BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Definitive Safeguard Measures on Imports of Certain Steel Products

(AB-2003-3)

APPELLEE SUBMISSION OF THE UNITED STATES

September 5, 2003

BEFORE THE
WORLD TRADE ORGANIZATION
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United States – Definitive Safeguard Measures on Imports of Certain Steel Products

(AB-2003-3)

Service List

APPELLANTS

H.E. Mr. Luiz Felipe de Seixas Corrêa, Permanent Mission of Brazil
H.E. Mr. Sun Zhenyu, Permanent Mission of China
H.E. Mr. Carlo Trojan, Permanent Delegation of the European Commission
H.E. Mr. Shotaro Oshima, Permanent Mission of Japan
H.E. Mr. Chung Eui-yong, Permanent Mission of Korea
H.E. Mr. Tim Groser, Permanent Mission of New Zealand
H.E. Mr. Kåre Bryn, Permanent Mission of Norway
H.E. Mr. Pierre-Louis Girard, Permanent Mission of Switzerland

THIRD PARTIES

H.E. Mr. Sergio Marchi, Permanent Mission of Canada
Mr. Ching-Chang Yen, Permanent Mission of Chinese Taipei
H.E. Mr. Jorge Iván Mora Godoy, Permanent Mission of Cuba
H.E. Mr. Eduardo Pérez Motta, Permanent Mission of Mexico
H.E. Mrs. Puangrat Asavapisit, Permanent Mission of Thailand
H.E. Mr. Mehmet Görkay, Permanent Mission of Turkey
H.E. Mrs. Blancanieve Portocarrero, Permanent Mission of Venezuela

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Australia – Salmon	*Australia – Measures Affecting Importation of Salmon*, Appellate Body Report, WT/DS18/AB/R, adopted 6 November 1998
Canada – Automotive Measures	*Canada – Certain Measures Affecting the Automotive Industry*, Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000
Canada – Dairy (Art. 21.5)	*Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products, Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW, WT/DS113/AB/RW, adopted 18 December 2001
EC – Asbestos	*European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, Appellate Body Report, WT/DS135/AB/R, adopted 5 April 2001
Korea – Beef	*Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Appellate Body Report, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001
Korea – Dairy	*Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, Appellate Body Report, WT/DS98/AB/R, adopted 12 January 2000
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US – Lamb Meat	*United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, Appellate Body Report, WT/DS177/AB/R, adopted 16 May 2001
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US – Section 211	*United States – Section 211 Omnibus Appropriations Act of 1998*, Appellate Body Report, WT/DS176/AB/R, adopted 1 February 2002

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Short title	Date and nature of submission
[Party] first oral statement	Oral statement by [party] at the first substantive meeting of the Panel with the Parties, October 29-31, 2002.
[Party] first written submission	Written submissions by [complaining party], submitted on August 30, 2002
[Party] Other Appellant's Submission	Other Appellant's Submission by [complaining party], submitted on August 26, 2003
[Party], Responses to the Panel's Questions for the Parties	Responses by [party] to questions from the Panel to the parties at the first substantive meeting of the Panel, submitted on November 12, 2002
[Party], Responses to the Panel's Second Set of Questions	Responses by [party] to questions from the Panel to the parties at the first substantive meeting of the Panel, submitted on January 6, 2003
[Party] second oral statement	Oral statement at the second substantive meeting of the Panel with the Parties, December 10-12, 2002.
[Party] second written submission	Written submission by [party], submitted on November 26, 2002
U.S. first written submission	Written submission by the United States, submitted on October 4, 2002
U.S. Response to Other Parties' Questions	United States Response to Questions from the Other Parties, submitted on November 15, 2002

I. INTRODUCTION

1. Pursuant to Rule 22(1) of the Working Procedures for Appellate Review, the United States responds to the submissions filed on 26 August 2003 by the European Communities ("EC"), Japan, Korea, China, Switzerland, Norway, New Zealand, and Brazil (collectively, "Complainants") pursuant to Rule 23 of the Working Procedures for Appellate Review challenging certain findings of the Panel in *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*.

II. EXECUTIVE SUMMARY

2. The Appellate Body has consistently found that it can only complete the analysis of issues that a panel has not resolved if the panel's findings of fact or undisputed facts on the panel record provide a sufficient factual basis to perform the necessary analysis. For the most part, Complainants have ignored this central requirement in their conditional appeals. Although they have conditionally appealed three issues – like product, the first sentence of Article 5.1[1] of the WTO *Agreement on Safeguards* ("Safeguards Agreement"),[2] and the Article 9.1 exclusion of developing countries – only one of the six Other Appellant's Submissions even attempts to address this threshold question. It does so only with regard to like product issues and, even in that limited sphere, provides a cursory analysis that ignores the factual issues that were hotly disputed and necessary for resolution of Complainants' like product arguments. Complainants also disregard the Appellate Body's instruction that novel questions – a category that certainly includes the appeals as to Article 9.1 – are not appropriate for the Appellate Body to address absent findings by a panel. Therefore, if the Appellate Body grants the United States' appeals, it should not continue on to address Complainants' conditional appeals.

3. The first set of issues on which Complainants request that the Appellate Body complete the legal analysis not undertaken by the Panel pertains to the manner in which they believe the United States should have defined certain imported products, like products, and domestic industries. Both the Complainants' submissions to the Appellate Body and the United States' submissions to the Panel underscore that the Complainants' arguments concerning like product questions encompass numerous factual issues.

4. The Appellate Body therefore cannot address these arguments absent some evidentiary basis. The Panel, however, made no findings with respect to Complainants' factual contentions concerning like product issues. It simply stated that it would not examine the Complainants' underlying arguments on the basis of judicial economy. There are also not any undisputed findings of record pertinent to these arguments. The contrary assertion of Japan, Korea, and

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[1] Complainants' conditional appeal involves only the first sentence of Article 5.1. Accordingly, all references to Article 5.1 in this submission refer only to the first sentence of that Article.

[2] Unless otherwise indicated, all citations to Article numbers in this submission are to the Safeguards Agreement.

Brazil, which is unsupported by the record, disregards the findings of the U.S. International Trade Commission ("ITC") and the positions the United States articulated before the Panel.

5. There are no findings or undisputed facts to which the Appellate Body can refer to decide issues that are integral to Complainants' arguments concerning the ITC's handling of the like product issues. Consequently, the Appellate Body must decline to complete the legal analysis of these arguments.

6. The second contingent appeal regards Article 5.1 arguments that Complainants made to the Panel, which they ask the Appellate Body to address only if it "should reverse sufficient of the Panel's findings as to undermine its conclusion that there is no legal basis for taking any of the U.S. safeguard measures." However, if the Appellate Body grants the relief requested by the United States for any one of the steel safeguard measures, any remaining Article 5.1 issue related to that measure would be impossible to resolve without making factual findings.

7. For example, Complainants frequently based their Article 5.1 arguments on alleged inconsistencies with Article 4.2(b) that they asserted. These would obviously be inapplicable if the Appellate Body reversed the Panel's adverse Article 4.2(b) findings. Complainants also argued frequently that the ITC or the U.S. President failed to provide an "explanation" at the time of taking the steel safeguard measures of how the measures complied with Article 5.1. The Panel found, without an appeal from Complainants, that the Safeguards Agreement does not require such an explanation at any time prior to the dispute settlement process. The remaining arguments raised by Complainants rest to some degree on findings of fact or undisputed facts that the Panel Report and Panel record do not provide. But, just as importantly, the United States presented two exercises indicating that each of the steel safeguard measures complied with Article 5.1. Even if one of Complainants' arguments could be considered to meet their burden of proof (and the U.S. submissions establish that they did not) no final conclusion as to Article 5.1 consistency could be reached without evaluating whether the U.S. demonstration rebutted Complainants' arguments.

8. Resolving this question would require *facts*, including:

- identification of data indicating the industry's condition absent the injury attributable to increased imports;
- identification of data relevant to ensuring that injury attributable to other factors is not attributed to increased imports; and
- identification of data needed to estimate the effect of the safeguard measures.

The Panel did not address the challenges to the level of the measures applied by the United States, so it did not make any findings of fact on these and other issues related to Article 5.1.

The parties never agreed on any of these questions, either. Therefore, there simply is not a factual basis for the Appellate Body to complete the Panel's Article 5.1 analysis.

9. The third contingent appeal regards the Article 9.1 arguments that China made to the Panel. However, there is absolutely no reason for the Appellate Body to reach the substance of China's claim – that it is a developing country for purposes of Article 9.1. The arguments China made before the Panel did not establish *any* basis for the Panel to rule in its favor. In fact, China presented *no facts at all* to establish that it is a developing country Member. Therefore, the proper conclusion is that China failed to meet its burden of proof.

10. However, the most important point is that the identification of developing country WTO Members is a novel and complex issue that the Panel never reached. It is just the type of issue for which the Appellate Body found in *EC – Asbestos*, "[i]n light of their novel character, we consider that Canada's claims . . . have not been explored before us in depth. As the Panel did not address these claims, there are no "issues of law" or "legal interpretations" regarding them to be analyzed by the parties, and reviewed by us under Article 17.6 of the DSU.[3] We ask the Appellate Body to reach the same conclusion with regard to China's Article 9.1 claims.

11. Should the Appellate Body decide that it must address the Article 9.1 arguments raised by China, it should consider the U.S. responses to those arguments, which demonstrated that China failed to establish any inconsistency between the U.S. safeguard measures and Article 9.1. The *only* support for its assertion consisted of statements made by individual Members and reflected in China's Protocol of Accession. In China's view, these documents reflect a general rule that China is a developing country, unless some other treatment is specifically provided. However, they show the opposite – that Members advocated a "pragmatic approach" to China's treatment, which would differ from agreement to agreement. Since the accession materials do not specify China's treatment under the Safeguards Agreement, they do not obligate Members to treat China as a developing country Member under Article 9.1.

III. ARGUMENT

A. The Complainants' Conditional Appeals on Like Product, Article 5.1, and Article 9.1 Do Not Satisfy the Satisfy the Prerequisites for the Appellate Body to Complete the Panel's Analysis.

12. The Appellate Body has stated, again and again, that it can only complete the analysis of issues that a panel has not resolved if the panel's findings of fact or undisputed facts on the panel record provide a sufficient factual basis to perform the necessary analysis. For the most part, Complainants have ignored this central requirement in their conditional appeals. Although they have conditionally appealed three issues – like product, Article 5.1, and the Article 9.1 exclusion

[3] *EC – Asbestos*, AB Report, para. 82.

of developing countries – only one of the six other appellant's submissions even attempts to address this threshold question. It does so only with regard to like product issues and, even in that limited sphere, provides a cursory analysis that ignores the factual issues that were hotly disputed and necessary for resolution of Complainants' like product arguments.[4] Complainants also disregard the Appellate Body's instruction that novel questions – a category that certainly includes the appeals as to Article 9.1 – are not appropriate for the Appellate Body to address absent findings by a panel. Therefore, if the Appellate Body grants the United States' appeals, it should not continue on to address Complainants' conditional appeals.

13. Article 17.6 of the DSU states unequivocally that "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." Thus, findings of fact do not fall within the Appellate Body's mandate. As a consequence, the Appellate Body has recognized that it may "complete the analysis" of an issue that the Panel has not addressed only in limited circumstances:

> In the past, we have completed the analysis where there were sufficient factual findings in the panel report or undisputed facts in the panel record to enable us to do so, and we have not completed the analysis where there were not.[5]

The Appellate Body has reiterated this principle in a number of reports.[6] It extends equally to disputes involving safeguard measures, as the Appellate Body noted when it found in *Korea – Dairy* that:

> [i]n the absence of any factual findings by the Panel or undisputed facts in the Panel record relating to whether the alleged increase in imports was, indeed, "a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions …", we are not in a position, within the scope of our mandate set forth in Article 17 of the DSU, to complete the analysis and make a determination as to whether Korea acted inconsistently with its obligations under Article XIX:1(a). Accordingly, we are unable to come to a conclusion on whether or not Korea violated its obligations under Article XIX:1(a) of the GATT 1994.[7]

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[4] Japan, Korea, and Brazil Other Appellants' Submission, para. 25.

[5] *US – Section 211*, AB Report, para. 343 (citations omitted).

[6] *Australia – Salmon*, AB Report, para. 118; *Canada – Dairy (Art. 21.5)*, AB Report, para. 98; *Canada – Automotive Measures*, AB Report, para. 133; *Korea – Beef*, AB Report, para. 128-129.

[7] *Korea – Dairy*, AB Report, para. 92.

14. The Appellate Body found further in *EC – Asbestos* that "[t]he need for sufficient facts is not the only limit on our ability to complete the legal analysis in any given case,"[8] and concluded that:

> As the Panel decided not to examine Canada's four claims under the *TBT Agreement*, it made no findings, at all, regarding any of these claims. Moreover, the meaning of the different obligations in the *TBT Agreement* has not previously been the subject of any interpretation or application by either panels or the Appellate Body. . . .
>
> In light of their novel character, we consider that Canada's claims under the *TBT Agreement* have not been explored before us in depth. As the Panel did not address these claims, there are no "issues of law" or "legal interpretations" regarding them to be analyzed by the parties, and reviewed by us under Article 17.6 of the DSU.[9]

15. Thus, it is not sufficient, as Complainants have done, to merely identify issues that the Panel did not address. It is necessary to establish that the resolution of those issues would not involve the Appellate Body in impermissible findings of fact or would otherwise be inappropriate. The following sections will demonstrate why, under the criteria enunciated in past reports, there is no basis in this appeal to complete the Panel's analysis with regard to like product, Article 5.1, or Article 9.1.

B. There Is No Basis for the Appellate Body to Complete the Analysis of Complainants' Claims Pertaining to Like Product Issues.

16. The first set of issues on which Complainants request that the Appellate Body complete the legal analysis not undertaken by the Panel, should the Appellate Body grant the appeal of the United States, pertains to the manner that they believe the United States should have defined certain imported products, like products, and domestic industries. As Complainants recognize, these are interrelated issues. Article 2.1 refers to a "product being imported" causing serious injury or threat of serious injury "to the domestic industry that produces like or directly competitive products." Article 4.1(c) defines the domestic industry as "the producers as a whole of the like or directly competitive products. . . . " We refer to these collectively as "like product" issues.

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[8] *EC – Asbestos*, AB Report, para. 79.

[9] *EC - Asbestos*, AB Report, paras. 81-82.

17. It is clear that, with respect to Complainants' claims concerning the ITC's handling of like product questions, the facts matter.[10] Even a cursory examination of the Complainants' submissions to the Appellate Body underscores this point. For example, the EC and Switzerland emphasize that like product definitions "must be coherent and not contain gaps."[11] Evaluating whether a product definition is "coherent" cannot be done in the absence of facts concerning the merchandise at issue. In the same vein, Japan, Korea, and Brazil include a chart in their submission purporting to show whether certain products are or are not "like" each other.[12] Again, this does not involve a question of legal interpretation. It involves a question of fact.

18. The United States similarly emphasized the fact-based nature of the ITC's like product analysis repeatedly before the Panel. Examples of such U.S. arguments appear in paragraph after paragraph of the Panel Reports:

- The U.S. argument that "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 factors appropriate for the context and facts of this particular investigation, made its like product definitions."[13]

- "The United States further submits that any like product analysis must be based on an evidentiary record."[14]

- The U.S. argument that "[t]he process of defining the domestic like product and the corresponding specific imported product is based on the facts in each particular case. . . ."[15]

- "The United States stresses that in defining the domestic like product, the USITC started with the imported article (or articles) that had already been identified in the

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[10] The Appellate Body recognized this proposition, in another context, in *EC – Asbestos*. There one of the pertinent issues involved the appropriate definition of "like products" under Article III:4 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). The Appellate Body emphasized the fact-based, case-by-case nature of the analysis, stating that any legal criteria used in the evaluation of likeness are "simply tools to assist in the task of sorting and examining the relevant evidence." *Ibid.*, AB Report, paras. 102-03.

[11] EC Other Appellant's Submission, para. 16; Switzerland Other Appellant's Submission, para. 7(ii).

[12] Japan, Korea, and Brazil Other Appellants' Submission, fig. 1.

[13] Panel Reports, para. 7.205.

[14] Panel Reports, para. 7.210.

[15] Panel Reports, para. 7.242.

request or petition for investigation ('subject imports') and examined the evidence in order to determine the domestic product(s) that are like the subject imported product(s)."[16]

- "The United States insists that the definitions are based on the application of the like product criteria to the particular facts involved. Where the facts differ the definitions will differ."[17]

19. Consequently, the submissions of both the Complainants and the United States make clear that the Appellate Body cannot meaningfully address the Complainants' claims concerning the ITC's handling of like product issues absent some evidentiary basis. And because the Appellate Body does not have the authority to make findings of fact, that evidentiary basis must exist elsewhere. All but one of the Complainants' submissions simply ignore this issue and the remaining submission does not indicate where such an evidentiary basis may exist.

20. The Panel Reports clearly fail to provide any evidentiary basis. The Panel made no findings with respect to Complainants' factual contentions concerning the ITC's like product definitions. It simply stated that it would not examine the Complainants' claims in this regard on the basis of judicial economy.[18] Complainants do not argue to the contrary. Nor do they, or could they, contend that Panel findings with respect to their other claims are pertinent to their claims concerning the like product definitions.[19]

21. There are also not any undisputed findings of record pertinent to the Complainants' claims concerning the ITC like product definitions. Japan, Korea, and Brazil claim in their submission that:

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[16] Panel Reports, para. 7.256.

[17] Panel Reports, para. 7.412.

[18] Panel Reports, para. 10.709. By contrast, in *EC – Asbestos*, where the Appellate Body did complete a "like product" analysis under Article III of GATT 1994 after reversing the Panel, it emphasized that the Panel provided factual findings. *EC – Asbestos*, AB Report, para. 133.

[19] Although the Panel did include a discussion of the certain carbon flat-rolled steel ("CCFRS") like product definition in its causation analysis, the Panel emphasized that it was not evaluating the Complainants' arguments under Articles 2.1 and 4.1(c) of the Safeguards Agreement. Panel Reports, para. 10.413. Moreover, even in those discussions, the Panel failed to provide any factual findings or evidentiary analysis to support its broad and conclusory findings, including its finding that the ITC's choice of like product for CCFRS prevented the ITC from properly assessing the "locus of competition" in the CCFRS market. *Ibid.*, paras. 10.378, 10.417. As a result, even in these discussions, the Panel's report is simply devoid of any factual or evidentiary findings that could allow the Appellate Body to complete the analysis on the like product issue.

> [t]he parties agree that the products composing the ITC's CCFRS product category are distinct. They have different physical properties, end uses, consumer tastes and habits, customer treatment, and production processes.[20]

Japan, Korea, and Brazil cite nothing that supports their contention that the United States agrees with this characterization of the evidence in the record. To the contrary, their suggestion that the United States and the Complainants agree on the facts disregards the findings of the ITC and the positions the United States articulated before the Panel.

22. For example, in one single Panel submission – the second written submission – the United States devoted no fewer than 11 separate paragraphs to describe why the record supported the ITC's conclusion that certain carbon flat rolled steel CCFRS at various stages of processing shares many common characteristics.[21] Indeed, in wording almost exactly contrary to that of the purported "agreement" articulated by Japan, Korea, and Brazil, the United States explained that:

> The ITC found that CCFRS at various stages of processing shared certain physical characteristics, were interrelated, had common end-uses, were generally distributed through the same marketing channels, and were essentially made through the same production processes (at least at the initial stages).[22]

23. The United States then undertook in its second written submission a detailed analysis of the evidence supporting these conclusions.[23] Not surprisingly, the United States' characterization of this evidence is diametrically different from the manner in which Japan, Korea, and Brazil characterize the evidence in their submission to the Appellate Body. For example, Japan, Korea, and Brazil assert that "[t]he ITC observed different physical properties among the CCFRS products."[24] This directly contradicts the U.S. argument that "the ITC found that CCFRS at different stages of processing share basic physical properties and are interrelated to a certain degree."[25] Similarly, Japan, Korea, and Brazil contend that "[t]he ITC observed that the distinct

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[20] Japan, Korea, and Brazil Other Appellants' Submission, para. 25.

[21] U.S. second written submission, paras. 77-87. For further discussion concerning this issue, *see* U.S. first written submission, paras. 116-142; United States, Responses to the Panel's Questions for the Parties, questions 26, 29, 60, 67, 146, 147, 149; United States, Responses to the Panel's Second Set of Questions, question 12.

[22] U.S. second written submission, para. 78.

[23] U.S. second written submission, paras. 79-87.

[24] Japan, Korea, and Brazil Other Appellants' Submission, para. 25.

[25] U.S. second written submission, para. 79.

CCFRS products have different end uses and are not interchangeable."[26] In fact, what the United States showed to the Panel was that "the ITC found that the evidence demonstrated that in some situations, there may be some substitution for use between products from one stage to another . . . ."[27] Consequently, the facts that Japan, Brazil, and Korea now claim are not in dispute were in fact seriously disputed before the Panel. And the Panel made no findings to resolve the disputes.

24. The situation is similar with respect to certain welded pipe, the only other like product definition referenced in the Complainants' submissions to the Appellate Body.[28] In its written submissions, the United States described the factual basis supporting its conclusion concerning the commonality of items within the certain welded pipe like product.[29] Before the Panel, Korea and Switzerland disputed this factual basis.[30]

25. Indeed, the Panel Reports indicate that there is a basic factual dispute with respect to *every* like product claim raised by the Complainants – namely, whether "standard" definitions of the steel products at issue exist, and, if so, what these definitions are. As the United States demonstrated to the Panel:

> the complainants' varied and inconsistent arguments regarding the appropriate definitions of like product demonstrate that no such universal definitions of steel products exist. . . . This begs the question of how the complainants know that the USITC's definitions were too broad if complainants cannot reach a consensus on any alternative definition.[31]

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[26] Japan, Korea, and Brazil Other Appellants' Submission, para. 25.

[27] U.S. second written submission, para. 84.

[28] The EC and Switzerland contend that their arguments apply to all ten products on which safeguards were imposed. *See* EC Other Appellant's Submission, para. 14; Switzerland Other Appellant's Submission, para. 5. They disregard that no Complainant submitted any argument to the Panel challenging the majority of the ITC's like product definitions. In particular, no argument was asserted by any Complainant concerning the ITC's definition of hot-rolled bar, cold-finished bar, rebar, stainless steel bar, stainless steel wire, and stainless steel rod. *Cf.* Panel Reports, paras. 7.350, 7.353-7.482 (indicating product-specific arguments asserted only for CCFRS, tin mill, welded pipe, and fittings, flanges and tool joints ("FFTJ")). Because the Complainants asserted no arguments to the Panel concerning these definitions, they may not attempt to do so before the Appellate Body.

[29] U.S. second written submission, paras. 88-91; U.S. first written submission, paras. 156-171; United States, Responses to the Panel's Questions for the Parties, questions 146, 148.

[30] *See* Panel Reports, paras. 7.448-7.476.

[31] Panel Reports, para. 7.248.

That such threshold factual issues remain unresolved underscores the pervasive and wide-ranging nature of the factual disputes between the parties – including among the Complainants themselves – concerning the ITC's like product definitions.[32]

26. Any resolution of the Complainants' claims pertaining to the ITC's definitions of like product would require an analysis of the underlying factual information in the record. The parties' submissions indicate that the United States and the Complainants have characterized the pertinent facts quite differently. The Panel, invoking judicial economy, declined to make findings to resolve these differences. The Appellate Body, whose mandate does not extend to making factual findings, cannot resolve these differences. Consequently, there is no basis to complete the legal analysis of the Complainants' claims concerning like product.

27. Complainants' legal claims involve intertwined factual and legal issues.[33] Even if the issues of fact could be severed from the claims – which they cannot – the issues of law are neither simple nor straightforward. It is telling that Complainants cannot succinctly describe the legal issues that they would have the Appellate Body resolve in their "conditional" cross-appeals. Indeed, both the EC and Switzerland essentially acknowledge as much by stating that "[t]he different claims and arguments relating to the proper definition of the imported product and the domestic industry producing the like or directly competitive product are complex."[34] The parties' arguments concerning the ITC's like product definitions are in fact so complex that the Panel Report required over 275 paragraphs merely to summarize them.[35]

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[32] For example, Korea claimed that the ITC's welded pipe like product involved two principal categories distinguished by size: welded pipe over 16 inches in diameter, and welded pipe under 16 inches in diameter. Panel Reports, para. 7.448. By contrast, Switzerland divided welded pipe into three principal categories distinguished by end use: pipes used to conduct fluids, mechanical tubes, and precision tubes. *Ibid.*, para. 7.456.

[33] As in prior disputes concerning U.S. safeguards measures, Complainants here are challenging particular measures, not U.S. law generally. *Compare U.S. – Line Pipe*, AB Report, paras. 76-77; *U.S. – Lamb Meat*, AB Report, para. 173. Consequently, as the United States emphasized to the Panel, the only basis on which to consider "whether Complainants have met their burden of proof with respect to like product is to examine whether the *specific factual findings* made by the ITC with respect to each of the contested like product findings cannot support a finding of 'likeness' consistent with ordinary meaning of the Safeguards Agreement, in its context and in light of the object and purpose of the agreement." U.S. second written submission, para. 29 (emphasis added).

[34] EC Other Appellant Submission, para. 15; Switzerland Other Appellant Submission, para. 7.

[35] *See* Panel Reports, paras. 7.200-7.482. Should the Appellate Body decide that it must address the arguments raised by Complainants concerning the ITC's like product definitions, it should consider the U.S. response to those arguments. *See* U.S. first written submission, paras.

28. Any resolution of the Complainants' claims pertaining to the ITC's definitions of like product would require an analysis of the underlying factual information in the record. As explained above, there are no findings or undisputed facts to which the Appellate Body can refer to decide issues that are integral to the Complainants' arguments. Consequently, there is no basis to complete the legal analysis the Panel did not undertake, for reasons of judicial economy, on Complainants' claims pertaining to the ITC's definition of like product.

C. Completing the Analysis Regarding Complainants' Article 5.1 Arguments Would Require the Appellate Body to Make Findings of Fact.

1. Addressing Complainants' Conditional Appeals Would Require Findings of Fact or Uncontested Facts.

29. Complainants ask the Appellate Body to address their Article 5.1 arguments only if "the Appellate Body should reverse sufficient of the Panel's findings as to undermine its conclusion that there is no legal basis for taking any of the U.S. safeguard measures."[36] However, if the Appellate Body grants the relief requested by the United States for any one of the steel safeguard measures, any remaining Article 5.1 issue related to that measure would be impossible to resolve without making factual findings.

30. At least one of Complainants' Article 5.1 arguments would become moot. The argument they raised most frequently before the Panel was that because the ITC failed to separate and distinguish injury caused by other factors from injury caused by imports, as required under

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63-171;U.S. Responses to the Panel's Questions for the Parties, questions 19-31, 59-69, 144-151; U.S. second written submission, paras. 43-91; U.S. Responses to the Panel's Second Set of Questions, questions 11-13, 18-22.

[36] EC Other Appellant's Submission, para. 6, China Other Appellant's Submission, para. 3; Switzerland Other Appellant's Submission, para. 3; Norway Other Appellant's Submission, para. 3; New Zealand Other Appellant's Submission, para. 1.1. The triggering event for Japan, Korea, and Brazil's conditional appeal regarding Article 5.1 is unclear. They ask the Appellate Body to complete the Panel's Article 5.1 analysis: (1) if it "upholds the Panel findings on causation," (2) "modifies the conclusions of the Panel with respect to causation errors on the basis of new reasoning not employed by the Panel," or (3) "if the Appellate Body reverses the findings of the Panel with respect to increased imports and causation." Japan, Korea, and Brazil Other Appellants' Submission, paras. 2-3. Uphold, modify, and reverse comprise the universe of actions the Appellate Body could take regarding causation, which would seem to suggest that these parties' Article 5.1 arguments are triggered regardless of what the Appellate Body does regarding that issue. That, of course, cannot have been the intent, as Complainants have emphasized that their appeals are conditional. In any event, the "conditions" for the conditional appeals do not affect the analysis presented in this section.

Article 4.2(b), the measures were presumed to be inconsistent with Article 5.1.[37] But, since Complainants' Article 5.1 appeal is contingent on the Appellate Body finding that the ITC determination was consistent with Article 4.2(b), a finding in favor of the United States would dispose of any presumption of inconsistency with Article 5.1.

31. The Panel actually resolved the second most frequent argument raised by Complainants: that the United States acted inconsistently with Articles 3.1 and 5.1 because, at the time of the application of the steel safeguard measures, neither the ITC nor the President published an explanation of how the measures complied with Article 5.1.[38] As the Appellate Body did in *US – Line Pipe*, the Panel rejected the view that a Member must demonstrate its observance of Article 5.1 through a public statement contemporaneous with taking a safeguard measure, stating that

> [t]he situation is different . . . when assessing whether the measures were applied only to the extent necessary to prevent the serious injury caused by increased imports. In that situation, it is before the Panel, during the WTO dispute settlement process, that the importing Member is forced for the first time to respond to allegations relating to the level and extent of its safeguard measures . . . .
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> In that second enquiry, the Panel is thus reviewing whether the measures "as applied" comply with the requirements of Articles 5, 7, 8 and 9 of the Agreement on Safeguards on the basis of the evidence and arguments put forward by the parties during the WTO dispute settlement process.[39]

Complainants have not appealed this finding. Since the Panel disposed of Complainants' claims in this regard, there is no analysis for the Appellate Body to complete, and it need not address these arguments in a contingent appeal.

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[37] *E.g.*, EC first written submission, paras. 592-593; Japan first written submission, para. 322; Korea first written submission, paras. 217-219; China first written submission, paras. 249-250; Norway first written submission, paras. 351-352; Switzerland first written submission, paras. 315-316; New Zealand first written submission, para. 4.199. In any event, this argument does not apply to stainless steel rod, as Complainants have not appealed the Panel's rejection of their challenges to the ITC causation analysis for that product.

[38] *E.g.*, Japan first written submission, paras. 325, 327-328; Korea first written submission, paras. 204-207, and 213 (CCFRS, tin mill, and welded pipe); Brazil first written submission, paras. 239-241; Norway first written submission, paras. 354-357; New Zealand first written submission, paras. 4.203-4.204.

[39] Panel Reports, paras. 10.26-10.27, *US – Line Pipe*, AB Report, paras. 233-234.

32. The remainder of Complainants' arguments are impossible to resolve in the absence of findings by the Panel or a consensus among the parties on the necessary facts. For example, several Complainants argued that the ITC's findings regarding its recommended safeguard measures were inconsistent with Article 5.1, or observed that the safeguard measures on some (but not all) of the steel products applied higher tariff levels than those recommended by the ITC.[40] They contended that the ITC findings demarcated the full extent of serious injury and the need to facilitate adjustment, and that any measure at a higher level would necessarily be inconsistent with Article 5.1.[41] However, the ITC's statements regarding its remedy recommendation simply were not relevant, as the ITC never suggested that its recommendations were the highest consistent with U.S. international obligations.[42] In addition, the arguments raised by Complainants also involved factual questions, such as the level of a measure necessary to prevent or remedy serious injury and to facilitate adjustment, that were not settled by the Panel and that the parties did not agree upon.

33. Complainants have not even attempted to portray their arguments as being independent of factual findings or agreed facts. Indeed, they cannot. But in any event, it is beyond dispute that the U.S. demonstration that the measures were consistent with Article 5.1 did rely on facts.[43] The United States presented two exercises, each of which demonstrated independently that the individual steel safeguard measures did comply with Article 5.1. The first of these, the "numerical exercise," estimated the supplemental duty that would be necessary to counteract the revenue loss to domestic producers that was attributable to increased imports. That process indicated that for each product, the supplemental duty applied by the United States was equivalent to or lower than the level estimated as necessary. The second exercise, the "modeling exercise," used an economic model to estimate revenue loss to U.S. producers that was attributable to increased imports and compared it to the estimated revenue gain associated with

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[40] Under U.S. law, the ITC recommends a safeguard measure for the President to take. The recommendation has no independent legal effect – the President is free to modify it or to disregard it completely in choosing the measure the United States will apply.

[41] *E.g.*, Japan first written submission, 323-326; Brazil first written submission, paras. 242-246; China first written submission, paras. 551-555; Switzerland first written submission, paras. 317-320; New Zealand first written submission, para. 4.200

[42] United States, Responses to the Panel's Questions to the Parties, paras. 197-198; U.S. second written submission, paras. 204-205; United States, Responses to the Panel's Second Set of Questions, paras. 115-116, 134-135.

[43] The United States demonstrated in its submissions that Complainants' arguments did not establish any inconsistency with the Safeguards Agreement. *See infra*, footnote 16. It presented the demonstration of consistency with Article 5.1 solely as a further demonstration that those arguments were invalid.

the supplemental duties. In each case, the estimated revenue gain associated with the safeguard measure was equivalent to or less than the revenue loss associated with increased imports.[44]

34. The key point is that completion of the Article 5.1 analysis requires an evaluation of the U.S. numerical exercise and modeling exercise. This is obviously the case for Complainants' arguments related to the exercises.[45] However, any evaluation of whether one of the safeguard measure was consistent with Article 5.1 would have to address the United States' affirmative demonstration that this was the case. And, any analysis of the numerical and modeling exercises requires *facts*, including:

- identification of data indicating the industry's condition absent the injury attributable to increased imports;
- identification of data relevant to ensuring that injury attributable to other factors is not attributed to increased imports; and
- identification of data needed to estimate the effect of the safeguard measures.

The next section will show that the Panel proceedings did not yield findings or undisputed facts sufficient for the Appellate Body to address these questions.

2. The Panel Did Not Make *Any* Findings of Fact and the Record Does Not Contain Undisputed Facts Sufficient to Complete the Analysis of Complainants' Article 5.1 Claims

35. Outside its single finding regarding *when* a Member may establish that it observed the requirements of Article 5.1, the Panel made *no* findings – factual or otherwise – related to consistency with Article 5.1. The record standing alone does not provide a sufficient factual basis for the Appellate Body to reach any conclusions, as the parties were in disagreement about the facts necessary to resolve the arguments.

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[44] Paragraphs 1055 through 1204 of the U.S. first written submission describe the exercises in detail. A review of these descriptions demonstrates that there is no truth to some of Complainants' rhetorical claim that the U.S. exercise "is composed of a series of calculations which contain no narrative explanation." EC Other Appellant's Submission, para. 28; Japan, Korea, and Brazil Other Appellants' Submission, para. 11; China Other Appellant's Submission, para. 5; Switzerland Other Appellant's Submission, para. 16; Norway Other Appellant's Submission, para. 42.

[45] *E.g.*, EC second written submission, paras. 513-517, 522-526; Korea second written submission, paras. 247-273 and Exhibit 14.

36. The United States based both the numerical exercise and the modeling exercise on data from the ITC Report and supporting materials. While there was, and is, no dispute among the parties as to the accuracy or impartiality of the ITC data used in these exercises, the parties disagreed on a number of issues relating to the manner in which that data was incorporated into and used in the exercises as well as the extent to which the data accurately reflected the manner in which injury had been caused by imports or other factors. There were also disagreements over how to reflect the effect that imports and other factors had on the relevant domestic industries and the effect that safeguard measures might have.

Choice of the base year

37. The U.S. numerical exercise began the estimation of the adverse effect of imports on U.S. producers' prices by using a base year during the investigation period before imports began to increase, but in which other factors that might affect the industry were already present. Thus, as a starting point, any decrease in domestic producers' prices after the base year could be attributed to imports. Since the domestic industries producing each product experienced different conditions of competition and different import patterns, the United States chose different base years (and explained the choices) for each product.[46] Some of the complainants vigorously disputed the base years chosen for CCFRS, hot-rolled bar, cold-finished bar, rebar, and welded pipe.[47]

Reflecting the effect of factors other than imports

38. The U.S. numerical exercise recognized that the choice of a base year might not weed out the effects of factors other than imports, especially if a factor first developed, or became more pronounced, after the base year. The United States made several adjustments to the numerical exercise to account for those types of factors. Some of the Complainants objected to the method chosen to make those adjustments for CCFRS, hot-rolled bar, rebar, welded pipe, stainless steel bar, and stainless steel rod.[48]

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[46] U.S. first written submission, paras. 1055-1080, 1085-1204.

[47] EC second written submission, paras. 423, 534, 537, 541, and 543; Korea second written submission, para. 252; Switzerland second written submission, para. 117; Korea, Response to the Panel's Second Set of Questions, paras. 86 and 88.

[48] EC second written submission, paras. 526, 535, 541, 549, and 551; Korea second written submission, para. 253; Norway, Response to the Panel's Questions for the Parties, no. 53; Korea, Responses to the Panel's Second Set of Questions, paras. 86-87, 91.

Whether certain data adequately reflected industry conditions

39. The ITC Report contained data on both unit values and prices for specific items within each product. The numerical exercise was based generally on the unit value data, which covered all products. However, for some products, the ITC indicated that the item-specific data reflected industry conditions more reliably than unit values, and the numerical exercise used the item-specific data instead. The ITC did not make such findings for CCFRS and welded pipe. However, some of the Complainants argued that the unit values did not accurately reflect competitive conditions for CCFRS and welded pipe.[49]

Potential effects of the measures

40. The United States demonstrated Article 5.1 consistency for eight of the domestic industries based on estimated price effects, and for the other two domestic industries based on volume effects.[50] Korea argued that the effects would be different from those discussed by the United States.[51] Korea also disagreed with some of the estimated elasticities that the United States used in the modeling exercise.[52]

41. Questions of what years most closely reflect the condition of the industry absent the injurious effects of imports, what data accurately reflect other factors causing injury, the elasticity of substitution, or any of the other topics noted briefly above require factual findings. These are not the only areas of disagreement over facts. Making findings of this type is exclusively the province of a panel, and the Panel in this dispute plainly did not make them. Therefore, there is no basis to complete the Panel's analysis regarding Article 5.1.[53]

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[49] Korea, second written submission, para. 251; Japan, Responses to the Panel's Questions for the Parties, no. 53; Korea, Responses to the Panel's Questions for the Parties, paras. 82-84.

[50] The numerical exercises based on the impact of increased imports on domestic producers' prices did not attempt to make an additional allowance for the effect of imports on the volume of goods sold. Similarly, the numerical exercises based on volume effects did not make an additional allowance for the effects of imports on prices.

[51] Korea second written submission, paras. 269-370; Korea, Responses to the Panel's Second Set of Questions, para. 76.

[52] *Ibid.*

[53] Should the Appellate Body nonetheless decide to grant Complainants' request, we ask it to consider the arguments on this issue that the United States made to the Panel, which demonstrate that the steel safeguard measures were fully consistent with Article 5.1. U.S. first written submission, paras. 1018-1214; U.S. first oral statement, paras. 173-179; United States, Responses to the Panel's Questions for the Parties, paras. 186-201, 299-307; U.S. second written

D. Article 9.1 and the Qualification of Members as Developing Countries are Novel Issues that There is No Need to Address if it Makes Findings in Favor of the United States.

42. China asks the Appellate Body to address its Article 9.1 arguments only if the Appellate Body should reverse sufficient of the Panel's findings as to undermine its conclusion that there was no legal basis for taking any of the U.S. safeguard measures.[54] However, there is absolutely no reason for the Appellate Body to reach the substance of China's claim – that it is a developing country for purposes of Article 9.1. The arguments China made before the Panel did not establish any basis for the Panel to rule in its favor. In fact, China presented *no facts at all* to establish that it is a developing country Member. Therefore, if the Panel decides to complete the Panel's analysis, the proper conclusion is that China failed to meet its burden of proof.

43. However, most importantly, this question falls squarely into the class of novel issues, like the TBT claims in *EC – Asbestos,* that should not be addressed on appeal in the absence of findings by a panel. The Appellate Body's reasoning on the TBT issues applies with even greater force here:

> [T]he meaning of the different obligations in the *TBT Agreement* has not previously been the subject of any interpretation or application by either panels or the Appellate Body. Similarly, the provisions of the Tokyo Round *Agreement on Technical Barriers to Trade*, which preceded the *TBT Agreement* and which contained obligations similar to those in the *TBT Agreement*, were also never the subject of even a single ruling by a panel.[55]

The general question of how a Member establishes its entitlement to treatment as a developing country, which predates the WTO Agreement, has never been addressed by the Appellate Body, a WTO panel, or a GATT panel. It is a complex question that the Safeguards Agreement does not address, and on which Members do not agree.

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submission, paras. 179-226; U.S. second oral statement, paras. 113-133; United States, Responses to the Panel's Second Set of Questions, paras. 115-195, 230-231. In addition, we direct the Appellate Body's attention to footnote 1337 to paragraph 1023 of the U.S. first written submission, which addresses concerns with the analysis of Article 5.1 in *US – Line Pipe*.

[54] China Other Appellant's Submission, para. 1. Norway also made Article 9.1 arguments before the Panel. Panel Reports, paras. 7.1892-7.1899. However, it has not asserted those arguments as the basis for a conditional appeal. Norway Other Appellant's Submission, para. 49. China has not joined in the arguments made by Norway, and has not cited them as a basis for its conditional appeal.

[55] *EC – Asbestos*, AB Report, para. 81.

44. Therefore, we ask the Appellate Body to reach the same conclusion it did in *EC – Asbestos*, and find that

> In light of their novel character, we consider that Canada's claims under the *TBT Agreement* have not been explored before us in depth. As the Panel did not address these claims, there are no "issues of law" or "legal interpretations" regarding them to be analyzed by the parties, and reviewed by us under Article 17.6 of the DSU.[56]

45. Should the Appellate Body decide that it must address the Article 9.1 arguments raised by China, it should consider the U.S. responses to those arguments, which demonstrated that China failed to establish any inconsistency between the U.S. safeguard measures and Article 9.1.[57] As a summary of those arguments, we note that China failed at every point during the Panel proceedings to present any evidence that it was entitled to treatment as a developing country for purposes of Article 9.1. Thus, it failed to present a *prima facie* case that the U.S. decision not to exclude it from the steel safeguard measures was inconsistent with Article 9.1.

46. China, as the party asserting an inconsistency with the Safeguards Agreement, bore the burden of proof. The support for its assertion consisted solely of statements made by individual Members and reflected in China's Protocol of Accession. The Working Party report simply establishes that these statements were made and not that a consensus supported such statements.

47. Even so, China argued that the Protocol establishes a general rule that China is a developing country except as otherwise specifically provided. Although the Working Party Report cites China as supporting this view, it does not indicate that other Members agreed. In fact, certain other Members advocated a "pragmatic approach," and stated that

> all commitments taken by China in her accession process were solely those of China and would prejudice neither existing rights and obligations of Members under the WTO Agreement nor on-going and future WTO negotiations and any other process of accession. While noting the pragmatic approach taken in China's case in a few areas, Members also recognized the importance of differential and more favorable treatment for developing countries embodied in the WTO Agreement.

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[56] *EC – Asbestos*, AB Report, para. 82.

[57] U.S. first written submission, paras. 1258-1286; U.S. first oral statement, paras. 80-84; United States, Responses to the Panel's Questions for the Parties, paras. 214-228 and 308; United States Response to Other Parties' Questions, paras. 61-65; U.S. second written submission, paras. 244-245; U.S. second oral statement, paras. 147-151.

China cited this statement as demonstrating support for its treatment as a developing country.[58] In fact, it reflects a reaffirmation of the general principle of differential treatment, and distinguishes China's position from that of Members generally eligible for treatment as developing countries.

48. As China itself recognized, many Members of the Working Party took the view that "[e]ach agreement and China's situation should be carefully considered and specifically addressed."[59] China admitted that the Protocol does not specifically address treatment under the Safeguards Agreement.[60] Thus, the only possible conclusion is that the Protocol and Working Party Report do not establish China's entitlement to treatment as a developing country for purposes of Article 9.1.

49. Finally, China disagreed with the U.S. designation of its Generalized System of Preferences ("G.P.") list as its list of developing countries for purposes of the steel safeguard measures. Section 502 of the Trade Act of 1974 sets out the factors for consideration in designating G.P. eligible countries. China argues that under section 502(b), certain "mandatory" factors unrelated to development dictate the composition of the G.P. list. However, it fails to note that the development criteria listed in section 502(c) are introduced by the phrase "the President shall take into account," demonstrating that they are required criteria. In addition, many of the section 502(b) "mandatory" criteria involve an element of discretion.

50. In any event, China has not established that the section 502(b) criteria unrelated to development have prevented its designation as a developing country and, accordingly, has not established that use of the U.S. G.P. list for Article 9.1 is inconsistent with WTO rules. Indeed, how the G.P. rules actually affect China is a matter on which the parties do not agree, and on which the Panel has made no findings. Therefore, the issue of the U.S. use of its G.P. list as the starting point for determining whether to exclude China from the safeguard measures is not amenable to resolution by the Appellate Body in this appeal.

51. One Article 9.1 issue should be completely outside of the conditional appeals, which according to China, "relate to claims on which the Panel exercised judicial economy."[61] The Panel did *not* exercise judicial economy on China's argument that Article 3.1 obligated the United States to provide, at the time of taking the safeguard measures, an "adequate and reasoned explanation" as to why it did not exclude China pursuant to Article 9.1.[62] The Panel found that

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[58] China second written submission, para. 383.

[59] China second written submission, para. 383, quoting China Protocol, para. 9.

[60] China second written submission, para. 381.

[61] China Other Appellant's Submission, para. 3.

[62] China Other Appellant's Submission, paras. IV.7-IV.9.

the Article 3.1 obligation to provide a report applied only to a "first enquiry" covering Articles 2, 3 and 4 and Article XIX. It concluded that Article 9.1 fell into a "second enquiry" that involves "reviewing whether the measures 'as applied' comply with the requirements of Articles 5, 7, 8 and 9 of the Agreement on Safeguards *on the basis of the evidence and arguments put forward by parties during the WTO dispute settlement process*."[63] The Panel found that, for this second inquiry, "it is before the Panel, during the WTO Dispute settlement process, that the importing Member is forced *for the first time* to respond to allegations relating to the level and extent of its safeguard measures."[64] China's conditional appeal does not mention this finding by the Panel, and certainly does not provide any basis to believe that it should be reversed.

52. In short, China's Article 9.1 conditional appeal is a novel issue that the Appellate Body should not address without the benefit of findings by the Panel. If it decides to reach this issue, it should find that China failed to establish a *prima facie* case that the U.S. actions were inconsistent with Article 9.1.

IV. CONCLUSION

53. For the reasons set forth above, the United States asks the Appellate Body to reject each of the requests set forth in paragraph 33 of the EC Other Appellant's Submission, paragraphs 2 through 4 of the Japan, Korea, and Brazil Other Appellants' Submission, paragraph V.1 of the China Other Appellant's Submission, paragraph 22 of the Switzerland Other Appellant's Submission, paragraph 49 of the Norway Other Appellant's Submission, and paragraphs 4.1 and 4.2 of the New Zealand Other Appellant's Submission.

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[63] Panel Reports, para. 10.27 (emphasis added).

[64] Panel Reports, para. 10.26.