that both an unforeseen development and a trade concession be demonstrated as a matter of fact. The United States argues that the USITC demonstrated both unforeseen developments and tariff concessions; no more is required.[467]

(e) The timing of unforeseen developments

7.140 The complainants contend that the relevant moment to judge whether an event was unforeseen is when the concession was granted.[468] The tariff concessions at issue in this case are those included in the United States' Uruguay Round Tariff Schedule. Therefore, only developments occurring after the conclusion of the Uruguay Round qualify as unforeseen developments.[469] For the complainants, the entirety of the unforeseen development must normally have occurred after the concession, in the sense of Article XIX of the GATT 1994, has been made.[470] If the unforeseen development had started before the concession, it cannot be considered to be unforeseen. For them, there will normally be a close temporal connection between the unforeseen developments and the increased imports. Alleged delayed causal link would require a specific explanation.[471]

7.141 For the European Communities, China, Switzerland and Norway, given this close temporal connection requirement, the period of investigation must cover both the time of the unforeseen development and the resulting increase in imports etc., to demonstrate the causal link.[472] They submit that the analysis in the USITC Reports relates to the past in general, and totally disregards the temporal nexus that must exist between the "unforeseen developments" and the increase in imports. There was no consideration by the USITC of whether these "unforeseen developments", which relate to events taking place as far back as 1989-1991 (the break-down of the USSR) but also to events in 1997 (the advent of the Asian crisis), led to subsequent increases in imports of specific products

[466] Appellate Body Report, *Argentina – Footwear (EC)*, para. 91.
[467] United States' second written submission, paras. 175-177.
[468] *US – Fur Felt Hats,* para. 8.
[469] The European Communities', China's, Switzerland's, New Zealand's and Norway's written replies to Panel question No. 5 at the first substantive meeting.
[470] The European Communities', China's, Switzerland's, New Zealand's and Norway's written replies to Panel question No. 11 at the first substantive meeting.
[471] European Communities' first written submission, para. 133; Norway's first written submission, para. 121; China's first written submission, para. 90.
[472] The European Communities', China's, Switzerland's, New Zealand's and Norway's written replies to Panel question No. 12 at the first substantive meeting.

within the period of investigation (1996-2000) or will do so in the coming three years when the United States' measures will be in force.[473]

7.142 For the United States an unforeseen development must occur "after" the "relevant tariff concession" or, presumably, other obligation that was incurred by a Member under GATT 1994. It argues that a Member may conclude that an obligation or concession from the Tokyo Round, or before, is "relevant" to the analysis under the Agreement on Safeguards. In the *Steel* investigations, the USITC found that US Uruguay Round tariff concessions were the relevant concessions for its analysis of unforeseen developments and the developments identified by the USITC all occurred after the conclusion of the Uruguay Round. The United States argues that the South East Asian and former USSR crises were perhaps foreseeable in the general, hypothetical sense, but the timing extent, and ongoing effect on global steel trade were not foreseen by the United States until well after the conclusion of the Uruguay Round.[474] [475]

7.143 The complainants disagree with the United States' view that "unforeseen developments" can occur before the concession was made as long as its effects was known only thereafter.[476] For Norway, if the effects are only "long term" they will in any case not have the magnitude nor the emergency character nor the causal link required by the Agreement. The European Communities, China, Norway and New Zealand add that the basic requirement is that the increased imports (or at the least the conditions under which they occur) must result from the unforeseen development. For this to happen, there will normally be a close temporal connection between the unforeseen developments and the increased imports. The absence of such a close temporal connection would tend to raise questions as to whether the "increased imports" resulted from the "unforeseen developments" and an adequate explanation would need to be made to explain this.[477]

7.144 New Zealand argues that the Russian crisis was not unforeseen because it commenced in 1991, predating the bindings on steel products in 1995. It argues that the USITC acknowledges this and that the United States negotiators were fully aware when they agreed to tariff concessions on steel of the economic consequences of the Russian crisis. The facts show that the decrease in consumption and the increase in exports in respect of former Soviet countries was not new. They did not arise after the conclusion of the Uruguay Round, but had existed since 1991.[478]

7.145 The United States responds that Article XIX indicates that there should be a sequential relationship of trade concessions, followed by unforeseen developments and then serious injury, but it does not require that the unforeseen developments be contemporaneous with the imports, or immediately precede the imports.[479]

7.146 For the United States, Article XIX implies a sequencing of an obligation or tariff concession, followed by an unforeseen development, followed by imports in such increased quantities and under

[473] European Communities' first written submission, para. 135; Switzerland's first written submission, para. 121; Norway's first written submission, para. 123; China's first written submission, para. 93.

[474] United States' first written submission, paras. 926-931.

[475] United States' written reply to Panel question No. 5 at the first substantive meeting.

[476] European Communities', China's, Switzerland's, New Zealand's and Norway's written replies to Panel question No. 12 at the first substantive meeting.

[477] European Communities', China's, New Zealand's and Norway's written reply to Panel question No. 12 at the first substantive meeting.

[478] New Zealand's first written submission, paras. 4.25-4.27, citing tables in USITC Report, Vol. II, OVERVIEW-4 and OVERVIEW-5, and USITC Second Supplementary Report, Attachment I, p.3 (Exhibit CC-11).

[479] United States' first written submission, para. 934.

such conditions as to cause serious injury.[480] In the United States' opinion, the ordinary meaning of "development" is "a result of developing; a change in a course of action or events or in conditions . . . an addition, an elaboration".[481] Thus, a development is best understood as a change of some kind, which is "unforeseen" if a Member's negotiators did not expect it to occur at the time they undertook the relevant obligation or concession.[482] Since *US – Fur Felt Hats* indicates that the "development" must occur after the obligation or concession, the United States concludes that the change in question should begin after that time. The working party in *US – Fur Felt Hats* reached a similar conclusion, finding that the "development" must occur after the relevant tariff concession (or, presumably, some other obligation). The United States refers to the Appellate Body's statement that an unforeseen development is one that was "unexpected"[483] and to the working party in *US – Fur Felt Hats*: "The term 'unforeseen developments' should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated".[484]

7.147 For the United States, the *US – Fur Felt Hats* report provides a good example of how this analysis works. The *US – Fur Felt Hats* working party found that hat styles changed continually, and that the likelihood of change was entirely foreseeable. However, it found that the negotiators did not foresee the degree of a particular change or its effect on the competitive situation faced by the domestic industry, and that these represented an unforeseen development. Thus, the existence of a particular condition at the time of an obligation or tariff concession (the continual evolution of hat styles) does not prevent a change in that condition (a large and sustained shift in style) from being treated as an unforeseen development.[485]

7.148 Therefore, for the United States, the reference period for assessing unforeseen developments could be any period after the relevant tariff concession was made. In addition, Article XIX implies that the unforeseen developments begin prior to the increase in imports. Thus, the time when injury caused by increased imports occurred could begin after the period when the unforeseen developments occurred. This does not necessarily mean that a longer period of investigation would be required for the assessment of unforeseen developments than for injury, since the period examined in the investigation of serious injury needs to be "sufficiently long to allow conclusions to be drawn".[486] Therefore, any reference period used for the determination of increased imports and serious injury should include some period of time before the import surge began so that the increase in imports and the effects of that increase could be determined.[487]

7.149 According to the United States, in the course of the steel investigation, producers and exporters from various complainants admitted that "[t]here can be a reasonable time lag in between the unforeseen development and the increase in imports leading to serious injury... [T]he time it takes for market participants to react to certain forces may be much longer. Beyond the simple supply and demand forces at play, various business cycles may influence business decisions and either exacerbate

---

[480] United States' first written submission, para. 934.

[481] The New Shorter Oxford English Dictionary, p. 634.

[482] Appellate Body Report, *Argentina – Footwear (EC)*, para. 91.

[483] Appellate Body Report, *Korea – Dairy*, para. 84; Appellate Body Report, *Argentina – Footwear (EC),* para. 91.

[484] United States' first written submission, para. 923, citing *US – Fur Felt Hats*, para. 9.

[485] United States' written reply to Panel question No. 11 at the first substantive meeting.

[486] Panel Report, *US – Line Pipe,* para. 7.200.

[487] United States' written reply to Panel question No. 12 at the first substantive meeting.

or dampen the change in trade flows".[488] The United States argues that there is no requirement that unforeseen developments be "recent". As long as they occurred after the relevant tariff concession and resulted in increased imports, that is sufficient to meet Article XIX requirements.[489]

7.150 In the present case, the United States claims that all the unforeseen developments took place after the Uruguay Round: the East Asian financial crisis began in mid-1997[490], and the particular financial disruptions and currency fluctuations cited by the USITC began in 1997, also after the Uruguay Round negotiations.[491] Thus, while the Soviet Union may have collapsed in 1989, with resulting dislocations in the successor states, these are not the developments that the USITC found to be unforeseen. Rather, the development in question was that those countries' condition changed after 1996 from the condition prevalent at the time of the Uruguay Round negotiations.[492]

7.151 The United States cites evidence presented by the USITC indicating that the developments it identified were in fact unforeseen. In its demonstration, the USITC cited evidence regarding the expectations of the negotiators of the Uruguay Round relating to the likely effects of that Round on imports of steel products.[493] The USITC also cited evidence indicating that the currency crises surprised even professional forecasters, who considered the matter at a much later time, and had more recent information available to them.[494] Thus, the USITC established that the developments were unforeseen.[495] [496]

7.152 The United States disagrees with the complainants' opinion that the unforeseen developments and the increased imports must occur very close in time, and the unforeseen developments should preferably still be occurring at the time injury occurs. It refers to the plain language of Article XIX, according to which it argues that "As a result of" certainly implies that the unforeseen developments occurred before the increase in imports, but implies nothing about the duration of the unforeseen developments.[497]

(f) Demonstration of "unforeseen developments"

(i) Competent authority's report

7.153 The European Communities, China, Switzerland, Norway and New Zealand argue that the Appellate Body has made clear in *US – Line Pipe* that unforeseen developments must be demonstrated by the competent authorities (in their report) before safeguard measures are applied. Moreover, according to the European Communities, China, Switzerland and Norway, the demonstration of unforeseen developments must feature in the same report by the competent authorities, as stipulated by the Appellate Body in *US – Lamb*.[498] Switzerland notes in this regard that

---

[488] Joint Respondents' Posthearing Brief: Flat-Rolled Products, Oct. 1, 2001, Vol. II at p.23 (Exhibit US-74).
[489] United States' written reply to Panel question No. 14 at the first substantive meeting.
[490] United States' first written submission, para. 961.
[491] United States' first written submission, para. 968.
[492] United States' written reply to Panel question No. 11 at the first substantive meeting.
[493] USITC Second Supplementary Report, p. 2 and n.5.
[494] USITC Second Supplementary Report, p. 2 nn. 6-8.
[495] United States' second written submission, para. 170.
[496] For the complainants' position on this point, see paras. 7.177-7.179.
[497] United States' second oral statement, para. 108.
[498] Switzerland's first oral statement on behalf of the complainants, para. 6; see also Norway's second written submission, para. 21 and the written replies of the European Communities, China and Switzerland to the Panel question No. 15 at the first substantive meeting, citing Appellate Body Report, *US – Lamb,* para. 72.

this report is where the competent authorities came to the determination that a safeguard measure was to be recommended. The USITC made its recommendations in the Report of December 2001. The Second Supplementary Report was issued on 4 February 2002, after the USITC recommended that safeguard measures be taken.[499]

7.154 Norway argues that a "determination" for the purposes of Article 2 and 4 of the Agreement on Safeguards, is the published conclusions of the investigations performed, whereby the competent authority of a Member State establishes that certain facts exist and that certain conditions (legal requirements) have been fulfilled that justify the imposition of the specific measure chosen under Article 5. Norway submits that, in the present case, the USITC did not make certain determinations in its original report, and subsequently issued two supplementary reports. In Norway's opinion, Article 3.1 requires that there be "a report", not "many reports" at different intervals. Norway submits that it, therefore, seems that the USITC's determinations with respect to Article 2, Article 4 and "unforeseen developments" may have taken place at different times, or not at all.[500]

7.155 Similarly, the European Communities, China, Norway, Switzerland and New Zealand suggest that there is no consideration of "unforeseen developments" in the USITC Report itself. The only mention of it is in a footnote in the separate report of one commissioner explaining that, although this is required in WTO law, it is not required by United States law.[501] Although the complainants admit that there is some discussion of the Asian and Russian crises in the USITC Report, no relation is made to with the requirement of unforeseen developments.[502]

7.156 The United States responds that the complainants are wrong as a matter of law. In its view, the only temporal requirement of Article XIX is that the findings of unforeseen developments must precede the application of the safeguard measure. It cites the Appellate Body in *US – Lamb* to uphold its view that Article XIX provides no express guidance on "when, where and how" a demonstration of unforeseen developments must be made. Instead, the Appellate Body found that it contained an implied requirement that the demonstration be made "before the safeguard measure is applied".[503]

7.157 According to the United States, the complainants are also wrong as a matter of fact. The determination, or legal conclusion as to whether products were being imported in such increased quantities and under such conditions as to cause serious injury, was made on 22 October 2001.[504] The USITC Report shows that the unforeseen developments discussed in the USITC Second Supplementary Report influenced its injury determinations. Prior to reaching its injury determinations, the USITC specifically sought information on and investigated the conditions it later identified as unforeseen developments and included information on those conditions in its report and in its injury views.[505]

7.158 The United States also responds that Article 3.1 of the Agreement on Safeguards contains certain substantive and procedural obligations regarding the content of the report and its publication, but it does not restrict the format of the report that contains the finding of unforeseen developments. The choice of whether to issue the components of an Article 3.1 report at the same time, or over a

---

[499] Switzerland's written reply to Panel question No. 15 at the first substantive meeting.

[500] Norway's written reply to Panel question No. 15 at the first substantive meeting.

[501] European Communities' first written submission, paras. 122-123; China's first written submission, para. 86; China's second written submission, paras. 24-28; Norway's first written submission, paras. 110-111; New Zealand's first written submission, para. 4.11; Switzerland's first written submission, paras. 109-110.

[502] Switzerland's first oral statement on behalf of the complainants, para. 9.

[503] United States' first written submission, paras. 949-953.

[504] United States' written reply to Panel question No. 15 at the first substantive meeting.

[505] United States' first written submission, paras. 953-955.

period of time, is left to the discretion of individual Members.[506] The United States argues that the complainants have provided no basis to conclude that presenting the report of the competent authorities in stages is inconsistent with the Agreement on Safeguards.[507] Although Article 3.1 requires a certain content for the report and specifies that it be published promptly, it does not require a specific format. According to the United States, the *Chile – Price Band System*[508] Panel has already accepted a multi-stage document as constituting a report of the competent authorities for the purposes of Article 3.1. Thus, Members retain the discretion to decide whether to issue the report all at once or in components.[509] The United States contends that its Second Supplementary Report is properly considered part of the report required under Article 3.1.

7.159 According to the European Communities, Switzerland and Norway, the *Chile – Price Band System* decision is not relevant, since the complaining party in that case did not raise the argument of whether different minutes constituted the "same" report. Moreover, in that case, an attempt to demonstrate unforeseen developments was made within the same minutes in which the recommendation was made to take definitive safeguard measures. Switzerland adds that the situation in *Chile – Price Band System* differs from the case at hand where the recommendation to take definitive safeguard measures was made one and a half months before the Second Supplementary Report was submitted, which contained the justification on the requirement of unforeseen developments.[510] For China, the use of a multi-part document is not, in itself, an issue. Instead, the issue of importance is the incompatibility of the idea that unforeseen developments were allegedly discussed at length during the administrative meeting, but they were not the subject of comments in the USITC Report, and it was necessary to wait for supplementary explanation in a later report.[511]

7.160 The European Communities and Switzerland also point to the fact that the United States has identified 22 October 2001 as the date of determination to argue that the Second Supplementary Report does not form part of the USITC's determinations because it was not issued until February 2002. Second, the terms of the Second Supplementary Report also make clear that the USITC did not reconsider its previous determinations or even purport to confirm them.[512] The European Communities points out that the United States uses the word "finding" to describe the conclusions drawn in the Second Supplementary Report. In the European Communities' opinion, there is a significant difference between the terms "determination" and "finding". The term "determination" refers to a decision that is more final and complete than a "finding" (which may be only one step on the way to a determination). The term "determination" refers to the final settlement of the matter before the adjudicator and to the reasoning relied on to reach that conclusion. Thus, an adjudicator who has to take account of all pertinent information and consider whether a certain number of circumstances and conditions are met before making a determination must do this before the determination is made. In the view of the European Communities, this demonstrates a fatal flaw in the United States' position. The view that a "finding" on unforeseen developments can be made after the determination that the conditions for the application of safeguard measures are met severs the logical connection that the Appellate Body considered must exist.[513]

---

[506] United States' first written submission, para. 952.

[507] United States' written reply to Panel question No. 15 at the first substantive meeting.

[508] Panel Report, *Chile – Price Band System*, para. 7.131.

[509] United States' written reply to Panel question No. 15 at the first substantive meeting.

[510] Switzerland's second oral statement, paras. 5-9; The written replies of Switzerland, Norway and the European Communities to Panel question No. 5 at the second substantive meeting.

[511] China's written reply to Panel question No. 5 at the second substantive meeting

[512] Switzerland's second written submission, paras. 8-12; European Communities' second written submission, paras. 40-44.

[513] European Communities' second written submission, paras. 45-47.

7.161 The United States responds that the complainants seem much disturbed that the US has described the USITC's demonstration of unforeseen developments as a "finding". In the United States' opinion, the complainants' quarrel is with the Appellate Body, not the United States or the USITC, since it was the Appellate Body that specifically found that competent authorities are to make "findings" or "reasoned conclusions" regarding unforeseen developments.[514] The United States argues that the European Communities continues to use the wrong terminology. In *US – Lamb*, the Appellate Body directed a competent authority to make "findings" or "reasoned conclusions" about the existence of unforeseen developments. The distinction between unforeseen developments, which are circumstances to be demonstrated, and increased imports, injury, and causation, which are conditions, was made by the Appellate Body.[515] Thus, there is no requirement to make a "determination" of a relationship between increased imports and unforeseen developments or tariff concessions. The United States submits that the USITC made the requisite findings related to unforeseen developments and tariff concessions in its Second Supplementary Report.[516]

7.162 The United States repeats its allegation that the complainants do not address the findings in *Chile – Price Band System*, in which the Panel accepted a multi-part document (minutes from individual meetings of Chile's Competition Committee) as the report of the competent authorities for the purposes of Article 3.1.[517]

(ii) The need for a reasoned and adequate explanation

Sufficiency and representativeness of data

7.163 The European Communities, Switzerland and Norway contend that the data on which the USITC relies relate to changes of consumption of steel products globally in selected countries and over selected periods and is unrepresentative and lacks objectivity. They submit that the USITC makes a number of unfounded assumptions such as that reductions in steel production did not keep pace with reductions in consumption and that, therefore, there was an increase in exports.[518] For example, the apparent consumption in the former USSR countries increased in 1999 and 2000. By 1995, the decrease in consumption resulting from the dissolution of the Soviet Union was not only foreseen; it had happened.[519] Had the United States demonstrated that the "Russian crisis" led to increased imports into the United States from other WTO Members, the Russian crisis could be relevant, but the USITC made no such demonstration.

7.164 According to the European Communities and Norway, the reference period for the increased imports (1996-2000) is entirely independent of the period investigated for the subsequently alleged unforeseen developments. There was no consideration by the USITC of whether the alleged "unforeseen developments", which relate to events taking place as far back as 1991 (the break down of the USSR), led to subsequent increases in imports of specific products within the period of

---

[514] United States' second oral statement, para. 105, citing Appellate Body Report, *US – Lamb*, para. 76.

[515] Appellate Body Report, *US – Lamb*, para. 72; Appellate Body Report, *Argentina – Footwear (EC)*, para. 91.

[516] United States' written reply to Panel question No. 6 at the second substantive meeting.

[517] United States' second written submission, para. 169, citing Panel Report, *Chile – Price Band System*, para. 7.131.

[518] European Communities' first written submission, paras. 154-155; Switzerland's first written submission, paras. 140-141; Norway's first written submission, paras. 142-43.

[519] European Communities' first written submission, paras. 157-162; Switzerland's first written submission, paras. 144-148; Norway's first written submission, paras. 146-150; China's first written submission, paras. 111-113.

investigation (1996-2000) or will do so in the coming three years when the United States' measures will be in force.[520]

7.165 China compares the statements of the United States with the official statistics contained on the USITC website, which show that the relevant former USSR republics account for only 20% of the total imports of the concerned steel products in the United States. In its opinion, this portion cannot be regarded as representative in order to have an adequate reasoning to explain an alleged increase in imports.[521] All of the complainants also point out that exports from the former USSR republics increased greatly before the Uruguay Round (625.7%) than after it (28.7%).[522] All of the complainants point to the conclusion that the increase in exports for the former USSR republics between 1996 and 1999 was destined for countries other than the United States.[523]

7.166 The complainants also argue that the USITC provided no data on whether the exports of the countries affected by the Asian crisis increased, still less whether these exports were directed to the United States. The USITC seems to assume an increase in exports towards the United States from a decrease in steel consumption in these countries. However, the USITC Report shows an increasing trend in finished steel products consumption as of 1999. Thus, even on the basis of the United States' assumptions, the Asian crisis cannot be considered an unforeseen development that is now leading to increased imports into the United States.[524] New Zealand also points out that the International Iron and Steel website shows that, by 1999, the fall in consumption in steel in Indonesia, Korea, Malaysia, the Philippines and Thailand had turned around.[525] Moreover, statistics from the USITC's own website show that steel imports into the United States from the former USSR republics increased only 4.5%, not nearly the 22% claimed by the United States, over the period 1996 to 1999. Therefore, if declining consumption led to an increase in exports of steel from the former USSR republics, 95.5% of those exports must have gone elsewhere, and not to the United States.[526]

7.167 In the opinion of the United States, the USITC based its analysis on import data that firmly supported its finding that the Asian financial crises disturbed the worldwide market for steel. Imports of steel products from each of the Asian countries most seriously affected by the currency depreciations of 1997 and 1998 surged after the currency crises began and remained at high levels afterward. The data also demonstrates that the crises displaced steel production elsewhere, as demonstrated by the unprecedented increase in imports from areas outside South East Asia.[527]

7.168 The United States responds that the complainants have presented no evidence that the currency disruptions that occurred prior to the import surges were, in fact, foreseen by anyone, much less that those events were foreseen by any negotiator from the United States during the Uruguay Round. Information cited by the USITC indicated that these crises were, in fact, unforeseen, not only

---

[520] European Communities' first written submission, paras. 132 and 135; Norway's second written submission, paras. 120 and 123.

[521] China's first written submission, paras. 102-106.

[522] European Communities' first written submission, para. 163; Switzerland's first written submission, para. 149; Norway's first written submission, para. 151; China's first written submission, para. 114; New Zealand's first written submission, para. 4.28.

[523] European Communities' first written submission, para. 167; Switzerland's first written submission, para. 154; Norway's first written submission, para. 156; China's first written submission, paras. 117.

[524] European Communities' first written submission, paras. 169-172; Switzerland's first written submission, paras. 156-159; Norway's first written submission, paras. 158-161; China's first written submission, paras. 119-122; New Zealand's first written submission, paras. 4.14-4.15.

[525] New Zealand's first written submission, para. 4.18.

[526] New Zealand's second written submission, para. 3.11.

[527] United States' first written submission, para. 963.

by negotiators, but also by professional economic forecasters right up until the time they began, and the severity of these crises was not fully appreciated even after events had begun to unfold. Economic forecasts prepared as late as October 1997 still projected "robust growth trends in most of the developing world", including most of Asia and Russia and other former USSR republics.[528]

7.169 The United States submits that economic data from that time period indicates that there was little reason to expect significant economic contraction in either South East Asia or the former USSR republics. Prior to the onset of these currency crises, the economies of South East Asia had experienced a period of consistent growth[529] and moderate inflation and had fairly disciplined macroeconomic policies.[530] Most of the former USSR republics had achieved positive growth rates in 1996 and in 1997.[531] Nonetheless, by late 1997, markets in these countries had been seriously destabilized, growth had contracted sharply, growth forecasts were downgraded, and steel production was being displaced into other markets, notably the United States.[532]

7.170 The United States argues that the USITC did not cite the dissolution of the Soviet Union as an unforeseen development, but rather the difficulties the former USSR republics encountered after dissolution. The USITC's investigation provided abundant evidence that the financial disruptions in the former USSR republics beginning in 1996 changed export and consumption patterns in the region. Although the decrease in apparent domestic consumption of steel products and the increase in exports began soon after the dissolution of the USSR, the severity of the imbalance between these trends sharpened after 1996. In 1996, the ratio of apparent domestic consumption of steel to exports for those countries was 1.37, meaning that for every ton of steel consumed, the countries exported 1.37 tons. By 1998, that ratio rose to 1.57 and in 1999 it remained high at 1.54. The region's reliance on exports increased significantly.[533] Imports into the United States market of flat-rolled products from Russia increased from 3.2 million short tons in 1997 to 5.1 million in 1998; from Kazakhstan, they increased from 22,588 short tons in 1997 to 149,265 in 1998; from Lithuania, they increased from 1,560 short tons in 1997 to 62,930 short tons in 1998.[534] Steel imports to the US market from 10 former USSR republics increased by 67.3% between 1997 and 1998 alone. Steel imports from Russia were subsequently limited by an agreement, but imports from the nine other former USSR republics remained high. Steel imports into the US market from those nine countries in 2000 were 145.4% higher than in 1996.[535]

7.171 The United States does not agree that the only data provided by the USITC to link the Asian and Russian crises with increased imports were consumption decreases in those regions. In its opinion, the USITC cited consumption data for the most severely affected countries in South East Asia, as well as production and consumption data for the former USSR republics. Elsewhere in the

[528] United States' written reply to Panel question No. 10 at the first substantive meeting, citing Minimill Coalition (Long Products) Prehearing Brief, Exhibit 19 (World Economic Outlook, Oct. 1997, p. 1) (Exhibit US-74).

[529] Minimill Coalition (Long Products) Prehearing Brief, Exh. 19 (World Economic Outlook, Oct. 1996, p. 26) (Exhibit US-74).

[530] Minimill Coalition (Long Products) Prehearing Brief, Exh. 19 (World Economic Outlook, Dec. 1997, p. 3) (Exhibit US-74).

[531] Minimill Coalition (Long Products) Prehearing Brief at Exh. 19 (World Economic Outlook, Oct. 1997, p. 27), Exhibit US-15.

[532] United States' written reply to Panel question No. 10 at the first substantive meeting.

[533] United States' first written submission, para. 968, citing USITC Report, OVERVIEW-19, Tables OVERVIEW-4 and OVERVIEW-5.

[534] United States' first written submission, para. 969, citing USITC Dataweb tables (US-49).

[535] United States' first written submission, para. 972, citing USITC Dataweb tables (US-49) and INV-Y-180 (US-40).

USITC Report, the USITC cited tables which showed imports by country by product for the entire period of investigation.[536] All of these data support the USITC analysis. The United States claims that the complainants take issue with the conclusions drawn by the USITC from that data, but have brought forward no data to indicate that their alternative explanations – e.g., perhaps production declined, perhaps imports to the US did not increase – are in fact plausible. In light of their failure to put forward a plausible alternate explanation, complainants have failed to make a prima facie case that the USITC's demonstration of unforeseen developments was inconsistent with the Agreement on Safeguards.[537]

7.172 Regarding New Zealand's allegation that contraction in steel consumption was symptomatic of the dislocations in the respective steel industries in South East Asia and the former USSR republics as a result of the currency crises that beset those economies, the United States suggests that these significant changes in consumption indicated both an increased pressure to export domestic production that could not be consumed in the domestic market and foregone import consumption; those foregone imports were also displaced into the world steel market.[538] Referring to data used by the USITC in its Second Supplementary Report, the United States argues that the figures show that the degree of dislocation experienced by these economies was severe. Although consumption expanded somewhat after the sharp contraction experienced in 1998, consumption remained well below 1995-1997 levels.[539]

7.173 The United States notes that the complainants have taken issue with this interpretation, arguing that the steep declines in consumption might have been caused by disruptions in production, leaving no excess, unconsumed steel production to be exported into other markets. However, the complainants point to no evidence in the record indicating that any such disruptions occurred. Furthermore, the complainants' argument overlooks the fact that imports into those countries also were affected by the sharp contraction in consumption. Even if production in the affected countries had declined, leaving no excess for export – and there is no evidence in the record to indicate that this occurred – imports that otherwise would have been consumed in those countries still would have been displaced out into the world market.[540] Imports of steel products from Indonesia, Korea, Malaysia, the Philippines and Thailand jumped by 113.5% between 1997 and 1998 alone, and were still 132.8% higher in 2000 than in 1996.[541]

7.174 The United States argues that there was an increasing discrepancy between production and consumption in the former USSR republics. The domestic markets of the former USSR republics were unable to absorb significant portions of local production. In 1994, steel production was approximately 2.28 times greater than consumption; this ratio peaked in 1998, when steel production was more than 2.58 times greater than consumption. This indicates that these industries were under constant, and increasing, pressure to find export markets for this excess production. The pressure to find additional export markets was exacerbated by the Asian financial crises that began in 1997,

[536] USITC Report, pp. 65-66 (CCFRS), 99-100 (hot-rolled bar), 107-108 (cold-finished bar), 115-116 (rebar), 168-170 (certain welded pipe), 178-180 (FFTJ), 213-214 (stainless steel bar), 222-223 (stainless steel rod), 259-260 (stainless steel wire, Commissioner Koplan), 303-305 (carbon flat products and stainless steel wire and wire rope, Commissioner Bragg), 309-310 (tin mill, Commissioner Miller), 347 (stainless steel wire and wire rope, Commissioner Delaney).

[537] United States' written reply to Panel question No. 7 at the second substantive meeting, citing Appellate Body Report, *US – Lamb*, para. 106.

[538] United States' written reply to Panel question No. 16 at the first substantive meeting.

[539] United States' written reply to Panel question No. 16 at the first substantive meeting, citing USITC Report, Vol. II, OVERVIEW-7.

[540] United States' written reply to Panel question No. 16 at the first substantive meeting.

[541] United States' first written submission, para. 962.

insofar as Asia had been an important export market for steel produced in the former USSR. Furthermore, the Asian currency crises spilled over and placed greater pressure on the currencies of the former USSR republics and curtailed growth there as well.[542]

7.175 In counter-response, New Zealand argues that there is no onus on the complainants to demonstrate that the relationship which the United States assumes to exist between the Asian and Russian economic crises and the purported increase in steel imports does not, in fact, exist. Nor is it for the USTR lawyers to attempt to prove that the assumptions were correct after the fact. Rather, it was up to the USITC to demonstrate that this relationship existed, yet it provided no evidence in support.[543] Norway agrees that the displacement theory provided by the United States is nowhere substantiated in the USITC Report. Although the United States presents some figures on their imports from ex-USSR countries, it provides none on displacement and diversions via WTO Members.[544]

7.176 The European Communities also contests the United States' use of further data that is not on the record to respond to the inadequacies of the USITC's analysis. This is not only unacceptable, but the fact of having to rely on extraneous data demonstrates the inadequacy of the explanation provided by the USITC.[545]

The USITC's explanation

7.177 The European Communities and Switzerland argue that the USITC's analysis is based on scattered and incomplete facts and results in vague suggestions and speculation. Both "primary" unforeseen developments, severe currency dislocations in the former USSR and Asia, are assumed to have led to massive increases of exports, or reductions in steel imports, in these countries, which consequently increased amounts of steel on the world market and allegedly caused increased imports into the United States. The alleged effect is rather indirect. Indirect effects, being more complex, would require a fuller explanation. The USITC's explanation is, however, superficial in the extreme. Most of the "evidence" for the alleged increase in exports from these countries comes from data relating to the decline in consumption of steel products on these markets. However, a decline in consumption does not mean there was an increase in exports. Switzerland and the European Communities suggest that, just as domestic production of steel-consuming industries was disrupted, so also could the production of steel producers have been disrupted[546], and the European Communities notes that nowhere in the USITC's Second Supplementary Report are these alternative scenarios considered.[547]

7.178 The European Communities and Switzerland also argue that the complex confluence of events that allegedly resulted in increased imports of particular steel products was not self evident. Yet, there is no hint of an explanation of how this occurred in the USITC Report and the explanation of these alleged unforeseen developments in the Second Supplementary Report does not constitute a reasoned and adequate explanation.[548] The European Communities adds that the USITC expressed no

---

[542] United States' written reply to Panel question No. 16 at the first substantive meeting, citing Minimill Coalition (Long Products) Prehearing Brief, Exh. 19 (World Economic Outlook, Dec. 1997, pp. 20 and 30) (Exhibit US-74).

[543] New Zealand's second oral statement, para. 5.

[544] Norway's second written submission, para. 44.

[545] European Communities' second written submission, paras. 80-81.

[546] Switzerland's second written submission, paras. 23-25; European Communities' second written submission, paras. 67-68.

[547] European Communities' second written submission, para. 69.

[548] Switzerland's second written submission, para. 36; European Communities' second written submission, para. 59.

view on whether these developments were in fact "unforeseen developments", as demonstrated by the way it threw the responsibility back to the USTR. The USITC expressly stated that an assessment of the extent that WTO panel decisions have suggested that "unforeseen developments" relates to the expectations of negotiators of the relevant tariff concessions is "in many respects outside the purview of this agency, since multilateral trade negotiations are not within its mandate, but are the responsibility of the USTR and relevant Executive Branch agencies". Yet, neither the USTR nor other agencies made a determination either.[549]

7.179 According to the European Communities, the USITC's explanations are far too vague to be considered reasoned and adequate explanations. For example, the USITC explanation of the effect of the Russian financial crisis is contained in only one paragraph of the USITC's letter. It refers in footnotes to an account of less than a page and a half in the USITC Report that relates not to a financial crisis in 1996 but to dislocation resulting from the dissolution of the former Soviet Union in 1991. There is no mention in the USITC Report of the financial crisis or "difficulties" in Russia or the former Soviet Union referred to in the USITC's Second Supplementary Report. The tables in the USITC Report demonstrate severe disruption between 1991 and 1994 (a period on which we are told the USITC did not rely) but nothing remarkable between 1996 to 1999.[550] The information concerning the Asian financial crisis is not much more detailed or precise. There is less than a page on the subject in the USITC Report and the data relates to steel consumption in five countries in 1998.[551]

7.180 The United States disagrees with the complainants that the USITC did not establish a link between the unforeseen developments and the resulting increase in imports. The USITC noted the existence of export-oriented industries, currency crises, contraction in consumption in those countries experiencing the currency crises, and the resulting disruption in world steel markets caused by those contractions.[552] The USITC further noted the counter-cyclical status of the US market when these financial crises occurred, with US demand remaining strong while other markets contracted or stagnated, and the persistent appreciation of the US dollar, which made the US market an especially attractive one for displaced imports.[553] The United States submits that the complainants have yet to point to any evidence on the record of the investigation which contradicts the USITC's interpretation of events, let alone demonstrates that the USITC's interpretation was not reasonable.[554]

7.181 In the opinion of the United States, at some point, the complainants must do more than just claim the USITC's demonstration of unforeseen developments is unreasoned or inadequate; the complainants must make some showing that the demonstration is unreasoned or inadequate. The United States submits that the USITC identified a number of developments, showed that those events were unforeseen, and demonstrated that those events resulted in increased quantities of imports. The USITC's demonstration was both reasoned and adequate. The complainants have presented no evidence or argument that would undermine the USITC's analysis.[555]

7.182 The complainants also argue that although the United States imposed 11 different safeguard measures on a large number of products, the USITC's explanation of unforeseen developments relates

---

[549] European Communities' second written submission, paras. 60-61.

[550] See Table OVERVIEW 4 on page OVERVIEW 19 of Volume II of the USITC Report.

[551] European Communities' second written submission, paras.70-71, citing Figure OVERVIEW 7 on page OVERVIEW 18 of Volume II of the USITC Report.

[552] USITC Second Supplementary Report, pp. 2-3.

[553] USITC Second Supplementary Report, pp. 3-4.

[554] United States' second written submission, para. 171.

[555] United States' second written submission, para. 178.

to steel production in general and relies on selected statistics for only certain selected products in certain selected countries over inconsistent periods. For them, a proper explanation of unforeseen developments would have been based on an examination of, and led to determinations on, unforeseen developments leading to increased imports in respect of each of the products, in accordance with Article XIX:1(a) of the GATT 1994, which refers to "any product". For the complainants, no link has been established between the unforeseen developments and each of the products on which safeguard measures are imposed. [556] New Zealand adds that the USITC's analysis with regard to the former Soviet Union is based only on data relating to the production of "crude steel"[557], and the USITC fails to explain the relationship of "crude steel" to the various product categories covered in its investigation. Similarly, the data relating to the Asian financial crisis relied on by the USITC relates to consumption of "finished steel products" only and can therefore not serve as a basis to impose safeguard measures on raw or semi-finished products.[558]

7.183 The complainants submit that there is no explanation the Asian crisis specifically affected the steel products on which safeguard measures were imposed any more than any other product. For the European Communities, the expression "such increased imports" as well as the general requirement that safeguard measures be emergency measures implies that there must be some special or extraordinary reason why the unforeseen development has an impact on the relevant sector or product. The European Communities, China and Norway add that the effects of unforeseen developments must be sufficiently specific to give rise to a sufficient causal link (or logical connection as it is sometimes called) with increased imports.[559] For New Zealand, a "logical connection" or linkage needs to be shown between the "unforeseen developments" and increased imports of the products to which the safeguard measure is applied. Thus, this is the level of specificity required for unforeseen development.[560] For the European Communities, China, Switzerland, Norway, and New Zealand, a specific effect on the product (or sector) concerned must be demonstrated and cannot simply be presumed. The robustness of the United States economy, for example, will have effects on many sectors of the economy and even cause increased imports of many products.[561] Nevertheless, the United States made no attempt whatsoever to relate the supposed "unforeseen developments" to increased imports of the specific products to which the measure applied.

7.184 The United States questions the complainants' reliance on the emergency nature of a safeguards action without defining the relationship between this emergency nature and the relationship that must exist between unforeseen developments and increased imports. It disagrees with the European Communities' sweeping assertion that "there must be some special or extraordinary reason why the unforeseen development has an impact on the relevant sector or product". In the opinion of the United States, nothing in Article XIX, the Agreement on Safeguards, or any Appellate Body or Panel report evaluating these texts indicates that the relationship between unforeseen developments and increased imports must be "special or extraordinary". Neither "special" nor "extraordinary" appears in the text of Article XIX or Article 2. Thus, Article XIX and the Agreement

[556] European Communities' first written submission, paras. 136-139; Switzerland's first written submission, para. 122-125; Norway's first written submission, paras. 124-127; China's first written submission, paras. 94-96, New Zealand's first written submission, para. 4.20.

[557] USITC Report, Vol II, Table OVERVIEW-3.

[558] New Zealand's first written submission, para. 4.21.

[559] The European Communities', China's and Norway's written replies to Panel question No. 7 at the first substantive meeting.

[560] New Zealand's written reply to Panel question No. 7 at the first substantive meeting.

[561] The European Communities', China's, Switzerland's, New Zealand's and Norway's written replies to Panel question No. 4 at the first substantive meeting.

on Safeguards plainly do not require proof of a "special" or "extraordinary" relation between an unforeseen development and the resulting increase in imports.[562]

7.185 Regarding the allegation that such unforeseen development had to be related specifically to the steel industry or to steel products, the United States argues that the only requirement under Article XIX:1(a) is that the imports in such increased quantities and under such conditions as to cause serious injury must be "as a result of" increased imports. The text does not require any degree of specificity. Thus, as long as the increased quantity of an imported product or the conditions under which it is imported are the result of an unforeseen development, it is irrelevant whether that development had other effects.[563] Article XIX does not require competent authorities to trace each unforeseen development, such as a massive economic crisis, to each specific increase in imports of a product or category. In this case, there was no need to trace the effects of each disturbance on each individual steel product.[564]

7.186 For the United States, the unforeseen developments do not have to be developments that affect only one economic sector. It argues that there is nothing in Article XIX that requires that unforeseen developments solely or primarily affect a single sector. For the United States, the implication of a rule – that unforeseen developments that affected multiple economic sectors might not be sufficient to meet the Article XIX standard – would be that Members would have greater flexibility to deal with narrow economic disruptions but limited or no authority to deal with truly dramatic economic events, such as the Asian financial crisis. This cannot be the case.[565]

7.187 The United States admits that, as a factual matter, the unforeseen developments identified by the USITC did result in a wide variety of steel products being imported into the US market in increased quantities and under such conditions as to cause serious injury to the relevant domestic industries. However, nothing in Article XIX requires that unforeseen developments only result in increased imports of one particular product. By this line of reasoning, the change in fashion cited in *US – Fur Felt Hats* might not have been an unforeseen event, since increased demand for a particular style of hat might have also increased demand for a particular style of glove or a particular shade of lipstick.[566]

7.188 As for the complainants' argument relating to crude steel and finished steel, the United States contends that complainants do not deny that all semi-finished and finished steel products begin as crude steel products, nor do they pretend that finished steel products are fashioned from something other than steel. According to the United States, their complaints also overlook the USITC's finding that imports of virtually all steel products increased in the wake of these unforeseen developments, even if the increases for some products were not deemed injurious. Moreover, the complainants also disregard the portion of the USITC's Report in which it distinguished the effects of those unforeseen developments on imports of certain products.[567]

7.189 In counter-response, Norway argues that the United States failed to substantiate the determination that unforeseen developments actually led to increases in imports for each and every product under investigation. The figures are not broken down in the USITC Reports (for each and every one of even the 10 product groups the measures are directed against), and there is no indication

[562] United States' second written submission, para. 173.
[563] United States' written reply to Panel question No. 7 at the first substantive meeting.
[564] United States' first written submission, para. 938.
[565] United States' written reply to Panel question No. 7 at the first substantive meeting.
[566] United States' written reply to Panel question No. 7 at the first substantive meeting.
[567] United States' second oral statement, para. 111.

anywhere in the reports or in the United States' submissions that e.g. the "Russian Crisis" led to increased imports of "tin mill products". Norway submits that, indeed, the countries of the former Soviet Union have only minimal exports of "tin mill products" to the United States – either directly or indirectly – as their exports are at the crude end of the scale.[568]

7.190 The European Communities argues that Article XIX of GATT 1994 requires that unforeseen developments result in increased imports of the product on which a safeguard measures is to be imposed and this applies to each of the ten (or arguably eleven) safeguard measures. Each safeguard measure, therefore, requires a demonstration that the requirements of Article XIX of GATT 1994 and the Agreement on Safeguards are satisfied for the product (or even product bundle) covered by the relevant measure. The European Communities submits that, clearly, justifying that there are unforeseen developments leading to increased imports of one product does not mean that this requirement is met for all products.[569]

7.191 The United States disagrees with the complainants' assertion that a competent authority must demonstrate a specific effect from unforeseen developments on specific industries, a requirement that allegedly arises from "the expression 'such increased imports'". According to the United States, that phrase occurs in neither Article XIX nor Article 2 of the Agreement on Safeguards, so it is difficult to discern how the phrase could be used to justify a burden not stated in Article XIX or the Agreement on Safeguards.[570] As a practical matter, the United States points out that the USITC found that the cited unforeseen developments did not affect the import levels of all steel products in uniform ways. The USITC specifically noted that the surge in imports for some products occurred later in the period of investigation and found that the disruptions in the Asian markets and the markets of the former USSR republics might have played smaller roles in increasing imports of stainless and tool steel products.[571]

(iii) Opportunity for interested parties to present their views to the USITC

7.192 Since the discussion on unforeseen developments is located in a second or additional report, the European Communities, China, Norway and New Zealand argue that concerned parties should have been asked about it and should have been given the opportunity to comment on it. These interested parties include importers, exporters and producers.[572] Since this did not occur, third parties were not provided with an opportunity to present their views on the issue of unforeseen developments.[573] According to the European Communities, China and Norway, Article 3.1 of the Agreement on Safeguards contains a general obligation to allow interested parties to express their views and comment on the views and evidence of other parties concerning all pertinent issues of law and fact.[574]

7.193 In the opinion of the United States, the USITC Report itself shows that the unforeseen conditions demonstrated in the USITC Second Supplementary Report informed its injury

[568] Norway's second written submission, para. 35.

[569] European Communities' second written submission, paras. 50-51.

[570] United States' second written submission, para. 172.

[571] United States' second written submission, para. 174, citing USITC Second Supplementary Report, p. 4 n. 24.

[572] European Communities', China's and Norway's written replies to Panel question No. 1 at the first substantive meeting and European Communities' first written submission, para. 178.

[573] European Communities' first written submission, para. 178; China's first written submission, para. 125; New Zealand's first written submission, para. 4.30; Norway's first written submission, para. 166.

[574] European Communities', China's and Norway's written replies to Panel question No. 1 at the first substantive meeting.

determinations. The USITC specifically sought information on unforeseen developments in the course of its investigation, by including specific questions on its various questionnaires and directly requesting parties to address the issue in written submissions.[575] The USITC investigated the conditions, and the parties addressed them in briefs and in testimony at the USITC hearings. The USITC Report's overview section addressed each of the conditions.[576] The turmoil in financial markets was specifically noted as a condition affecting competition in the domestic market.[577] Accordingly, the allegation that third parties had no opportunity to present evidence and their views on the issue of unforeseen developments, in violation of Article 3.1 of the Agreement on Safeguards, is patently incorrect.[578] The USITC gave public notice of its institution of the steel investigation and it invited public comments and suggestions regarding the content of its questionnaires. The USITC accepted prehearing written submissions with no page limits, and several of those initial written submissions discussed unforeseen developments. The USITC's prehearing Staff Report included information on the Asian economic crisis, continuing post-dissolution difficulties in the former USSR republics, and the appreciation of the United States dollar. The USITC held a series of public hearings at which various Commissioners directly solicited comments from the parties on unforeseen developments.[579]

7.194 The European Communities questions the United States' assertion that it gave adequate opportunity to interested parties to comment on unforeseen developments, in accordance with Article 3.1 of the Agreement on Safeguards. According to the European Communities, the reference by the United States to questionnaires and to staff reports which interested parties could comment upon was not enough to substantiate this claim, since the United States could point only to a single USITC staff paper, which, upon examination, could not be said to give interested parties an opportunity to respond.[580]

7.195 According to the United States, the European Communities' position is incorrect in its apparent belief that Article 3.1 requires a competent authority to list explicitly the issues under consideration and request the interested parties to present their views on each issue. There is no basis for this claim in the text of the Agreement on Safeguards. According to the United States, indeed, the Appellate Body has defined a competent authority's obligation as limited to giving interested parties "an opportunity" to submit evidence and to comment on evidence presented by others.[581] The United States reiterates that the USITC far exceeded this requirement by providing multiple opportunities for parties to present evidence, argument, and comment, as well as actively seeking parties' input. It also argues that the European Communities' suggestion that a competent authority has a responsibility to

---

[575] United States' written reply to Panel question No. 1 at the first substantive meeting, citing Purchasers' Questionnaire at Question I-6 (US-43); Importers' Questionnaire at Question I-6 (US-42); Domestic Producers' Questionnaire at I-7 (US-41). Transcript, pp. 326-327 (Chairman Koplan) (US-44); 343 (Commissioner Hillman) (US-45); 1445 (Vice Chairman Okun) (US-46); and 2626 (Vice Chairman Okun) (US-47).

[576] USITC Report, pp. OVERVIEW-17-18 (Asian financial crisis), OVERVIEW-18-19 (former USSR countries), OVERVIEW-57-60 (exchange rates), OVERVIEW-25-27 (U.S. steel market). Continued demand growth was discussed in individual production sections.

[577] USITC Report, pp. 56-58. The moderate-to-high degree of substitutability, which facilitated the flow of steel imports from other markets into the United States market, was also discussed individual production sections. USITC Report, pp. 58 (CCFRS), 308 (tin mill), 96 (hot-rolled bar), 105 (cold-finished bar), 112 (rebar), 158 (certain welded pipe), 171 (FFTJ), 210 (stainless steel bar), 219 (stainless steel rod).

[578] United States' first written submission para. 954

[579] United States' written reply to Panel question No. 1 at the first substantive meeting.

[580] European Communities' second written submission, paras. 82-87.

[581] Appellate Body Report, *US – Wheat Gluten*, para. 54.

provide a draft of the authority's own views for comment by the interested parties, is an obligation that cannot be extrapolated from Article XIX or the Agreement on Safeguards.[582]

(iv) The timing of the explanation of "unforeseen developments"

7.196 The complainants also argue that since unforeseen development must be demonstrated as a fact before a safeguard measure is imposed, the published report of the competent authorities must contain a "finding" or "reasoned conclusion" on the "unforeseen developments". The USITC Report did not address "unforeseen developments". Instead, on 9 February 2002, the USITC submitted a Second Supplementary Report, based on a USTR request that it identify the unforeseen developments for each affirmative determination.[583] For the European Communities China, Switzerland, and Norway, the USITC's explanation is *ex post* and unrelated to the increased imports during the investigation period. In their view, the USITC's explanation of unforeseen developments is subsequent to, and divorced from, the findings on increased imports and serious injury, contrary to the requirements contained in Article XIX:1(a) of the GATT 1994.[584]

7.197 The United States argues, on the other hand, that the USITC's issuance of the Supplementary Report after it finished its analysis of all imports does not make the Supplementary Report an "*ex post facto* analysis". The USITC provided the response prior to the decision to apply the safeguard measures, which meets the requirement under Article 2.1 of the Agreement on Safeguards to apply a measure "only if that Member has determined" that increased imports of a product are causing serious injury.[585] The United States submits that the "determination" for purposes of Articles 2 and 4 of the Agreement on Safeguards is the legal conclusion of the competent authorities as to whether a product is being imported in such increased quantities and under such conditions as to cause serious injury. The United States' determination in this sense was made on 22 October 2001.[586]

7.198 In counter-response, China points out that the issuing of a number reports over a period of time raises certain concerns, where the original report serves as the basis for the determination of serious injury and a supplementary report provides additional pertinent information particularly regarding unforeseen developments. China asks whether the additional information could have been taken into account by the USITC in its Report for the determination of injury? If so, how is this compatible with the fact that there were no comments on unforeseen developments in the USITC Report and that it was necessary to wait for the specific request of the USTR for identification of unforeseen developments to receive explanations from the USITC? In China's opinion, the Supplementary Report could not heal the defects found in the USITC Report.[587]

7.199 The United States responds by pointing out that the complainants have not attempted to explain why the format and structure of the Report is not the sort of internal detail specifically left to a competent authority.[588] Moreover, the complainants ignore the fact that the USITC specifically labelled the developments as unforeseen, cited evidence regarding the expectation of negotiators when

---

[582] United States' second written submission, para. 168.

[583] European Communities' first written submission paras. 124-125, citing USITC Second Supplementary Report, Attachment I, pp. 1 to 4, Exhibit CC-7; Switzerland's first written submission, paras. 110-112.

[584] European Communities' first written submission, para. 131; China's first written submission, para. 91; Switzerland's first written submission, para. 118; Norway's first written submission, para. 119.

[585] United States' first written submission, para. 951.

[586] United States' written reply to Panel question No. 15 at the first substantive meeting.

[587] China's second written submission, para. 31.

[588] United States' second written submission, para. 169, citing Appellate Body Report, *US – Line Pipe*, para. 158.

undertaking the Uruguay Round, and added in the expectations of professional forecasters to demonstrate the extent to which these events were unforeseen even as they were unfolding.[589]

D. "A PRODUCT"

1. Order of identification of the imported product and the domestic industry

7.200 The European Communities and China claim that USITC's approach of basing its determinations on arbitrary and shifting groups of products without first identifying specific imported products is fundamentally flawed and inconsistent with Article 2.1 of the Agreement on Safeguards.[590] The United States argues in its defence that there is no requirement in the Agreement on Safeguards to first identify a specific imported product.[591]

7.201 The European Communities, Korea, China, Switzerland and Norway argue that the first obligation in a safeguards investigation under Article 2.1 of the Agreement on Safeguards is to identify a specific imported product. This exercise precedes the definition of the "domestic industry producing like or directly competitive products".[592] New Zealand argues that the process for determining the relevant "domestic industry" must focus at the outset on the product which it is alleged is being imported in increased quantities. This requires an initial definition of that imported product.[593]

7.202 Korea argues that, in the absence of such an analysis, the petitioning domestic industry would determine the scope of the like product, which clearly turns the legal requirements of the Agreement on Safeguards on their head.[594] Similarly, Norway submits that if the imported product is not properly defined, then there cannot be a "like product", and thus no definition of the domestic industry. First defining the domestic industry results in "turning everything up-side down" and is clearly not permissible under the Agreement on Safeguards.[595]

7.203 For Japan, however, the order in which the imported product and like product are defined is immaterial, as long as the scope of the domestic like product and, in turn, the domestic industry is properly defined. Japan and Brazil submit that the debate over sequencing masks the real issue of how products – like and imported – are properly divided, in order to ensure that there is a one-to-one "likeness" relationship between the imported and domestic products in defining the domestic industry. In Japan's view, the guidance on how to divide products exists in the context of like product, for which there is a wealth of jurisprudence.[596]

7.204 The United States contends that while the USITC begins with the universe of imports identified in the request, the USITC is only required to define or identify the domestic product or products like or directly competitive with the imported article or articles in the petition or request. It

[589] United States' second oral statement, para. 110.

[590] European Communities' first written submission, para. 181; China's first written submission, para. 171.

[591] United States' first written submission, paras. 97 and 101.

[592] European Communities' first written submission, paras. 179, 185; China's written reply to Panel question No. 35 at the first substantive meeting; Korea's first written submission, para. 19; Norway's first written submission, paras. 168, 176; Switzerland's first written submission, paras. 164, 171.

[593] New Zealand's first written submission, para. 4.32.

[594] Korea's first written submission, para. 22.

[595] Norway's second written submission, para. 52.

[596] Japan's written reply to Panel question No. 17 at the second substantive meeting; Brazil's written reply to Panel question No. 23 at the second substantive meeting.

is not required to consider whether and how to subdivide (or combine) the imported article or articles identified in the request into relevant sub-groupings prior to identifying the domestic like products.[597]

7.205 The United States submits that the complainants' arguments seem to be based on a notion that definitions of the like product are made prior to the gathering of evidence. The USITC, however, does not predetermine its definitions of like product. In the present case, the USITC appropriately began its like product analysis with the imports subject to this particular investigation, which included a range of steel products, and after considering the factors appropriate for the context and the facts of this particular investigation, made its like product definitions. Contrary to the complainants' allegations, the USITC was not required to begin with any predefined like products that had been identified in different investigations pursuant to other statutory standards and based on the particular records of the cases in which they were defined.[598]

7.206 The United States also responds that it would be acceptable under the Agreement on Safeguards for competent authorities to first identify the domestic industries (domestic product) that have been injured and then secondly to identify the specific imported products that are considered to have caused the injury. Article 4.2(a) indicates what the competent authorities must do before reaching a determination; it does not require them to perform these tasks in a particular order. The United States submits that, in any event, the USITC did not identify the domestic industry first. It first considered the merchandise subject to investigation, identified the identical domestically produced steel, divided the domestic steel into discrete like products, and divided imports into the same categories.[599] After defining its domestic like product(s), the USITC identified the subject imports (i.e., "such product", or "specified imported product") that corresponded or matched up to each of the like product definitions in order to conduct each of its analyses of increased imports, serious injury, and causation.[600]

7.207 In response, the European Communities submits that the United States' approach can not be reconciled with the text of Article 2.1 of the Agreement on Safeguards, which explicitly distinguishes between "a product" or "such product" on the one hand and the "like or directly competitive products" produced by the domestic industry on the other. The term imported "product" is used with reference to each of the conditions specified in Article 2.1 ("a product" or "such product"). Contextually, the difference between these two concepts is further corroborated by Article 4.1(c) of the Agreement on Safeguards which elaborates on the definition of the "domestic industry" and clarifies that such definition is only relevant "in determining injury or threat thereof". Article 4.2(a) of the Agreement on Safeguards then assumes a determination of "increased imports" before it can be analysed whether these have caused or are threatening to cause serious injury and Article 4.2(b) contains the term "product concerned". Finally, Article 2.2 of the Agreement on Safeguards also refers to "a product being imported" against which a measure can be imposed.[601]

7.208 Korea submits that the absence of a specific requirement as to how the analysis of the imported product must be done is not determinative. By its terms, the Agreement on Safeguards makes very clear that it is "such imported product" or, in the case of Article XIX of the GATT 1994, a "particular product or products" which must be identified.[602] Article 2.2 refers to "a product being imported" against which a measure can be imposed. The Agreement makes clear that while there is

[597] United States' first written submission, para. 95.
[598] United States' first written submission, para. 105.
[599] United States' written reply to Panel question No. 23 at the first substantive meeting.
[600] United States' written reply to Panel question No. 145 at the first substantive meeting.
[601] European Communities' second written submission, para. 113.
[602] Korea's second written submission, para. 21.

no limitation on the scope of the products that are subject to investigation, each "such product" in the investigation must be identified and analysed, otherwise there would be no basis for imposing a measure on that product.[603]

7.209 The United States counter-argues that there appears to be some consensus that the order of analysis employed in the USITC's general methodology (i.e., whether the domestic like product or specific imports are identified first) is not the issue but, rather, it is whether some product definitions in this particular investigation were too broad.[604] The USITC's focus on the domestic product rather than the imported product for its analysis of whether there is a single or multiple like products is fully consistent with the object and purpose of the Agreement on Safeguards. The Agreement on Safeguards provides for an analysis of the condition of the domestic industry (i.e., consideration of whether the domestic producers of the like product are experiencing serious injury) in order to protect it if necessary, albeit temporarily, from increased imports. Given the purpose of the Agreement, examining the products domestically produced to ascertain the composition and scope of the pertinent like products is eminently reasonable. After all, the United States argues, if the objective is a precise identification of the domestic like product so as to be able to define the relevant domestic industry in order "to ensure that only domestic producers suffering serious injury are given temporary breathing room to facilitate adjustment"[605], logic dictates that the analysis start with consideration of the domestic products, not the subject imports. The focus of the safeguard analysis is on the condition and response to stimuli of the domestic industry. The nature of the exporting producer and industries would not logically further this required analysis.[606]

7.210 The United States further submits that any like product analysis must be based on an evidentiary record. Subdividing imports into various groups prior to the collection of any evidence as part of the investigation, as some complainants advocate, would call into question the very basis of any resulting finding. In contrast, the USITC did not predetermine its like product definitions, but rather first gathers evidence, and only then proceeds to an analysis using the factors appropriate to its investigation, and a like product determination based on the facts of the particular case. This approach ensures that, as with other pertinent issues of law and fact, the consideration of like product definitions is consistent with Article 3.1.[607]

7.211 According to the United States, requiring a competent authority to delineate the relevant like product divisions based exclusively on the imported products set forth in a petition or request for investigation raises a number of concerns, not the least of which is the fact that there is no basis for such an obligation in the Agreement on Safeguards. The imposition of such a requirement could also hamstring the competent authority in ways that would prove detrimental to its investigation and, therefore, would likely also detract from the conclusions that the authority ultimately reaches. The very global nature of a safeguards proceeding means that an investigation often will implicate products from many countries and the products originating in each of those countries may vary considerably. Therefore, for the competent authority to focus its inquiry on the imported products rather than the domestic products is far less likely to produce information that will be useful for defining the domestic like product or products, and the relevant domestic industry or industries.[608]

---

[603] Korea's second written submission, para. 22.
[604] United States' second written submission, para. 44.
[605] European Communities' written reply to Panel question No. 51 at the first substantive meeting.
[606] United States' second written submission, para. 47.
[607] United States' second written submission, para. 49.
[608] United States' second written submission, para. 50.