

## ANNEX C

### Parties' Comments on Other Parties' Questions

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## ANNEX C-1

### KOREA'S COMMENTS ON QUESTIONS FROM THE PANEL TO THE UNITED STATES

(7 May 2001)

(i) **The measure**

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

Answer

See Korea's answer to Panel's Question 8 to the Republic of Korea.

**2. At para. 184 of its first written submission, the United States asserts that "the only limit on the volume of imports free from the 19 per cent supplemental duty is the number of WTO Members who choose to take advantage of the 9,000 ton exemption." Would this mean that there is a limit on the volume of imports subject to the lower tariff, and that the limit will be reached if all WTO Members choose to take advantage of the 9,000-short-ton exemption?**

Answer

Obviously, there is a natural limit to the imports which will be subject to the lower rate of duty because only a limited number of countries make and supply line pipe to the US market. The ITC identified only seven significant suppliers other than Canada and Mexico.<sup>1</sup> Based on this assumption, the expected limitation on the quota amount would be approximately 63,000 tons at the normal rate of duty. As shown in Exhibit 49, total in-quota imports of line pipe during the first full quota year equalled 64,067 tons, while total imports from all subject suppliers (except Mexico and Canada) totaled 78,671 tons.<sup>2</sup> Therefore, there is a maximum level of imports that would be likely to enter at the normal rate of duty. This information was available to the ITC and the President.

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<sup>1</sup> See e.g., *ITC Determination, Staff Report*, Table 3 at II-15 (KOR-6); *see also ITC Determination, Bragg and Askey Views on Remedy*, I-89, n.11 (KOR-6) (noting that there are eight countries that constitute the principal sources of line pipe imports into the United States, as well as Venezuela). Moreover, the US President's announcement contained a list of all of the countries in the world capable of producing line pipe. Most had never supplied line pipe to the United States and have not under the US President's measure.

<sup>2</sup> See Exhibit 49 (Chart 1: US Imports of Line Pipe (1999-2000); Chart 2: US Imports of Line Pipe (March 2000-February 2001) (updated from previously submitted KOR-29) (KOR-49).

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

Answer

The decision as to whether a measure is a tariff-rate quota (TRQ) cannot depend on whether it has been properly constructed and implemented by a Member. Otherwise a Member could evade each requirement of Article XIII of the GATT 1994 by failing to comply with all the requirements of Article XIII. That, in fact, appears to be the US defence to date – the United States asserts that the measure cannot be a TRQ because the United States has not met the requirement of a quota by establishing a total quota amount. The fact that the United States has violated its obligation cannot constitute proof that the obligation does not exist.

As the question suggests, Korea agrees with the Panel that not all TRQs require an overall limit, because, as the Panel properly notes, Article XIII:2(a) of the GATT 1994 provides “wherever practicable.” For example, import licenses are contemplated as an alternative to a total quota.<sup>3</sup>

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

Answer

See Korea’s answer to Panel’s Question 9 to the Republic of Korea.

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

Answer

See Korea’s answer to Panel’s Question 10 to the Republic of Korea.

**6. In their oral presentation the United States asserted that the President’s decision on the safeguard measure relied on the same data and information as the ITC recommendation. Can the United States also confirm that there were no other documents prepared after the ITC’s**

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<sup>3</sup> Article XIII.2(b) of the GATT 1994.

**recommendation that formed the basis for the President's decision on the measure even if those documents relied on the same data and information before the ITC?**

Answer

See US letter, dated 23 April 2001, conceding that such documents exist, but refusing to provide them to the Panel.<sup>4</sup> It appears that the US explanation is that such documents are confidential<sup>5</sup> and their rationale for not giving them to the Panel is that those documents are not released to other reviewing bodies. However, Korea notes that the United States also refuses to give data that is released to other reviewing bodies.<sup>6</sup> Moreover, it is now unclear in light of the US response to this question, how much the measure taken by the President relies on the ITC memoranda. It appears that the United States is now saying that the measure can and must be evaluated exclusively on the basis of the Presidential Proclamation and published memorandum, which "form the entirety of the explanation of the decision to impose ... the measure."<sup>7</sup> Neither the proclamation nor the measure provide any explanation or rationale for the measure. The United States appears to take the position that the measure is unreviewable by the Panel.

**(ii) Serious injury**

**7. At para. 267 of its first written submission, the United States submits that "any problems experienced by Geneva resulted in part from the difficulties it experienced in line pipe sales ... ." What "part," or proportion, of Geneva Steel's "difficulties" could be directly attributed to its line pipe operations? Please explain, and provide supporting documentation.**

Answer

In its letter dated 23 April 2001, the United States answers as follows:

It was not necessary for the USITC or Geneva Steel to apportion the difficulties reflected in its data because the USITC collected financial information from Geneva Steel (and 14 other US line producers) *specifically regarding their line pipe operations*. As noted in the USITC Report, Geneva Steel did not produce other products in the facilities where line pipe was made.

It is further clear from the record before the USITC that declines in line pipe operations had a significant overall effect on Geneva Steel's operations. At the hearing in the injury phase of the USITC investigation an executive from Geneva Steel confirmed that line pipe "is an essential part of our business from an overall margin perspective," and that Geneva lost half of its volume of line pipe sales between 1997 and 1998.<sup>8</sup>

The US statement is not responsive to the question posed by the Panel for the very reasons observed by Commissioner Crawford.<sup>9</sup> Specifically:

- (a) The United States asserts that "Geneva did not produce other products in the facilities where line pipe was made." But, this is a reference to a passage of the ITC Staff

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<sup>4</sup> Letter Fr: United States Re: Panel's Request for Information (23 April 2001) at 3 ("US 23 April Letter").

<sup>5</sup> The Panel should ask the United States whether it is relying on Article 3.2 of the SA as its rationale for not providing the documents. If not, the United States needs to cite to some other authority.

<sup>6</sup> See Korea First Written Submission at paras. 87-92.

<sup>7</sup> US 23 April Letter, Response to Question 6 at (i).

<sup>8</sup> *Id.*, Response to Question 7 at (ii)(citation omitted)(emphasis in original).

<sup>9</sup> See generally ITC Determination, Crawford Dissenting Views on Injury at I-63 (KOR-6).

Report referring to other pipe products. The contrast is to other line pipe producers which also produced OCTG, standard and structural pipe.<sup>10</sup> Geneva did produce other finished steel products--plate and hot-rolled coil.

- (b) As Commissioner Crawford correctly observed, the problem was that Geneva closed one of its blast furnaces and attributed the shutdown to the line pipe market.<sup>11</sup>
- (c) Missing from the US response to the Panel, but not missed by Commissioner Crawford, is that the finished steel products produced from the blast furnaces of Geneva are hot-rolled steel and carbon plate--not line pipe.<sup>12</sup> Hot-rolled steel and carbon plate are finished steel products themselves and are "other product[s]" being produced in the facilities where welded line pipe is manufactured.<sup>13</sup> Only some of that hot-rolled and plate production is used for the production of line pipe.
- (d) Thus, one cannot conclude that the shutdown of the blast furnace and its impact on the financial condition of Geneva was properly attributed to line pipe because Geneva produced no other "pipe" product on its line pipe-making line. Moreover, that's not the point. The point is that the shutdown of its blast furnace should have been attributed to conditions in Geneva's primary markets of hot-rolled and plate.<sup>14</sup> Indeed, Geneva has been an active participant in unfair trade cases against imported plate and hot-rolled coil. Commissioner Crawford's conclusion was not only logical, but also correct. It also demonstrates why Commissioner Crawford observed that it was incorrect to attribute the shutdown of the blast furnace to imports of line pipe.

In addition, Korea notes that the only public record reference relied on by the United States to establish the source of Geneva Steel's problems is the ITC testimony of Mr. Johnsen, Executive Vice President and General Counsel of Geneva Steel.<sup>15</sup> Mr. Johnsen only stated that line pipe was "an essential part of our business," but this does not answer the question as to whether the bankruptcy can be attributed to the production of line pipe.<sup>16</sup> Given such self-serving testimony, this issue required a more thorough analysis. There is certainly no denial there that Geneva's primary business is hot-rolled sheet and cut-to-length plate<sup>17</sup> or that a "blast furnace" is not used to produce pipe.

This uncritical acceptance of assertions by the domestic industry witnesses contrasts sharply with the ITC's treatment of the dual-stencilled line pipe issue. In the latter case, the ITC states that Respondent's evidence could not be considered because Respondents failed to precisely quantify the amount of dual-stencilled line pipe sold as standard pipe.

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<sup>10</sup> See ITC Determination, Staff Report at II-25 (KOR-6).

<sup>11</sup> See ITC Determination, Crawford Dissenting Views on Injury at I-63 (KOR-6); ITC Determination, Staff Report at II-9, n.65 (KOR-6); see also US First Written Submission at para. 103.

<sup>12</sup> See ITC Determination, Crawford Dissenting Views on Injury at I-63 (KOR-6).

<sup>13</sup> See ITC Determination, Staff Report at II-25 (KOR-6).

<sup>14</sup> See ITC Determination, Crawford Dissenting Views on Injury at I-63 (KOR-6).

<sup>15</sup> See US First Written Submission at para. 103. We note that in making a reference regarding Geneva Steel, in Footnote 106 of their submission (found in para. 103), the United States cites to pages 32-33 of the Transcript of the Hearing on Injury. There is no reference to Geneva Steel on either of those pages. The correct cite is to pages 51-52. See Injury Transcript at pp. 32-33 (KOR-50) and pp. 51-52 (KOR-7) (Testimony of Mr. Johnsen, Executive Vice President and General Counsel, Geneva Steel).

<sup>16</sup> According to the United States, the decline in the line pipe business "played a major role in the decision to shutdown one of its blast furnaces and in the company's bankruptcy." US First Written Submission at para. 103.

<sup>17</sup> See Injury Transcript at pp. 51-52 (KOR-7); see also ITC Determination, Crawford Dissenting Views on Injury at I-63 (KOR-6).

Finally, it is also not clear how the costs of the temporary shutdown and the bankruptcy have been allocated to line pipe. Korea's position is that none of those costs should have been attributed to line pipe. Since "some" costs were attributed, the ITC should have examined closely how such costs were allocated, given that Geneva's primary business was not line pipe. The US answer--*i.e.*, that we collected data "specifically regarding their line pipe operations"--begs the question: how were these general costs allocated to line pipe?

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

Answer

With respect specifically to Lone Star and the impact of those allocations on the financial condition of the industry, we note that in its letter of 23 April, the United States indirectly concedes that the other Commissioners failed to address the issues observed by Commissioner Crawford.<sup>18</sup> The significance of this allocation is discussed at length in Korea's Written Rebuttal.

**9. At footnote 75 of the ITC's determination (page I-16), reference is made to data at page II-31 of the staff report. What is the equivalent reference in the non-confidential version of the staff report? In note 75, reference is also made to the "two of the largest firms." Does this reference include Geneva Steel and/or Lone Star Steel?**

Answer

"Two of the largest firms" refers to Lone Star and California Steel (CSI), which were the two US producers verified by the ITC.<sup>19</sup>

The ITC report is riddled with issues regarding the allocation of costs. For dual- and triple-stencilled line pipe, there are also issues regarding the allocation of revenues.<sup>20</sup> As has been seen in the case of Lone Star, these allocations can have a significant impact. The ITC's analysis of these issues was far too cursory. (We expect that the data at II-31 of the ITC Staff Report is confidential.)

Moreover, while the ITC majority stated that there was insufficient evidence of more than a "relatively small" shift from OCTG to line pipe,<sup>21</sup> it was the duty of the ITC to fully investigate this issue in accordance with its obligations under Articles 3.1 and 4.2(b) of the SA.<sup>22</sup> Furthermore, the ITC conclusions on this point about whether producers can shift between products are contradictory, because, in the remedy recommendation, the ITC majority notes that producers can further increase their line pipe production by shifting production away from other products like OCTG.<sup>23</sup>

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<sup>18</sup> US 23 April Letter, Response to Question 8 at (ii) and (iii).

<sup>19</sup> See ITC Determination, Staff Report at II-25 (KOR-6).

<sup>20</sup> US 23 April Letter, Response to Question 7 at (ii) n.2 (citing Staff Report at II-25) ("Any allocations that had to be made by the US line pipe producers in order to report financial data specific to their line pipe operations were based on their sales of end products or on other acceptable allocation methodologies." See USITC Report at p. I-31 (explaining that "increases in per-unit overhead and SG&A were allocated ... in proportion to their sales of end products or based on other acceptable allocation methodologies.")) (KOR-6).

<sup>21</sup> See ITC Determination, Majority Views on Injury at I-30-31 (KOR-6).

<sup>22</sup> United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, Report of the Appellate Body, WT/DS166/AB/R (22 December 2000) ("US – Wheat Gluten (AB)") at paras. 54-55.

<sup>23</sup> See ITC Determination, Majority Views on Remedy at I-78 (KOR-6).

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

Answer

US law is very clear that the “competent authorities” for purposes of US safeguard investigations include the ITC and the President.<sup>24</sup> Each has specific statutory functions for determining serious injury and recommending and imposing remedies. Korea sees no basis to conclude that, within the meaning of Article 3.1 of the SA, findings and conclusions by the “competent authorities” on “all pertinent issues of fact and law” in an “investigation” would not include the findings and conclusions of the President.

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

Answer

Korea believes that the answer to this question is that all relevant factors of an objective and quantifiable nature have to be examined by the authorities in accordance with Article 4.2(a) of the SA. In this case, Korea actually raised some significant issues on those factors. Moreover, Korea believes that an annualized capacity increase of 25 per cent between 1998 and 1999<sup>25</sup> is objective, quantifiable, and relevant since the dramatic capacity expansion coincided with the drop in domestic demand and falling prices.

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

Answer

Yes, it would be inconsistent with a finding of present serious injury because the industry must be suffering serious injury at the “end of the period.” Although Korea does not believe that in all cases an improvement in the domestic industry performance would prevent a finding of present serious injury, the competent authorities would have to explain how such a finding of serious injury could still be made under such conditions. If the improvement were significant enough, as in this case, so that the industry was no longer facing an emergency situation and was objectively expected to continue its recovery given the overall conditions of competition, then a finding of serious injury caused by increased imports would be precluded.

**13. At para. 134 of its first written submission, the United States asserts that “Korean respondents failed to place on the record objective and quantifiable information as to the extent**

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<sup>24</sup> See 19 USC. § 2252 (KOR-1).

<sup>25</sup> See ITC Determination, Staff Report at II-22, Table 5 (KOR-6); see Exhibit 48A (Welded Line Pipe – Domestic Industry Capacity, Apparent Consumption and Export Shipments). (KOR-48A).

**to which imports from Korea of dual stencilled line pipe were used in standard pipe applications.” Did the USITC seek such information for itself?**

Answer

In *US – Wheat Gluten*, the Appellate Body held that Article 3.1 of the SA requires that the “authorities charged with conducting ... an “investigation” – must actively seek out pertinent information ... [W]here the competent authorities do not have sufficient information before them to evaluate the possible relevance of such an ‘other factor,’ they must investigate fully that ‘other factor,’ so that they can fulfil their obligations ... under Article 4.2(a) of the SA.”<sup>26</sup>

This issue on dual-stencilled line pipe was raised and discussed by the Korean Respondents during the ITC investigation on several occasions. The fact that there had been several years of litigation over the proper classification of such pipe strongly indicated that the effect might be very significant.<sup>27</sup> The ITC should have investigated the extent and proper quantification of dual-stencilled line pipe if it was not satisfied with the evidence presented by the Korean Respondents. That evidence included: (i) an affidavit and direct testimony by an individual, Mr. Smith, with 35 years of experience in the industry;<sup>28</sup> (ii) a confidential affidavit by a distributor with equivalent experience who confirmed the estimate of Mr. Smith that 70-80 per cent of the dual-stencilled line pipe imported into the West Coast is sold for standard pipe applications;<sup>29</sup> and (iii) the actual export data, by mill, by specification and by region, which supported the affidavits.<sup>30</sup>

**14. Did the ITC undertake any quantitative analysis (such as a regression analysis, and/or elasticity analysis, for example) in support of its qualitative analysis regarding the impact of other factors such as the oil and gas crisis, and declines in the domestic industry exports?**

Answer

No. The ITC’s legal analysis of causation, specifically the investigation of the effects of “other factors,” clearly was insufficient and not in compliance with Article 4.2(b) of the SA. The ITC did not attempt to identify and isolate the effects of other factors such as the oil and gas crisis. They certainly were not “quantified” in any manner. Yet, the United States says they “weighed” the relative impact of each factor (one by one). However, as elaborated in Korea’s Written Rebuttal, the United States relied almost exclusively on a two-period comparison for its causation or “weighing” analysis. Regardless of the hypothetical integrity of such an analysis, that actual comparison was riddled with flawed facts and assumptions.

**15. In para. 104 of its first submission the United States responds to Korea’s argument that the industry was not injured as shown by an increase in capital expenditure during the POI. Would the United States also comment on Korea’s argument made in Para 250 of its first submission that during the POI two new producers began operations in 1998 and 1999?**

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<sup>26</sup> See *US – Wheat Gluten* (AB) at paras. 53 and 55.

<sup>27</sup> See Exhibit 53 (Posthearing Brief on Injury of Japanese and Korean Respondents (7 October 1999) (Exh. 13) (attaching the description of the factual background to this dispute in the US Court of Appeals for the Federal Circuit. The implications of that issue were discussed in both the pre-hearing brief and post-hearing brief (KOR-53).

<sup>28</sup> See Prehearing Brief, Exh. 13 (affidavit of Mr. Ed Smith) (KOR-53).

<sup>29</sup> See Posthearing Brief, Exh. 2 (KOR-25).

<sup>30</sup> See *id.*, Exh. 12 (KOR-53).

Answer

Korea believes that this is very relevant evidence confirming that the industry was not in a state of significant overall impairment. Producers do not enter an industry that promises no financial return.<sup>31</sup>

**16. In para. 109 of its first submission the United States explains that the \$25 – \$30 price increase referred to by Korea could just as likely compensate for rising raw material costs following the imposition of anti-dumping duties on hot-rolled steel. Were all imports of hot-rolled steel affected by the anti-dumping measure? What was the coverage of the US measure or measures on hot-rolled steel? Were there other suppliers of hot-rolled steel that were not affected by the anti-dumping measures? Furthermore, at para. 22 of its first written submission, the United States refers to a “decline in the price of hot-rolled carbon steel.” Is such a price decline consistent with the rising raw material costs referred to in para. 109 of its first written submission? Please explain.**

Answer

The antidumping investigation of hot-rolled steel covered imports from Japan, Russia and Brazil only. Imports from Russia and Brazil are covered by suspension agreements while imports from Japan are covered by an antidumping order.<sup>32</sup>

There were a number of other suppliers of hot-rolled coil that were not covered by the antidumping case. According to US Census Bureau statistics, there were over 40 exporters of hot-rolled steel to the United States, including major suppliers such as Korea, Canada, Taiwan, France, the Netherlands, etc.<sup>33</sup>

Finally, with respect to raw material costs and the conflict between the US assertions concerning rising raw material costs at paragraph 109 of its First Written Submission and declining raw material costs at paragraph 22 of its First Written Submission, the data before the Commission clearly confirms that raw material prices were at an all-time low at the end of the POI – in part explaining why line pipe prices had declined. During the period of January-June 1999, raw material prices had declined to \$244/ton compared to \$276/ton during the January-June 1998 period and \$290/ton for 1998 as a whole.<sup>34</sup>

Finally, as noted in Korea’s submission, announced line pipe price increases totaled \$80/ton by the time of the ITC decision.<sup>35</sup>

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<sup>31</sup> Prudential and Northwest Pipe are the two producers who entered the market in 1999. See ITC Determination, Crawford Dissenting Views on Injury, p. I-61, n.26; see e.g., Prehearing Injury Brief at 13-14, Exh. 4 (KOR-56) (Prudential press release, dated 22 September 1999, stating: “As a result of improvements in demand and pricing, we expect to break even or show a slight profit in our third quarter results, with anticipation of further improvement in the fourth quarter.”); see also Korean Respondents’ Posthearing Brief on Remedy, p. 35, Exh. 11 (KOR-56)(Northwest Pipe press release, dated 19 October 1999, stating: “We have seen definite improvement in demand and pricing, and we expect to see further improvement in the fourth quarter...”).

<sup>32</sup> See ITC Determination, Separate Views on Injury at I-48 n.88 (KOR-6).

<sup>33</sup> See Exhibit 54 (US Imports of Hot-Rolled Steel Products) (KOR-54).

<sup>34</sup> See ITC Determination, Staff Report at II-28, Table 10 (KOR-6).

<sup>35</sup> See ITC Determination, Crawford Dissenting Views on Injury at I-69, n.68 (KOR-6); Posthearing Brief on Injury, Exhibit 1 (KOR-25); Korea’s Statement Regarding the United States Request For A Preliminary Ruling (WT/DS202)(11-12 April 2001) at p. 2.

(iii) Exclusion of Canada and Mexico

**17. According to the United States, the absence of any reference to GATT Article XIX in Article XXIV:8(b) means that Article XIX safeguard measures “may or must be made part of the general elimination of ‘restrictive regulations of commerce’ under any FTA (para. 216, US first written submission). Why does the United States consider that safeguard measures “may” (as opposed to “must”) be made part of the general elimination of “restrictive regulations of commerce” under any FTA? Would an a contrario reading of Article XXIV:8(b) mean that the imposition of a safeguard measure between FTA partners is inconsistent with the concept of an FTA? Please explain.**

Answer

Korea considers that the US position on this point is inconsistent and illogical. We assume this position by the United States is necessitated by the fact that the NAFTA exception is applied on a case-by-case basis. It seems to be the US position that Article XXIV of the GATT 1994 does not address the issue. For this reason, Korea does not believe that the United States is relying on Article XXIV:8 as a defence.

Article XXIV:8(b) of the GATT 1994 has a meaning. Either Article XIX measures are permitted between FTA Members or they are not. The fact that Article XIX does not appear in Article XXIV:8 is not dispositive, as the Appellate Body held in *Turkey – Textiles*.<sup>36</sup>

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

Answer

See Korea’s answer to Panel’s Question 16 to the Republic of Korea.

**19. In Turkey – Textiles (WT/DS34), the Appellate Body stated that a GATT Article XXIV defence may be available in the context of a customs union if two conditions are met: (1) the measure at issue is introduced upon the formation of the customs union, and (2) “the formation of [the] customs union would be prevented if it were not allowed to introduce the measure at issue.” In this regard, please explain how the formation of the NAFTA would have been prevented if the NAFTA parties had not been allowed to introduce the safeguards exemption provided for in section 311(a) of the NAFTA Implementation Act. If the formation of NAFTA would have been prevented but for the safeguards exemption, why are NAFTA members not automatically excluded from safeguard measures imposed by other NAFTA members?**

Answer:

It is not clear to Korea that the United States is relying on Article XXIV of the GATT 1994 as a “defence” in this case. The United States seems to center its entire argument on the language of Footnote 1 to Article 2.1 of the SA, which does not apply to the US safeguard measure.

In fact, Korea believes that Article XXIV of the GATT 1994 cannot provide a defence when the NAFTA explicitly provides that safeguards are to be applied on a case-by-case basis.

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<sup>36</sup> Turkey – Restrictions on Imports of Textile and Clothing Products, WT/DS34/AB/R (22 October 1999) at para. 64.

**20. The United States argues, on the basis of the last sentence of note 1 to the Safeguards Agreement, that “issues related to FTA imports are to be addressed exclusively under the relevant GATT 1994 articles” (para. 220, US first written submission). In this regard, please comment on the Appellate Body’s finding in Argentina – Footwear (para. 106) that “the footnote only applies when a customs union applies a safeguard measure ‘as a single unit or on behalf of a member State.’” Does the United States consider that the Appellate Body’s finding does not apply to the last sentence of footnote 1? Please explain.**

Answer

It is impossible to read the Appellate Body opinion as providing that the last sentence of Footnote 1 is separate from the rest of Footnote 1 and not covered by the Appellate Body’s interpretation that “the footnote” – *i.e.*, not parts thereof – “only applies when a customs union applies a safeguard measure ‘as a single unit or on behalf of a member State.’”<sup>37</sup> The language of the opinion is quite definitive. The only issue the Appellate Body did not address is whether Article XXIV of the GATT 1994 – independent of Footnote 1 – provided Argentina with a defence to a violation of any other provision of GATT 1994, because Argentina did not appeal that issue. We note that the United States does not appear to be relying on Article XXIV as a defence.

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

Answer

See Korea’s answer to Panel’s Question 15 to the Republic of Korea.

**(iv) Unforeseen developments**

**22. At para. 230 of its first written submission, the United States asserts that the collapse in oil prices was not expected. At what point in time is the United States referring to in making this statement? In other words, when was the collapse in oil prices not expected, or unforeseen?**

Answer:

First, Korea notes that the United States made no attempt in its decision to comply with its obligation to identify “unforeseen developments.” Moreover, the Appellate Body has identified that “‘emergency actions’ are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, a Member finds itself confronted with developments it had not ‘foreseen’ or ‘expected’ when it incurred that obligation.”<sup>38</sup> To suggest that a “boom/bust” cycle is not expected in an industry historically characterized by “boom/bust” cycles defies the meaning of “unexpected.” Not only are these cycles expected in this industry, but the capital investment cycles of this industry clearly demonstrate that this industry is aware of these cycles and invests accordingly.<sup>39</sup>

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<sup>37</sup> Argentina – Safeguard Measures on Imports of Footwear, Report of the Appellate Body, WT/DS121/AB/R (14 December 1999) (“*Argentina – Footwear (AB)*”) at paras. 106-109 (emphasis added).

<sup>38</sup> *Argentina – Footwear (AB)* at para. 93 (emphasis added).

<sup>39</sup> See generally Korea First Written Submission, paras. 31-33, 246-51; ITC Determination, Crawford Dissenting Views on Injury at I-62 n.33 (KOR-6).

(v) Causal link

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

Answer

Irrespective of whether it would be a sufficient analysis, Korea does not believe that the United States demonstrated that the industry would still have suffered injury irrespective of the crisis in oil and gas. The United States never performed such an analysis nor addressed this question. It only examined whether imports were a greater cause of injury than that single cause, standing alone.<sup>40</sup>

The focus and sequence of the US evaluation of “other factors” is inconsistent with Article 4.2(b) of the SA. The ITC begins with an analysis of the combined effects of other factors plus imports and determines whether they together cause “injury.”<sup>41</sup> If so, then the ITC examines whether “the impact of increased imports is as great or greater than the effect of the downturn in demand”<sup>42</sup> or any other independent cause. This analysis is backwards and it does not isolate the effects of other factors.

Article 4.2(b) of the SA clearly requires that imports cause “*serious injury*.” Other factors also can simply be the cause of “injury” in accordance with Article 4.2(b). This language strongly supports the view that the injury from other factors must be specifically isolated before the serious injury from imports is evaluated.<sup>43</sup>

The ITC Majority engaged in a two-period analysis to evaluate causation. They compared the period of 1994-1996 with the period of 1998 and the first half 1999. However, they began with an incorrect factual finding with respect to imports. As the Panel observed at the meeting of the parties, the percentage increase in imports between 1996 and 1997 and the percentage increase between 1997 and 1998 were very comparable, and 1997 was the industry’s best year. The ITC nonetheless simplistically concluded that the effect of the imports was much greater than the effect of the oil and gas crisis since the presence of imports was the only significant difference facing the industry in 1998/99 and 1994-96.

The ITC Majority also ignored the other significant differences. First, the ITC assumed that the effects of the oil and gas crisis could be measured in their totality by reference to the level of apparent consumption in 1999. They then looked exclusively at the annualized level of consumption in 1999 and found that it was not significantly below that for the period of 1994-1996. This analysis ignored the very significant fact that there was a 30 per cent decline in apparent consumption from the

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<sup>40</sup> See ITC Determination, Majority Views on Injury at I-22 (KOR-6). The Separate Views on Injury concluded that the scale tipped the other way and reached the contrary conclusion with respect to the question of present injury--*i.e.*, they determined that the oil and gas crisis was the greater cause of present injury, but imports were the greater cause of threat. See ITC Determination, *Separate Views on Injury* at I-37, I-44 (KOR 6).

<sup>41</sup> See ITC Determination, Majority Views on Injury at I-22 (KOR-6).

<sup>42</sup> *Id.*

<sup>43</sup> See *US – Wheat Gluten (AB)* at paras. 68-69.

first half of 1998.<sup>44</sup> Such a significant drop in consumption could be expected to produce significant injurious effects. No similar drop in consumption had been experienced in the previous periods.<sup>45</sup> Furthermore, that decline coincided with a 25 per cent increase in domestic capacity on an annualized basis due to significant new capacity coming on stream<sup>46</sup> (US producers were projecting an increase in demand).<sup>47</sup> Export markets had also dried-up due to the decline in oil and gas demand worldwide.

Thus, the ITC failed to properly identify and isolate the effects of other “differences” between those two periods, including increased capacity, declining export markets and domestic consumption.<sup>48</sup> The oil and gas crisis was the underlying cause that produced all these other effects and their confluence caused an industry decline. The combined effects of all these factors so dilute the effects of imports that imports no longer had a genuine and “substantial” relationship to the serious injury.

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

Answer

No, it cannot since Article 4.2(c) of the SA only requires that “other factors” cause “injury” (Imports must cause “serious injury.”) By definition, other factors may not account for the totality of serious injury.

As noted above, the ITC analysis is backwards and does not properly isolate the effects of other factors. Nor does the US causation standard even allow the ITC to measure the effect of each factor. Rather, the US methodology is simply to weigh imports against each individual cause. Hypothetically, under the US standard, if there are 10 causes, including imports, each contributing 10 per cent of the “injury,” the ITC could determine that imports are the substantial cause of serious injury because imports are “not less than any other single cause.” Yet, imports in this scenario could not be found to bear a “genuine and substantial” relationship to serious injury since in the absence of these other factors, serious injury may not have occurred.<sup>49</sup> This standard does not comply with the requirements of Article XIX of the GATT 1994 or Article 4.2(b) of the SA.

**25. Did the ITC find that injury was caused by “other factors” in addition to the decline in the oil and gas industry? If so, how did the ITC ascertain that the injurious effects of all these “other factors” together did not preclude the conclusion that there was a genuine and substantial relationship of cause and effect between the increased imports and the serious injury?**

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<sup>44</sup> The United States indexed data shows that apparent consumption declined almost 30 per cent between first half of 1998 and second half of 1999. See *US 16 February Letter*.

<sup>45</sup> See *id.*.

<sup>46</sup> See KOR-48A.

<sup>47</sup> See KOR-56.

<sup>48</sup> See KOR-48A.

<sup>49</sup> See Restatement (Second) of Torts § 433 cmt. e. (1965)(KOR-58).

Answer

See answers to Questions 23 and 24 above. Moreover, we note that the ITC did not properly investigate the extent to which producers had shifted between the production of OCTG and line pipe.<sup>50</sup> The United States had an obligation to conduct a more thorough analysis of the degree to which the collapse in the market for OCTG resulted in a shift to line pipe production and distorted the financial results of the line pipe industry.<sup>51</sup>

(vi) **Developing country exemption**

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

Answer

There is no question that the safeguard measure would apply to developing countries if they exported in excess of the 9,000 short tons. The 9,000 short tons is an arbitrary limit that does not reflect the terms of Article 9 of the SA. The language of Article 9 suggests that the determination of whether a developing country is “in” or “out” should be made at the time the measure is imposed so that it can be determined whether the measure applies to them or not. The 9,000-short-ton limit is arbitrary also because it must be constantly reconstructed based on current import levels. This is particularly the case when Mexico and Canada are excluded so that import levels will vary.

**27. With regard to para. 227 of the US first written submission, does the 9,000-short-ton exemption guarantee that developing country Members accounting for 3 per cent or less of total subject line pipe imports into the United States will not be subject to the Line Pipe measure? What if the volume of subject line pipe imports (especially from Canada and Mexico) increases to such an extent that a developing country Member could export more than 9,000 short tons to the United States, and still remain at or below the 3 per cent threshold?**

Answer

No, it does not guarantee that developing country Members will not be subject to the line pipe measure. The measure is a TRQ, with a quota of 9,000 short tons plus a 19 per cent duty. The TRQ applies equally to developing countries. Were a developing country to export 10,000 short tons to the US market, 1,000 tons would be subject to a 19 per cent tariff. Thus, the United States has failed to exempt developing countries. With respect to the US claim that 9,000 short tons represents the 3 per cent limit, Korea observes that 9,000 short tons is far in excess of 3 per cent of current import levels and could be below future levels. If developing countries are not exempted, they are also denied their preference under Article 9 of the SA because the overall limit has not been set by the United States in this case. There is no way of determining what level of imports 3 per cent represents.

(vii) **Increased imports**

**28. In *Argentina – Footwear*, the Appellate Body found that the increase in imports must be *inter alia* “recent enough.” How “recent” should the increase in imports be, relative to the date of the competent authority’s decision to impose a safeguard measure? What is the minimum period of time that a domestic industry would need in order to file a petition following a sudden increase in imports? In the present case, could the US line pipe industry have filed a petition**

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<sup>50</sup> See *US – Wheat Gluten (AB)* at para. 55; see also *KOR-48C (The Percentage Relationship Between Net Shipments of Line Pipe and Net Shipments of OCTG)*.

<sup>51</sup> See *US – Wheat Gluten(AB)* at para. 55.

**before it did? Please explain. Could the ITC have reached its determination before it did? Please explain.**

Answer

See Korea's answer to Panel's Question 3 to the Republic of Korea.

**29. The United States argues in para. 66 of its first submission that a comparison of "mismatched" interim periods could create distortions because of seasonal changes in market conditions. Does the United States, therefore, believe that line pipe is a seasonal product? If line pipe is not a seasonal product why is it necessary to compare "matched" interim periods, as opposed to the immediately preceding interim period?**

Answer

The ITC record contains no evidence that line pipe is a seasonal product.

## ANNEX C-2

### THE REPUBLIC OF KOREA'S COMMENTS ON UNITED STATES' RESPONSE TO QUESTIONS FROM THE PANEL AT THE SECOND MEETING WITH THE PARTIES

1. The Panel extended to the Parties the opportunity to respond to the submissions of 15 June 2001. Before proceeding, Korea notes that it provided its responses to the Panel's questions and to the positions of the United States as they were expressed by the US representatives at the Second Meeting with the Parties ("Second Panel Meeting"). Very little has been added by the United States through the written response. Therefore, rather than repeating our points and arguments, Korea will largely confine itself to commenting on new material provided in the US response.

#### Questions for All

2. Question 4, paragraphs 8-11 of the United States Responses to Questions from the Panel at the Second Meeting with the Parties ("Second US Response"). Korea notes that the United States has made no claim of prejudice because, of course, it could not do so. As noted in paragraph 11 of Korea's Second Response to Questions,<sup>1</sup> the Appellate Body held in *Thailand – Antidumping on Angles* that the question is whether a party "suffer[ed] any prejudice on account of any lack of clarity in the panel request."<sup>2</sup> None has been claimed here nor shown to exist.

3. As Korea properly identified in paragraph 9 of the "Panel Request,"<sup>3</sup> critical information on which the United States relied in its decision-making has not been provided to Korea. Korea's claim in paragraph 9 is clearly separate from its Article 3 and 4 claims made in relation to the ITC phase of the investigation in paragraph 1 of its Panel Request.<sup>4</sup> The nature of the measure and "how" it was determined to be limited to the extent necessary to remedy the injury are the most basic critical information. To date, the US response has been limited to the scant information contained in the Presidential Proclamation.

4. This issue regarding the lack of critical information regarding the measure has been central to this case. In its letter of 30 January 2001, to the Panel, Korea requested the Panel to seek information pursuant to its authority under Article 13.1 of the DSU, including with respect to the measure.

5. The United States has responded to the Panel that the obligation to explain the basis of the action – as required by Articles 3.1 and 4.2(c) of the SA – does not extend to the Article 5.1 obligations. Korea has disagreed from the outset. The issue has been raised and fully addressed by both parties. There is no basis to allege prejudice.

6. Regarding the ongoing obligation of Article 5.1, the United States takes issue with the phraseology used for the claims contained in Korea's panel request. The United States cites to the "tense" in which particular verbs appear in the Panel Request as proof of what is in or out of the Panel

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<sup>1</sup> *Korea's Responses to Questions to the Parties from the Panel and Korea's Initial Comments on Responses of the United States during the Second Substantive Meeting of the Parties*, (15 June 2001).

<sup>2</sup> *Thailand – Antidumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, Report of the Appellate Body, WT/DS122/AB/R (12 March 2001) at para. 95.

<sup>3</sup> See *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* ("US – Safeguard Measures on Line Pipe"), Request for the Establishment of a Panel by Korea ("Panel Request"), WT/DS202/4 (15 September 2000) at para. 9.

<sup>4</sup> See *US – Safeguard Measures on Line Pipe*, Panel Request, at para. 1.

Request. Such an allegation is clearly at odds with the Appellate Body precedents and ignores the distinction made by the Appellate Body between arguments and claims.<sup>5</sup>

### Questions for the United States

7. Question 1, paragraph 23 of the Second US Response. The United States now states that “there is no other documentation demonstrating how, at the time it applied the line pipe safeguard, the United States ensured compliance with the obligations of Article 5.1.”

8. In the *United States’ Response to Questions from the Panel and Korea*, dated 7 May 2001, the United States conceded, at paragraphs 26-30, that there are additional documents prepared during the Presidential decision making. It is the position of the United States, however, that they will not be released to the Panel.

9. Question 6, paragraph 37 of the Second US Response. The US seems to be arguing over whether the allocation methodology is only somewhat distortive (because the declines for both line pipe and OCTG were similar) or very distortive because OCTG declined much more precipitously than line pipe. (Korea has demonstrated that, in fact, the latter was the case.) In either case, the failure to properly separate out the effect of the declines due to OCTG was an error and overstated the declines in the line pipe industry indicators. The ITC never conducted such an analysis but rather simply defended the methodology as “verified” by ITC staff. Korea believes that the Panel should conclude that the database before the ITC could not form the basis for a serious injury or threat decision because of the significant distortions in the data and the failure to properly isolate the “like product” (see also Korea’s Response in paragraph 21).

10. Moreover, we disagree with the U.S. observation that Commissioner Crawford “misread AISI data.” Korea Exhibit 48-C, using the AISI monthly shipment data relied on by the ITC and included in the U.S. Exhibit 3, demonstrates that domestic shipments of OCTG declined more sharply in 1998 and 1999 compared to domestic shipments of line pipe.<sup>6</sup> The graph is correct and demonstrates that costs allocated on the basis of a company’s sales of OCTG and line pipe will result in an over-allocation of costs to line pipe simply because of the more precipitous collapse in OCTG sales during that period.

11. Question 8, paragraph 40. Korea believes that a proper analysis of Geneva Steel was never performed. Moreover, the US did not answer the Panel’s question concerning what the industry’s operating income would have been without the costs associated with Geneva Steel’s closing of its blast furnace and attendant bankruptcy.

12. Question 10, paragraph 42 of the Second US Response. The United States repeats its accusation that Korea has “conceded” that certain conditions were unexpected. Korea does not and has not conceded that the United States has met its obligation with respect to “unforeseen developments”.

13. As noted at paragraphs 147-149 of Korea’s Written Rebuttal, the “unforeseen development” must be the cause of the increase in imports.<sup>7</sup> The oil and gas crisis, which Korea agrees caused the

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<sup>5</sup> See *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Appellate Body, WT/DS98/AB/R (14 December 1999) at para. 123; *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body, WT/DS27/AB/R (9 September 1997) at paras. 141-43 (“Article 6.2 of the DSU requires that *claims*, but not the *arguments*, must all be specified sufficiently ... in order to allow the defending party ... to know the legal basis of the complaint.”)

<sup>6</sup> See Exhibit 48C (KOR-48C) and *Second US Response* at para. 31.

<sup>7</sup> *Written Rebuttal of Korea* (7 May 2001) at paras. 147-49.

temporary decline in the industry indicators, did not cause imports to increase. Indeed, it caused imports to decline as well. That, of course, is the point.

14. Korea made its claim with respect to unforeseen developments in paragraph 2 of the “Panel Request”<sup>8</sup> and the United States does not deny that it failed to make a finding of unforeseen developments in its determination in violation of Article XIX.<sup>9</sup>

15. Other Questions, Capacity: paragraph 49 of the Second US Response. The United States refers to the ITC questionnaire, which defined average production capability as follows:

*Average production capability.* The level of production that your establishment(s) could reasonably have expected to attain during the specified periods. Assume normal operating conditions (i.e., using equipment and machinery in place and ready to operate; normal operating levels (hours per week/weeks per year) and time for downtime, maintenance, repair, and cleanup; and a typical or representative product mix).<sup>10</sup>

16. The above definition does not impose a uniform methodology on domestic producers. To the contrary, the actual allocation methodology is at the discretion of each producer and explained in the confidential questionnaire responses. The ITC determination makes no mention of the closing of facilities in the second half of 1998. Yet, according to the ITC at Table 5 in its determination, domestic capacity in 1998 and 1999 was as follows:

1 <sup>st</sup> half 1998	2 <sup>nd</sup> half 1998	1 <sup>st</sup> half 1999
656,714	480,668*	708,952
* 1,137,382 (1998 capacity) - 656,714 (1 <sup>st</sup> half 1998) = 480,668		

Source: ITC Report, Table 5, at II-22, KOR-6.

17. It is difficult to believe that 176,046 tons were removed from the domestic industry in the second half of 1998 – but was not noted by the ITC – and then jumped by 228,284 tons (47.5 per cent) in the first half of 1999. That makes no sense, given the nature of the industry in question. Thus, it is appropriate to annualize 1999 data to get an accurate picture of the degree to which capacity increased between 1998 and 1999 – i.e., 25 per cent. Capacity could not increase by 8 per cent between the first half of 1998 and 1999, as alleged by the US. Nor, could it have increased by 47.5 per cent, which is the alleged amount of increase between the second half of 1998 and the first half of 1999. It increased by 25 per cent between 1998 and 1999, partly due to the inauguration of new plants. That increase in capacity was responsible for “leading” prices down.

18. Other Dual-Stencil Line Pipe Questions, paragraphs 50-52 of the Second US Response. The United States suggests that the issue of dual-stencil line pipe was a new issue that was first raised in the Respondent’s Pre-Hearing briefs.

<sup>8</sup> See *U.S. – Safeguard Measures on Line Pipe*, Panel Request, at para. 2.

<sup>9</sup> See *United States - Safeguard Measures on Imports on Fresh, Chilled or Frozen Lamb Meat from New Zealand*, Report of the Appellate Body, WT/DS177/AB/R (1 May 2001) at para. 74.

<sup>10</sup> *General Information, Instructions, and Definitions for Commission Questionnaires*, Circular Welded Carbon Quality Line Pipe, Inv. No. TA-201-70 at 6.

19. The fact is that the issue of the usage of dual-stencil pipe had been well-known to the ITC even before the beginning of the investigation on the instant case. Thus, in its Pre-Hearing Staff Report, the ITC noted as follows concerning dual and triple stencilling by US producers.

In some instances, the assignment of sales values and costs to welded line pipe and standard pipe was complicated by dual (or triple) stenciling. For example, the triple stenciled welded line pipe and standard pipe sold by \*\*\* in 1994 were physically the same product. Under these circumstances, according to company officials, the product's end use is the only practical way to distinguish between welded line pipe and standard pipe.<sup>11</sup>

20. We note that the ITC appears to be treating dual/triple stencilled line pipe produced by domestic producers as line pipe or standard pipe depending on their usage. We further note that the ITC, irrespective of such a prior knowledge, did not ask purchasers to identify what percentage of their sales of dual/triple stencilled pipe were used respectively for standard or line pipes. An incidental point to be made here is ITC's differential treatment of witnesses for petitioners and for respondents. The ITC completely ignored the witness for Korean respondents, whose testimony was also under oath, and whose testimony was further supported by an additional confidential affidavit<sup>12</sup> and actual imports of dual stencil pipe by port.<sup>13</sup>

21. Moreover, it appears that dual-stencilled or triple-stencilled line pipe was not always treated as "line pipe" by the US domestic industry itself. For the purposes of assigning costs and sales, it seems that the US industry based allocations between standard pipe and line pipe based on "end use" of those pipes. Korea finds that this is another distortion in the sales and cost data since the ITC treated all dual-stencilled or triple-stencilled line pipe as "line pipe" in terms of imports. This further highlights the problem with the methodology the ITC used to allocate the cost data.

22. Finally, the ITC routinely follows up and requests information additional to that in the original questionnaires. As the US admits in its response to Panel questions, the ITC specifically requested additional data from the Japanese producers in the case of arctic grade and alloy line pipe, which it treated as "a supplement to the Japanese producers' questionnaire responses."<sup>14</sup> Obviously, that same procedure was not followed with respect to the dual-stencil line pipe issue.

23. Other Questions. The determination of the "competent authorities" and the views of the Commission, Paragraphs 57-63 of the Second US Response.

24. It appears to be the position of the US that the "competent authorities" encompass only the ITC and only those Commissioners that made an affirmative decision on which a safeguard measure can be based.

25. There is no support in the SA for such a narrow reading, and the obligations of the SA are not dependent on the structure of decision-making process in the United States or any other Member State. First, "competent authorities" is clearly a term used to refer to those entities entrusted with the responsibility for safeguards actions. The composition of that entity can not change depending upon the determinations made from one case to another. According to the US theory, the "competent authorities" in the US could be three Commissioners in one case (in case of a 3-3 "affirmative decision") and all six in a unanimous decision. There is no support for such a theory. The SA is

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<sup>11</sup> *Prehearing Staff Report*, Circular Welded Carbon-Quality Line Pipe, Inv. No. TA-201-70 (21 September 1999) at p. I-25; identical language in *ITC Determination, Staff Report* at II-25 (KOR-6).

<sup>12</sup> *See Posthearing Brief of Japanese and Korean Respondents* at Exh. 2 (KOR-25).

<sup>13</sup> *See id.* at Exh. 12 (KOR-62).

<sup>14</sup> *Second US Response* para. 48.

framed in terms of the entity – not individual members of the ITC. Similarly, under the US theory, the President is not encompassed in the “competent authorities,” even though the President is clearly an entity which finally decides whether to take a safeguard measure.

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