IN THE MATTER OF THE
U.S. SAFEGUARD ACTION TAKEN ON BROOM CORN BROOMS FROM MEXICO

(USA-97-2008-01)

before the panel established under Chapter Twenty of the North American Free Trade Agreement

Final Panel Report

January 30, 1998

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I. FACTUAL BACKGROUND

The U.S. Tariff Quota on Broom Corn Brooms

1. Since 1965, the United States of America (United States) has maintained tariff-rate quotas on imports of broom corn brooms. The structure of the most-favored-nation (MFN) tariffs has been as follows:

> For broom corn brooms (other than whisk brooms), 121,478 dozen could enter at a duty of 8% ad valorem. For imports in excess of that amount, the applicable duty was 32 cents each for brooms valued at not more than 96 cents each[1] and 32% ad valorem for brooms valued at over 96 cents each.[2]
>
> For whisk brooms wholly or in part of broom corn, 61,655 dozen could enter at a duty of 8% ad valorem. For imports in excess of 61,655 dozen, the applicable MFN duty was 9.2 cents for whisk brooms valued at not over 96 cents each, and 24.8% ad valorem for whisk brooms valued at over 96 cents each.[3]

The NAFTA Tariff Obligations on Broom Corn Brooms

2. Under the North American Free Trade Agreement (NAFTA),[4] the United States Government agreed to grant preferential tariff treatment to imports of broom corn brooms from Mexico,[5] as follows:

> All whisk brooms wholly or in part of broom corn and all broom corn brooms valued at not more than 96 cents became duty-free as of January 1, 1994;

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1 Items 9603.10.40 and 9603.10.50 of the United States Harmonized Tariff Schedule (USHTS). This summary is based on the discussion at page II-9 of the ITC Staff Report, appended to the ITC Report, U.S. International Trade Commission, *Broom Corn Brooms*, Investigations Nos. TA-201-65 and NAFTA 302-1 (Publication No. 2984, August 1996 [hereinafter: ITC Report]).

2 Id. Item 9603.10.60.

3 Id. Items 9603.10.05, 9603.10.15, and 9603.10.35.

4 North American Free Trade Agreement, 32 I.L.M. 612, signed Dec. 17, 1992, [hereinafter NAFTA].

5 Similar whisk brooms and other brooms imported from Canada have been subject to various rates of duty through 1997, and became free of duty on January 1, 1998.

For broom corn brooms valued at over 96 cents, a tariff-rate quota was created under which the first 100,000 dozen were duty-free; imports in excess of 100,000 were subject to a duty of 22.4% *ad valorem* for calendar years 1994 through 1999; 16% for 2000 through 2004; and zero-duty thereafter.

3. These tariff rates were entered in the United States Schedule to Annex 302.2 of Chapter Three of NAFTA. Article 302 provides:

> "1. Except as otherwise provided in this Agreement, no Party may increase any existing customs duty, or adopt any customs duty, on an originating good.
>
> "2. Except as otherwise provided in this Agreement, each Party shall progressively eliminate its customs duties on originating goods in accordance with its Schedule to Annex 302.2."

The NAFTA Safeguards Provisions

4. Chapter Eight of NAFTA, entitled "Emergency Action," permits governments to impose temporary tariff increases or other trade restrictions otherwise prohibited by the obligations of Chapter Three, whenever it is determined that increasing imports are causing or threatening to cause serious injury to domestic industries under certain specified conditions. Trade restrictions to provide relief in such situations are known as "safeguard measures."

5. In general, NAFTA Chapter Eight has three major components:

Article 801, entitled "Bilateral Actions," allows a Party to withdraw a NAFTA tariff concession on a temporary basis if, as a result of that concession, goods from another Party are being imported in such increased quantities as to constitute a substantial cause of serious injury, or threat thereof, to a domestic industry producing a like or directly competitive product.

Article 802, entitled "Global Actions," reserves to each NAFTA member government the right to impose global safeguard measures authorized by General Agreement on Tariffs and Trade (hereinafter GATT) Article XIX and the World Trade Organization (hereinafter WTO) Agreement on Safeguards. Article XIX authorizes Members of the WTO to suspend obligations or concessions on a multilateral basis when imports of a good are a cause of serious injury, or threat thereof, to a domestic industry producing a like or directly competitive product.

Article 803 obligates the Parties to ensure that safeguard proceedings and determinations —both bilateral and global— comply with certain requirements designed to guarantee fair, objective, and transparent treatment.

United States Safeguards Procedures

6. Under United States law, domestic interests seeking the imposition of safeguard measures on imports of a particular product may file a petition with the International Trade Commission (ITC).[6] The ITC's proceedings are divided into an injury phase and a remedies phase:

> The ITC must first determine whether imports are a substantial cause of serious injury, or threat thereof, to the domestic industry producing a like or directly competitive product.
>
> If the ITC injury determination is affirmative, the ITC then conducts a proceeding to determine what types of safeguard measures it should recommend that the President of the United States adopt.[7]

7. Once the ITC has submitted its recommendations to the President of the United States, the President has broad discretion; he can accept or reject the ITC's recommendations in their entirety, or adopt an alternative plan of action.[8] The President cannot impose safeguard measures, however, unless the ITC has made an affirmative determination of injury.[9]

The U.S. Safeguards Proceeding on Broom Corn Brooms

8. On March 4, 1996, the U.S. Cornbroom Task Force, an industry group whose members account for more than 50 percent of domestic production of broom corn brooms, filed a petition under section 202 of the Trade Act of 1974,[10] the provision of U.S. law authorizing global safeguard actions. The petition alleged that broom corn brooms were being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or threat of serious injury, to the domestic industry producing broom corn brooms.

9. At the time it filed the section 202 petition, the Task Force filed a second petition with the ITC under section 302(b) of the NAFTA Implementation Act,[11] the U.S. legislation authorizing bilateral safeguards measures provided for in NAFTA Article 801. This second petition alleged that, as a result of the reduction or elimination of a duty provided for under the NAFTA, broom corn brooms from Mexico were being imported into the United States in such

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6 The ITC is an independent, quasi-judicial fact-finding agency of the U.S. Government established by legislation enacted in 1916. A principal function of the ITC is to determine the impact of imports on U.S. industries under several statutory provisions, including the U.S. safeguard laws and antidumping and countervailing duty laws, and, upon request, to provide information and advice to the Congress and the President on tariff and trade matters.

7 Trade Act of 1974 §§ 201-02, as amended, 19 U.S.C. §§ 2251-52.

8 Trade Act of 1974 § 203, as amended, 19 U.S.C. § 2253.

9 Id.

10 19 U.S.C. § 2252.

11 19 U.S.C. § 3352(b).

increased quantities (in absolute terms) and under such conditions that imports of that article from Mexico, alone, constituted a substantial cause of serious injury, or a threat of serious injury, to the domestic industry producing an article like or directly competitive with the imported article. As provided for under U.S. law, the ITC conducted a single investigation to examine the two petitions jointly.[12]

10. The ITC made its injury determinations in the two investigations on July 2, 1996. It made affirmative determinations that petitioners were entitled to relief in both investigations, by a vote of 4-2 in the global safeguard case and a vote of 5-1 in the NAFTA bilateral safeguard case.

11. Following a second proceeding to determine its recommendations regarding the appropriate remedy to be provided, the ITC transmitted a report communicating its findings and recommendations to the President on August 1, 1996.

12. On August 30, 1996, the President of the United States determined that he would take appropriate and feasible action in the global safeguard case, but not take action in the NAFTA bilateral safeguard case. However, rather than implement action in the global safeguard case at that time, he announced that he would first seek a negotiated solution with appropriate foreign countries that would address the serious injury to the domestic industry, promote positive adjustment, and strike a balance among the various interests involved. Consultations were held with Mexico on September 6, 1996, and October 9, 1996, and with certain other countries with an interest in the matter. No agreement was reached.

13. On November 28, 1996, the President issued Proclamation 6961 adopting the following safeguard measures, in force as of that date, for a three year period.[13] They can be summarized:

> Broom corn brooms (other than whisk brooms) from Mexico valued at no more than 96 cents, classified under item 9603.10.50, formerly entirely free of duty under NAFTA, remained free if imported in quantities within the global tariff quota of 121,478 dozen, but if imported in quantities over 121,478 dozen became subject to an over-quota tariff rate of 33 cents in the first year, to be reduced to 32.5 cents in the second year, to 32.1 cents in the third year, and then back to zero in accordance with the obligations in the U.S. Schedule to NAFTA.
>
> Broom corn brooms (other than whisk brooms) from Mexico valued at more than 96 cents, classified under item 9603.10.60, formerly free of duty if imported in quantities within a tariff quota of 100,000 dozen but subject to an over quota tariff rate of 22.4%, remained free if imported in quantities within the quota, but became subject to an over-quota tariff rate of 33% for the first year, to be reduced to 32.5% in the second

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12 19 U.S.C. § 3357.

13 Proclamation No. 6961, 61 Fed. Reg. 64431-33 (December 4, 1996) (To Facilitate Positive Adjustment to Competition From Imports of Broom Corn Brooms).

year, to 32.1% in the third year; and then to the rate of 16% in accordance with the obligations of the U.S. Schedule to NAFTA.

No change was made in the duty-free status of all whisk brooms wholly or in part of broom corn.

The NAFTA Dispute Settlement Proceedings

14. On August 21, 1996, shortly before the President determined that he would take action under the global safeguard measures by trying to negotiate an agreement, Mexico requested formal consultations under Article 2006(4) of the NAFTA.[14] Consultations took place on September 6, 1996 and on October 9, 1996, but failed to resolve the dispute. Therefore, pursuant to NAFTA Article 2007, on November 25, 1996, the Government of Mexico requested that the NAFTA Free Trade Commission meet regarding this matter.[15]

15. On November 28, 1996, the President of the United States issued Proclamation 6961 imposing the three-year tariff increase described above. The Free Trade Commission met on December 11, 1996, but did not find a solution to this case.

16. On December 12, 1996, Mexico instituted retaliatory tariffs against certain imports from the United States, which Mexico asserted had substantially equivalent effect to the U.S.

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[14] Letter from Minister Blanco to Ambassador Barshefsky, Mexico Exhibit 13. The letter stated in part:

> The injury findings issued by the Commission were a direct consequence of having defined the "domestic industry" taking into account only the production of broom corn brooms and not that of plastic brooms. Given that these latter goods are "like or directly competitive goods" with respect to broom corn brooms, the Commission's definition of "domestic industry" is not in accord with Articles 801(1) and 805 of the North American Free Trade Agreement (NAFTA), or with Article 4 of the WTO Agreement on Safeguards. On the basis of these reasons, the Government of Mexico considers that the injury determinations were issued in a manner incompatible with the requirements of NAFTA, especially those of Chapter VIII.

[15] Letter from Minister Blanco to Ambassador Barshefsky, Mexico Exhibit 14. The letter stated in part:

> Determinations [of the ITC] were based on a definition of 'domestic industry' that considered only the production of broom corn brooms and not that of another type of brooms that are "like or directly competitive goods" and consequently the ITC's determination of "domestic industry" is not in accord with Articles 802 and 805 of NAFTA.

safeguard action.[16] According to Mexico, the trade effect of the U.S. action will be approximately $1.4 million in the first year.[17]

17. On January 14, 1997, Mexico requested establishment of a panel under Article 2008 of the NAFTA.[18] The terms of reference were established for the panel on April 28, 1997.

> "To examine, in the light of the relevant provisions of the North American Free Trade Agreement, the matter referred to the Commission as set out in the request for a Commission meeting, submitted by Mexico on November 25, 1996, and to make findings, determinations and recommendations as provided in Article 2016(2)."[19]

18. The panel was constituted on July 17, 1997.

19. Mexico's submission was filed before the Secretariat on July 31, 1997. The Counter Submission of the United States was filed on August 25, 1997. On September 9, 1997, a Hearing was held in Washington, D.C. The following day the Panel communicated additional questions to the parties in writing. On October 10, 1997, the Parties submitted their Replies to the questions asked by the Panel. On October 22, 1997, Mexico filed the Comments on the United States Reply to the Questions of the Panel. On November 3, 1997, both Mexico and the United States filed Supplementary Written Submissions.

20. On November 7-8, the members of the Panel met to prepare their report. The report was completed through written communications and telephone conference calls on December 8 and 16, 1997. It was initially circulated to the parties on December 23, 1997. The parties' comments on the initial report were communicated to the Panel on January 16, 1998. The final text of the report was communicated to the parties on January 30, 1998.

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16 Notice from Diario Oficial, Mexico Exhibit 14, and letter from Minister Blanco to Ambassador Barshefsky, Mexico Exhibit 15.

17 Initial Submission submitted by the United Mexican States, at paragraph 26.

18 Letter from the Mexican Government requesting the establishment of a Panel, January 14, 1997, Mexico Exhibit 16.

19 Letter of Hugo Perezcano Díaz to NAFTA Secretariat of April 28, 1997, Mexico Exhibit 18. The Mexican request of November 25, 1996, referred to in the terms of reference, is quoted in footnote 14.

II. ARGUMENTS OF THE PARTIES

21. In view of the limited nature of the Panel's eventual findings in this matter, it is neither necessary nor appropriate to record in detail each of the legal arguments made by the parties during the course of this proceeding. The following is a summary of the parties' principal arguments.

22. The legal claims made by the government of Mexico in this panel proceeding center around a single overarching legal claim. Under the GATT/WTO rules that control the basic global safeguards measures authorized by NAFTA Article 802[20] and the NAFTA rules stated in Article 802 itself,[21] a government may apply a global safeguard measure to imported products only if those products are being imported into its territory in such increased quantities as to cause "serious injury" to a "domestic industry." Both the GATT/WTO and NAFTA agreements define "domestic industry" as the domestic producers of those products that are "like or directly competitive" with the imported article in question.[22] The United States safeguard action in this case rests on the ITC's determination, in the virtually identical words of the U.S. statute, that broom corn brooms were being "imported into [the United States] in such increased quantities as to be a substantial cause of serious injury to the domestic industry producing an article like or directly competitive with the imported article." The central legal claim made by the government of Mexico is the claim that the ITC did not correctly define the "domestic industry" whose economic condition must be examined to determine the existence of "serious injury."

23. The ITC determined that the relevant "domestic industry" was the group of United States production facilities devoted to the production of broom corn brooms, and those production facilities alone. The ITC's finding of "serious injury," accordingly, was based upon its analysis of the economic condition of those production facilities alone. The government of Mexico argues that the relevant "domestic industry" should have included the United States production facilities devoted to the production of plastic brooms. As a consequence, Mexico argues, the ITC's analysis of "serious injury" should have been based on an analysis of the overall economic condition of both sets of United States production facilities — those producing broom corn brooms *and* those producing plastic brooms. Accordingly, the Mexican argument concludes, the ITC's determination of serious injury is legally incorrect, because it was based on an analysis of only a part of the relevant "domestic industry."

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20 WTO Agreement on Safeguards, Article 2.

21 For example, NAFTA Article 802 prevents application of global safeguard measures to the products of other NAFTA Parties unless imports from that Party "contribute importantly" to the serious injury.

22 WTO Agreement on Safeguards, Article 4(1)(c); NAFTA Article 805.

24. The relevant text of the ITC's determination with regard to the definition of "domestic industry" is as follows:[23]

Domestic Industry

Under both sections 202 and 302 the Commission is required to determine whether increased imports are a substantial cause of serious injury or the threat thereof "to the domestic industry producing an article that is like or directly competitive with the imported article."[3] Section 302(c) of the NAFTA Implementation Act makes applicable to section 302(b) determinations the definition of domestic industry and factors to be considered that are set out in section 202(c) of the Trade Act.

Section 202(c)(6)(A)(i) defines the term domestic industry to mean:

> *with respect to an article, the producers as a whole of the like or directly competitive article or those producers whose collective production of the like or directly competitive article constitutes a major proportion of the total domestic production of such article.[4]*

The statute provides instruction in three areas in identifying the domestic industry: that the Commission (1) shall, in the case of a domestic producer that also imports, treat as part of the domestic industry only its domestic production, to the extent that information is available; (2) may, in the case of a domestic producer that produces more than one article, treat as part of such domestic industry only that portion or subdivision of the producer which produces the like or directly competitive article; and

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23 ITC Report at pages I-9 to I-11. Footnotes 3-16 of the ITC report have been reproduced with their original numbers.

3 In the view of Commissioner Newquist, if there is an industry producing an article that is "like" the imported article, it is usually unnecessary to consider whether there are also industries producing "directly competitive" articles, absent specific allegations that producers of directly competitive articles are also injured.

4 Section 202(c)(6)(A)(i). This definition was added by the Uruguay Round Agreements Act and is based on that in paragraph 1(c) of Article 4 of the Safeguards Agreement. The Statement of Administrative Action notes that this definition "codifies existing ITC practice, which is consistent with the meaning given to the term in the safeguards agreement." Statement of Administrative Action, submitted with the implementing bill on Sept. 27, 1994, published in H.Doc. 103-316, vol. I (103d Cong. 2d Sess.) at 961. The language "or those producers whose collective production of the like or directly competitive article constitutes *a major proportion* of the total. . ." (emphasis added) codifies the expectation that the Commission, as a practical matter, will not always obtain 100 percent participation in its fact gathering process.

(3) may also find there to be a "geographic" industry when certain conditions are present.[5]

We find that broom corn brooms represent a distinct product line and that the domestic industry consists of domestic producers of broom corn brooms.[6] *Domestic broom corn brooms are "like" the imported broom corn brooms. Domestic and imported broom corn brooms are made of the same materials (for example, virtually all of the broom corn used in making domestic broom corn brooms and most of the broom corn used in making imported broom corn brooms is grown in Mexico),*[7] *and the imported and domestic products are generally regarded as interchangeable.*[8] *Broom corn brooms are further distinguishable from other types of brooms, in that they are made from different materials (broom corn) than other types of brooms (e.g., plastic brooms).*

Production processes are generally different for broom corn and other brooms. About 84 percent of broom corn brooms produced in the United States in 1995 were produced using the wire-wound process, and nearly 16 percent were produced using the nailed-machine method.[9] *The wire-wound method is very labor intensive, and requires skilled craftsmen; it requires months or even years of experience for a worker to become proficient in this process.*[10] *On the other hand, slightly more than 80 percent of plastic brooms manufactured in the United States in 1995 were produced using the staple-set*

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5 Sections 202(c)(4)(A)-(C). In determining whether there are one or more domestic industries corresponding to producers of a like or directly competitive product, the Commission traditionally has followed a "product-line approach, taking into account such factors as the physical properties of the article, customs treatment, where and how it is made (e.g., in a separate facility), uses, and marketing channels. *See, e.g., Fresh Winter Tomatoes*, Inv. No. TA-201-64 (Provisional Relief Phase), USITC Pub. 2881 (April 1995) at I-7. The Commission traditionally has looked for clear dividing lines among possible products, and has disregarded minor variations. *See, e.g., Stainless Steel Table Flatware*, Inv. No. TA-201-49, USITC Pub. 1536 (June 1984) at 3-4.

6 In its posthearing brief on injury, petitioner stated that the domestic industry producing the like product in these investigations consists of the facilities producing broom corn brooms. Importers (the Mexican National Cornbroom Association), on the other hand, asserted in their posthearing brief on injury that, applying the Commission's "product-line" analysis, there is no separate industry producing broom corn brooms, but rather a single industry producing a single product—brooms. They further asserted that broom corn and plastic brooms have exactly the same uses, are made by the same companies, are made using the same production processes, are made by the same employees, and are sold through the same marketing channels.

7 Report at II-4, 5.

8 We do not draw any distinctions among the three types of broom corn brooms: whisk, upright, and push brooms. All three types are imported into the United States. All three involve the same raw materials and production processes and are produced by the same group of producers. Although the uses tend to be different, all are distributed through the same marketing channels.

9 Report at II-7.

10 Report at II-4, 7.

process, with most of the remainder produced using the nailed-machine method.[11] *The staple-set process is almost totally automated.*[12]

Firms that produce both broom corn brooms and plastic brooms were able to supply the Commission with separate financial, employment, production, and other data for their respective broom lines, further indicating that the firms producing both types of brooms recognize broom corn brooms and plastic brooms as distinct products. Broom corn brooms and plastic brooms are generally considered interchangeable in the marketplace, but there is evidence that broom corn brooms have sweeping and handling characteristics that are perceived by customers to be superior in some applications.[13] *While broom corn brooms and plastic brooms tend to be sold through the same marketing channels,*[14] *and are often sold side-by-side,*[15] *they are labeled as corn brooms and plastic brooms and are often purchased by customers for different uses.*[16]

Thus, for the foregoing reasons, we conclude that the domestic industry for the purpose of these investigations consists of the facilities producing broom corn brooms.

25. The government of **Mexico** argued that the ITC determination that the "domestic industry" consisted only of broom corn brooms was erroneous in two principal respects: (1) The ITC determination rested on a definition of "like product" that was not in accordance with the correct legal definition of that term in the GATT/WTO and NAFTA agreements. (2) Certain elements of the ITC determination failed to conform to NAFTA Article 803 and Annex 803.3 requirements of completeness, consistency and transparency pertaining to the investigation and appraisal of factual and legal issues by the national investigating authority. Later, during the course of the panel proceedings, Mexico also called attention to certain parts of the ITC's "domestic industry" determination which suggested that the legal basis of its decision might not have been the "like product" concept, and argued that the alternative legal theories suggested by these ambiguities were also a source of legal error.

26. The government of the **United States** interposed two preliminary objections to these arguments. The United States argued (1) that the Panel had no jurisdiction to adjudicate the conformity of "global safeguard measures" with GATT/WTO legal requirements, and (2) that the Panel was barred from considering Mexico's claim that the ITC determination did not conform with the requirements of NAFTA Article 803 and Annex 803.3(12) because Mexico had failed to give timely notice of that claim.

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11 Report at II-8.

12 Report at II-8.

13 Report at II-8, 9.

14 Report at II-16 and petitioner's brief on provisional relief at 34-35.

15 Report at II-9.

16 *Id*.

The Panel's Jurisdiction to Consider GATT/WTO Obligations.

27. The **United States** argued that the Panel did not have jurisdiction to adjudicate legal claims based on the obligations of GATT Article XIX and the WTO Agreement on Safeguards. The United States took the position that both the Panel's terms of reference and the general provisions of Chapter Twenty under which the Panel was created limited the Panel's competence to legal claims based on NAFTA obligations. The United States thus argued that the Panel could not consider GATT obligations unless they had somehow been adopted by incorporation into the NAFTA agreement. In the view of the United States, the provisions of NAFTA Article 802, the NAFTA provision reserving to member governments the right to employ global safeguards authorized by GATT Article XIX and the WTO Agreement on Safeguards, did not incorporate the legal obligations of those GATT/WTO provisions into the NAFTA agreement. The United States contrasted the language of NAFTA Article 802 ("Each party retains its rights and obligations under Article XIX of GATT . . .") with the direct language of incorporation employed in NAFTA Articles 301(1) and 309(1) ("Article [III and XI] of the GATT and its interpretative notes . . . are incorporated into and made part of this Agreement."). The United States took the position that, while the Panel would have jurisdiction to consider legal claims based upon the additional conditions stated in NAFTA Article 802, it was the intention of the parties that claims based upon the GATT/WTO safeguards provisions themselves would have to be pursued through the GATT/WTO dispute settlement mechanism.

28. **Mexico** noted that NAFTA Article 2005(1) generally gives parties the right to initiate dispute settlement either in GATT or in NAFTA whenever a dispute involves a matter "arising under both this Agreement and the *General Agreement on Tariffs and Trade*." In Mexico's view, its contentions with regard to the ITC's definition of "domestic industry" raised an issue of U.S. compliance with the additional conditions stated in NAFTA Article 802 and the definition of "domestic industry" in Article 805 that pertains to those conditions, as well as U.S. compliance with the process requirements stated in Article 803 and Annex 803.3. Thus, Mexico argued, the present dispute does "arise" under both NAFTA and GATT/WTO within the meaning of Article 2005(1), and therefore can be brought in either a NAFTA or a GATT/WTO forum. Furthermore, since NAFTA Article 2005(6) provides that once a NAFTA or GATT forum is selected that forum "shall be used to the exclusion of the other," a NAFTA forum selected under Article 2005(1) necessarily has jurisdiction to dispose of all overlapping GATT issues involved in that dispute.

Timely Notice of Claims Presented

29. The **United States** argued that NAFTA imposes two notice requirements that must be satisfied before a particular legal claim can be considered by a Chapter Twenty dispute settlement panel. First, the United States contended, a legal claim must be raised in consultations pursuant to NAFTA Article 2006, the conduct of which are the first of two prerequisites to the appointment of a dispute settlement panel under Article 2008. Second,

following consultations, the legal claim must also be raised in the complainant's request for a meeting of the NAFTA Commission under Article 2007, the convening of which is the second of the two prerequisites to the appointment of a panel.

30. In support of the first notice requirement, the United States argued that the purpose of the consultation requirement necessitates that both the respondent and third parties be given notice of all legal claims, and cited a recent GATT panel decision construing GATT dispute settlement procedures to that effect.[24] In support of the second notice requirement, the United States noted that the standard terms of reference established by Article 2012(3) limit the panel to an examination of "the matter referred to the Commission (as set out in the request for a Commission meeting) . . ." In turn, Article 2007(3) requires that the request for a Commission meeting state "the measure or other matter complained of and indicate the provisions of this Agreement that it considers relevant . . ."

31. Applying these notice requirements, the United States noted that the only NAFTA provisions cited in Mexico's request for consultations of August 21, 1996, and its request for a Commission meeting of November 25, 1996,[25] were NAFTA Articles 802 and 805. Consequently, the United States concluded, legal claims under other NAFTA Articles — particularly claims relating to the process requirements of Article 803 and Annex 803.3 — could not be considered by the Panel. In particular, the United States argued, Mexico's failure to mention Article 803 in its November 25, 1996 request for a Commission meeting meant that legal claims under Article 803 and Annex 803.3 were not within the Panel's terms of reference.

32. In response, **Mexico** argued that the adequacy of notice must be judged on whether it fairly informs the other party of the legal claims being made. In this connection, Mexico noted that both its request for consultations and its request for a Commission meeting had made clear that Mexico's central legal claim concerned the legal inadequacy of the ITC's definition of the "domestic industry" in this case, and the consequent legal inadequacy of the ITC's "serious injury" finding based thereon. In Mexico's view, its assertion that the ITC defined the wrong "domestic industry" necessarily involved all aspects of the ITC determination on that issue, not only the legal standard itself but also the application of that standard to the particular facts of the case, including the various elements of the ITC's decision-making process dealt with in NAFTA Article 803 and Annex 803.3.

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24 *United States — Imposition of Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/82 (1994) at paragraph 337.

25 The relevant texts of these letters are quoted in notes 14 and 15 above. The request for consultations also cited Article 801, which related to the bilateral safeguard portion of the ITC determination that was never acted upon.

The Legal Definition of "Like Product"

33. **Mexico** argued that the definition of "domestic industry" in Article 4:1(c) of the WTO Agreement on Safeguards and in the parallel NAFTA provisions can be interpreted as stating two separate and alternative legal tests. The reference to "producers . . . of the like or directly competitive products" can be understood as saying that, in order to be included in the relevant domestic industry, a product must either be "like" the imported product being investigated, or it must be "directly competitive" with it. Mexico argued that "like" is a reference to the concept of "like product" that is employed in several provisions of the GATT, while "directly competitive" can be understood as a reference to products which, though not "like" the imported product, are nonetheless commercially interchangeable or substitutable for it.

34. Mexico's claim of error was based on the contention that U.S.-made plastic brooms were "like" the imported broom corn brooms under investigation. Mexico considered that the "likeness" claim was sufficiently clear to make it unnecessary for Mexico to address the other part of the legal test — the issue of whether plastic brooms were "directly competitive" with imported broom corn brooms, or the legal consequences that would follow from an affirmative finding on that issue.

35. Mexico argued that the commonly understood meaning of the English word "like" and its Spanish and French equivalents *similar* and *similaire* in the other two official language texts of GATT and NAFTA does not require that the goods in question be identical, but merely that they be substantially similar in all important respects. As is made clear in Article 15 of the WTO Customs Valuation Code, those who drafted GATT/WTO legal texts have used the term "identical goods" when they meant to require that goods be identical. Prior GATT/WTO panel decisions have likewise interpreted the "like product" concept to include goods that are similar although not identical.[26]

36. Mexico noted that GATT and WTO precedents had consistently interpreted "like product" as a concept whose application requires the consideration of the following factors: "the product's end-uses; consumer tastes and habits; and the product's properties, nature and quality."[27] Comparison of broom corn brooms and plastic brooms under these three criteria

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26 Mexico cited, inter alia, *Japan — Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages,* L/6216 (1987) at paragraph 5.5; *New Zealand — Imports of Electrical Transformers from Finland*, L/5814 (1985) at paragraph 4.6; *Japan — Taxes on Alcoholic Beverages*, WT/DS8/R (panel report, 1996) at paragraph 6.3; id. WT/DS8/AB/R (Appellate Body, 1996) at page 5.

27 Initial Submission submitted by the United Mexican States, at page 40. Mexico cited a 1970 GATT working party report on border taxes as the initial source of this list of factors, L/3464 (1970) at paragraph 18, and the following Panel reports as having cited this list with approval: *United States — Measures Affecting Alcoholic and Malt Beverages*, DS23/R (1992) at paragraphs 5.23-5.26; *Canada — Measures Affecting the Sale of Gold Coins*, L/5863 (1985, unadopted) at paragraph 51; *Canada — Certain Measures Concerning Periodicals*, WT/DS/31/R (1997) at paragraph 5.22.

showed in each case a degree of similarity and interchangeability that required classifying them as "like products." Similarly, in Mexico's view statements in both the ITC determination and the ITC staff report acknowledging the commercial interchangeability of broom corn brooms and plastic brooms confirmed the conclusion that they were "like products." Concerning the somewhat different factors considered in the ITC's determination, Mexico argued that the ITC's findings that broom corn brooms were a "distinct product line," were made by different production processes, were tracked with separate financial records, or were made from different materials were not relevant to a determination of "like product" status. In Mexico's view, the great weight the ITC placed on the difference in production processes employed for making broom corn brooms was incorrect as a matter of law.

37. The **United States** argued that the generally understood meaning of the word "like," while not synonymous with the word "identical," did call for a greater degree of similarity than is commonly associated with the English word "similar."

38. The United States called attention to the same multi-factor definition of "like product" found in GATT precedents cited by Mexico. It contended that determinations of "likeness" have tended to focus more on intrinsic physical properties rather than commercial interchangeability. The United States also called attention to statements in a recent decision by the WTO Appellate Body affirming that "like product" is to be assessed on a case-by-case basis, and will always involve "an unavoidable element of individual discretionary judgment."[28] In the view of the United States, such case-by-case analysis requires individual consideration of the particular contextual elements involved in each case, including the particular legal provision in which the term "like product" is being employed. In this connection, the United States called attention to the adjustment purposes of the safeguard measures authorized by GATT Article XIX, and argued that in this particular legal context it was appropriate for the ITC to consider, in determining "likeness," whether the production methods and worker skills currently employed in U.S. production of broom corn brooms could be used in making other brooms.

Process Requirements: Standard of Review

39. **Mexico** also argued that some of the subsidiary determinations made by the ITC, even though relevant to a correct definition of "like product," failed to satisfy the requirements of NAFTA Article 803 and Annex 803.3 pertaining to the process of decision that must be followed by national investigating authorities. The chief legal claims of this kind related to the ITC's findings on the subsidiary issue of whether broom corn brooms and plastic brooms were commercially interchangeable. Mexico's first claim was that the ITC had failed to investigate all the facts relevant to this issue, noting that the ITC's initial questionnaire sought no information at all about the market characteristics of plastic brooms, and that a subsequent telephone survey of plastic broom producers, the results of which the Mexican government was unable to evaluate because of its confidentiality, did not suffice.[29] Mexico's second claim was that the ITC's

28 *Japan — Taxes on Alcoholic Beverages*, WT/DS8/AB/R (1996) at page 21.

29 Mexico suggested that the scope of the ITC investigation may have been influenced by a passage in the Statement of Administrative Action that accompanied the United States legislation implementing the

apparent finding that broom corn and plastic brooms were not entirely interchangeable was both in conflict with the ITC's own staff report, and not supported by objective evidence in the record before the ITC.

40. In support of these legal claims, Mexico argued that the Panel was obligated to subject the ITC determinations to a rigorous standard of review, albeit not *de novo* review. First, Mexico contended, since NAFTA Chapter Eight and GATT Article XIX are exceptions to the basic free trade obligations of NAFTA, under Rules 33 and 34 of the Model Rules of Procedure for Chapter Twenty of the North American Free Trade Agreement the burden is on the United States to establish compliance with the requirements of those exceptions. Next, Mexico called attention to the provisions of NAFTA Article 803 that require governments to ensure the "consistent, impartial, and reasonable administration of laws, regulations, decisions and rulings governing all emergency action proceedings," and the specific requirements of Annex 803.3(9) and (10) calling for national investigating authorities to investigate all relevant information, evaluate all relevant factors, and make decisions on the basis of objective evidence. Mexico then cited two recent WTO decisions involving measures taken under the safeguard provisions of the WTO Agreement on Textiles and Clothing, calling for panels to make an "objective assessment" of whether the decision-making body examined all relevant facts before it, and provided an adequate explanation of how the facts as a whole supported the determination made.[30]

41. The **United States** argued that the ITC's investigation sought and obtained substantial information on the question of "domestic industry," received extensive argumentation on that issue, and made all the necessary findings of fact called for by the relevant safeguards provisions. The United States further contended that each of the necessary ITC determinations complied with the NAFTA provisions and WTO precedents cited by Mexico, having been adequately explained and supported with citations to the relevant evidence summarized in the Staff Report.

42. In support of its position, the United States argued that the NAFTA provisions and WTO precedents cited by Mexico did not require as demanding a review as Mexico had interpreted them to require. The United States stressed the consistent admonition in these authorities that

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NAFTA Agreement, H.R. Doc. No. 103-159 (1993). The passage referred to U.S. producers of broom corn brooms as the "U.S. broom corn industry." Supplementary Written Submission submitted by the United Mexican States, at page 25, footnote 40.

30 *United States — Restrictions on Imports of Cotton and Man-made Fiber Underwear*, WT/DS24/R (1996), at paragraphs 7.7 to 7.13; *United States — Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/R (1997)* at paragraphs 7.13 to 7.17.

panels were not to conduct *de novo* review of the facts, nor were they to substitute their judgment as to the weight of evidence for the judgment of the national investigating authorities.[31]

43. On the question of burden-of-proof, the United States called attention to a recent NAFTA dispute settlement decision in which the burden of establishing compliance with an exception was treated as a burden of production rather than a burden of persuasion,[32] and a recent WTO precedent rejecting a claim that the transitional safeguards provisions of the WTO Agreement on Textiles and Clothing were the type of exception that required shifting the burden of proving compliance to the respondent.[33]

The Legal Basis of the ITC Determination

44. Mexico's arguments in support of its legal claim that the ITC's "domestic industry" determination was legally incorrect also included several other arguments that arose from ambiguities and omissions in the ITC's explanation of the legal standards upon which its "domestic industry" determination rested. The ambiguities and omissions concerned the meaning of the term "like or directly competitive products" used in both the NAFTA and GATT/WTO definitions of "domestic industry." The initial submissions of the parties were addressed to the correctness of the ITC "domestic industry" determination on the assumption that the ITC's determination rested on a legal conclusion that plastic brooms were not a "like" product to broom corn brooms. The arguments of the parties focused on the legal standards that have been used in GATT/WTO legal decisions defining the "like product" concept, and on the application of those legal standards to the factual characteristics of plastic brooms and broom corn brooms. Although the United States argued that Mexico had waived any other claim of error by taking

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31 In addition to the two WTO precedents cited by Mexico, at note 27 above, the United States cited a 1951 working party report reviewing an Article XIX safeguard measure, *Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade,* GATT Doc. CP/106, at paragraphs 33, 40, and three recent GATT panel reports involving review of antidumping determinations: *United States — Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway,* ADP/87 (1994), at paragraphs 492-494; *Korea — Anti-Dumping Duties on Imports of Polyacetal Resins from the United States,* ADP/92 (1993) at paragraph 227; *United States — Measures Affecting Imports of Softwood Lumber from Canada,* SCM/153 (1993), at paragraphs 334 - 335.

32 *In the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products,* Secretariat File No. CDA-95-2008-01 (1996).

33 *United States — Measure Affecting Imports of Woven Wool Shirts and Blouses from India,* WT/DS33/AB/R (1997) at page 16.

this approach,[34] Mexico explicitly declined to waive such other claims of error, both in the initial hearing before the panel and on all subsequent occasions.[35]

45. On several occasions during the panel proceedings, Mexico called attention to elements of the ITC's explanation of its "domestic industry" determination that did not conform to the assumption that that determination had been based on the legal conclusion that plastic brooms were not "like" imported broom corn brooms. Mexico noted that the five factors applied by the ITC in determining whether plastic brooms should be included in the domestic industry were identified as factors to determine whether goods are "like or directly competitive," rather than factors directed to the issue of "likeness" alone.[36] Mexico also observed that the ITC had never actually stated that plastic brooms were not "like" imported broom corn brooms.[37]

46. Then, after having also pointed out that the ITC determination contained no finding as to whether plastic brooms were "directly competitive,"[38] Mexico went on to raise several different possible interpretations of the legal theory that could be deduced from the ITC's unexplained use of the term "like or directly competitive" in the absence of any further findings on "likeness" and "direct competitiveness". One possibility was that, despite general agreement that "like" and "directly competitive" are separate concepts defined by different criteria, the ITC was making negative findings as to both concepts simultaneously.[39] Another possibility was that the ITC was accepting the view, stated in footnote 3 of its determination, that identification of a "like" product made it unnecessary to include "not-like-but-directly-competitive" products in the same domestic industry -- despite the fact that apparently only one member of the ITC majority had subscribed to that view.[40] Still another possibility, suggested by ITC practice in other safeguard determinations, was that the ITC treated "like and directly competitive" as a unitary concept, often including both "like" and "directly competitive" goods in the "domestic industry" without

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34 See, Transcript of Panel Hearing of September 9, 1997, at pages 100, 119, 123. See also, Answers to the Questions of the Panel to the Parties, submitted by the United States of America (October 10, 1997) at pages 25-26.

35 See, Transcript of Panel Hearing at pages 68-70, 130. See also, Answers to the Questions of the Panel to the Parties, submitted by the United Mexican States (October 10, 1997) at page 3; Supplementary Written Submissions submitted by the United Mexican States (November 3, 1997) at page 18.

36 Answers to the Questions of the of the Panel to the Parties, submitted by the United Mexican States (October 10, 1997) at pages 4-5, 7; Comments on the United States Government Reply to the Questions of the Panel submitted by the United Mexican States (October 22, 1997) at page 11.

37 Id., at paragraph 12.

38 See, Transcript of Panel Hearing at pages 69-70, 130. See also, Answers to the Questions of the Panel to the Parties, submitted by the United Mexican States (October 10, 1997) at page 3.

39 Id.

40 Id.

drawing a clear distinction between them;[41] Mexico considered that the instant decision had been an "arbitrary and inconsistent" exception to that practice.[42]

47. Each of Mexico's suggested legal interpretations of the ITC's "domestic industry" determination was accompanied by a claim of legal error -- a claim that the interpretation was either inconsistent with prevailing interpretations of "like or directly competitive," or internally inconsistent, or arbitrary. Each of these claims was stated in contingent terms, because its applicability was dependant upon the interpretation to be given to the ITC's legal explanation.

48. The United States took the position that the ITC "domestic industry" determination must be interpreted as a finding, based on application of the "like product" concept, that plastic brooms were not "like" imported broom corn brooms.[43] The United States asserted that that meaning was clear from the fact that the ITC did find explicitly that U.S.-made broom corn brooms were "like" imported broom corn brooms, and that its conclusion excluding plastic brooms from the relevant "domestic industry" was explained in terms of differences between plastic and broom corn brooms.[44] The United States argued, in addition, that it was not a violation of NAFTA for the ITC, having determined that plastic brooms were not "like" imported broom corn brooms, not to make any finding on whether plastic brooms were "directly competitive" with imported broom corn brooms.[45] The United States observed that the term

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41 Id., at page 4. Supplementary Written Submission submitted by the United Mexican States (November 3, 1997) at page 18 and at Exhibit 2.

42 Id., at page 18.

43 Transcript of Panel Hearing of September 9, 1997, at pages 112-113. Answers to the Questions of the Panel to the Parties, submitted by the United States of America (October 10, 1997) at paragraphs 4, 6, 13. Post-Hearing Submission of the United States of America (November 3, 1997) at page 11.

44 Id.

In its comments on the initial report of the panel, Comments of the United States of America on the Initial Panel Report (January 16, 1998) at pages 9-11, the United States also pointed out that the ITC had referred, in an earlier phase of its proceedings, to a statement in the legislative history of the U.S. safeguards legislation making clear that "like" and "directly competitive" are separate and distinct concepts. United States International Trade Commission, *Broom Corn Brooms*, Investigation No. NAFTA-302-1 (Provisional Relief Phase), USITC Publication 2963 (May 1996) at I-13 to I-14, citing H.R. Rep. No. 571, 93rd Cong., 1st Sess. 45 (1973) and S. Rep. No. 1298, 93rd Cong., 2nd Sess., at pages 121-122 (1974). The cited House and Senate Reports state as follows:

> The words "like" and "directly competitive", as used previously and in this bill are not to be regarded as synonymous or explanatory of each other, but rather to distinguish between "like" articles and articles which, although not "like," are nevertheless "directly competitive." In such context, "like" articles are those which are substantially identical in inherent or intrinsic characteristics (i.e., materials from which made, appearance, quality , texture, etc.), and "directly competitive" articles are those which, although not substantially identical in their inherent or intrinsic characteristics, are substantially equivalent for commercial purposes, that is, are adapted to the same uses and are essentially interchangeable therefore.

45 Transcript of Panel Hearing of September 9, 1997, at pages 118-119, 135. See also, Post-Hearing Submission of the United States of America (November 3, 1997) at page 10.

"like or directly competitive" is expressed in the disjunctive, and argued that an interpretation requiring that both "like" and "directly competitive" products be included in the relevant "domestic industry" would render the term "like" redundant, since all "like" products also fall into the category of products covered by "directly competitive."

III. FINDINGS

Preliminary Issues

1. The Panel's Jurisdiction to Consider GATT/WTO Obligations.

49. It will be recalled that the United States argued that the Panel did not have jurisdiction to adjudicate claims by Mexico based on the obligations of GATT Article XIX and the WTO Agreement on Safeguards — the GATT/WTO obligations that govern the type of global safeguard measure involved in this case.

50. The panel determined that it was not necessary to resolve this preliminary objection, because it was possible to dispose of the issues in dispute under the NAFTA agreement alone. After giving full consideration to Mexico's legal claims under both the relevant GATT/WTO safeguards provisions and the NAFTA safeguards provisions that also apply to global safeguards measures, the Panel ultimately concluded that the dispute should be resolved under the rule that is stated, in virtually identical terms, in both NAFTA Annex 803.3(12) and Article 3.1 of the WTO Safeguards Code -- the rule requiring that the investigating authority publish a report setting out its findings and reasoned conclusions on all pertinent issues of fact and law.[46] Since the NAFTA and WTO versions of the rule are substantively identical, application of the WTO version of the rule would have in no way changed the legal conclusion reached under NAFTA Annex 803.3(12). Accordingly, the Panel chose to rest its decision entirely on NAFTA Annex 803.3(12), without relying on Article 3.1 of the WTO Safeguards Code. It was

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46 The two texts are as follows:

Annex 803.3(12): "The competent investigating authority shall publish promptly a report, including a summary thereof in the official journal of the Party, setting out its findings and reasoned conclusions on all pertinent issues of law and fact."

Article 3.1: "The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law."

thus unnecessary for the Panel to make any determination with regard to the preliminary United States objection concerning the Panel's jurisdiction to consider the GATT/WTO provisions referred to in NAFTA Article 802.

2. Timely Notice of Claims Presented

51. It will be recalled that the United States had argued that the only legal claims that Mexico had properly raised before this Panel were its legal claims based on NAFTA Articles 802 and 805. According to the United States' argument, legal claims under other NAFTA Articles — particularly claims relating to the process requirements of Article 803 and Annex 803.3 — could not be considered by the Panel, because Mexico had not given timely notice of them in its request for consultations of August 21, 1996, and its request for a Commission meeting of November 25, 1996. In particular, the United States argued, Mexico's failure to mention Article 803 in its November 25, 1996 request for a Commission meeting meant that legal claims under Article 803 and Annex 803.3 were not within the Panel's terms of reference.

52. In response, Mexico argued that the adequacy of notice must be judged on whether it fairly informs the other party of the legal claims being made. In Mexico's view, its assertion that the ITC defined the wrong "domestic industry" necessarily involved all aspects of the ITC determination on that issue, not only the legal standard itself but also the application of that standard to the particular facts of the case, including the various elements of the ITC's decision-making process dealt with in NAFTA Article 803 and Annex 803.3.

53. The Panel agreed generally with the United States contention that timely notice must be given of legal claims to be considered in a dispute settlement proceeding. The Panel was unable to agree, however, with the determinative significance the United States had attached to the citation of specific NAFTA provisions in evaluating the adequacy of the notice actually given. The WTO standards for determining the adequacy of notice call for a more pragmatic appraisal of the notice that has been given. Article 6:2 of the WTO Understanding on Dispute Settlement specifies that requests for the establishment of a panel must "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." In applying this standard, the panel in the *Desiccated Coconut* case stated:

> In our view, at a minimum, it should have been possible, based on a reasonable reading of the documents determining the scope of the [Panel's] terms of reference, to conclude that this Panel would be asked to make findings regarding Brazil's failure to consult.[47]

The United States suggested that the adequacy-of-notice standard to be deduced from the combination of NAFTA Articles 2012 (3) and 2007 (3) is more stringent than the WTO

47 *Brazil -- Measures Affecting Desiccated Coconut*, WT/DS22/R (1996), at paragraph 289.

standard,[48] but the Panel was not persuaded that the requirement of Article 2007 (3) that the complainant's request for a Commission meeting "indicate the provisions of this Agreement that it considers relevant" must be read as a strict requirement that every relevant provision be cited no matter how clearly the description of the legal claim indicates its applicability. The wording of Articles 2012 (3) and 2007 (3) does not require such a stringent interpretation, nor is such an interpretation in any way necessary to serve the purposes of a notice requirement.

54. In this case, Mexico had clearly stated from the beginning that its principal legal claim was that the ITC had reached an erroneous conclusion with regard to its determination of "domestic industry" by excluding U.S. producers of plastic brooms.[49] In evaluating a determination applying a legal concept such as "domestic industry" with constituent concepts such as "like product" and "directly competitive product," it is almost impossible to separate the abstract legal standard from its application to the particular facts of the case. It is only by examining the decision-maker's application of the legal standard to the particular facts of a case that a reviewing panel can determine whether the correct legal standard was applied. And in doing so, a panel must necessarily examine not only the legal standard articulated by the investigating authority itself, but also the process of decision by which that standard was applied, the factors or criteria considered, and the facts that the decision-making body had deemed sufficient or insufficient to meet the standard. The fact that the NAFTA agreement happens to have specific provisions addressed to the detailed elements of this process of decision does not make the process a legal issue separate and distinct from the central claim of error.

55. The question of whether notice of a legal issue identified by citation to one provision of an agreement fairly includes notice of related issues explicitly dealt with in another provision of that agreement is a question that will always depend on the relationship among the particular legal issues involved. In this case, the Panel finds that the legal issues identified by a claim of legal error in the application of the "domestic industry" concept identified by reference to NAFTA Articles 802 and 805 necessarily include the more specific legal issues dealt with in NAFTA Article 803 and Annex 803.3. The Panel finds, therefore, that the notice given by Mexico in both its request for consultations of August 21, 1996, and its request for a Commission meeting of November 25, 1996, was adequate notice of Mexico's legal claims under NAFTA Article 803 and Annex 803.3. Since the same adequate notice was given in both communications, it is unnecessary to decide whether notice in both communications was required.

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48 Counter Submission of the United States of America, at footnote 28.

49 This was clear in Mexico's August 21, 1996 letter requesting consultations and its November 25, 1996 letter requesting a meeting of the Free Trade Commission, quoted at notes 14 and 15 above.

56. In conclusion, the Panel must reject the preliminary objection entered by the United States pertaining to the adequacy of the notice given by Mexico. Accordingly, the Panel *finds* that its terms of reference authorize it to examine Mexico's legal claims under NAFTA Article 803 and Annex 803.3, and that the Panel is not otherwise precluded from examining those legal claims.

3. Process Requirements: Standard of Review

57. The Panel examined carefully the other arguments of the parties regarding the standard of review that the Panel was required to apply when appraising various elements of the ITC's determination. The Panel reserved judgment, however, on these issues until it could be determined which points of disagreement would in fact need to be resolved in order to reach a decision in this case. As is explained in paragraphs 67-77, the Panel's preliminary examination of the issues in this case forced it to the conclusion that other more basic problems made it unnecessary to address the more detailed factual issues to which the parties' standard-of-review arguments were addressed. Accordingly, the Panel has made no separate findings on the standard-of-review issues raised by the parties.

The Merits

58. The Emergency Action (Safeguard) provisions of NAFTA, Articles 801 through 805 define two safeguard procedures. One, Article 801, is a bilateral procedure designed for the situation in which imports from a NAFTA partner constitute the key source of imports that may be threatening a domestic industry. The other, Article 802, protects the rights of the Parties to apply WTO safeguards on a global basis. The latter is the NAFTA Article authorizing the safeguard measures at stake in this case.

59. As explained above, in reaching its determination that increasing imports of broom corn brooms had caused serious injury to a "domestic industry," producing a "like or directly competitive" product, the ITC's report defined the affected U.S. "domestic industry" to include U.S. manufacturers of broom corn brooms, but not to include U.S. manufacturers of other brooms.[50] Considering that, during the period under investigation, there was a displacement of domestic broom production from broom corn brooms to plastic brooms,[51] this definition of the domestic industry increased the likelihood of finding injury. Whether this definition was in accordance with the NAFTA treaty is therefore a central issue in this case.

60. Since there is no disagreement with the ITC's conclusion that U.S.-made broom corn brooms are "like" the imported broom corn brooms that are the subject of this investigation —

50 ITC Report, at pages I-9 to I-11.

51 Id. at page II-14.

indeed, they are identical — the only issue as to the definition of the "domestic industry" in this case is whether U.S.-made plastic brooms are "like or directly competitive" with the imported broom corn brooms. It is the exact meaning and implications of the term "like or directly competitive" that define the controversy before the Panel.

61. The ITC ruled that the relevant domestic industry was the domestic producers of broom corn brooms and those producers alone. The full text of the ITC's explanation of this conclusion is reproduced at paragraph 24 above. The ITC's explanation of its conclusion can be read to imply that it relied on a subsidiary conclusion that plastic brooms were not "like" the imported broom corn brooms that were the subject of the safeguard proceeding. Several elements of the ITC explanation made that implication quite strong. The ITC began its analysis by explaining that in determining "domestic industry" it traditionally applied a multi-factor approach that took into account such factors as "the physical properties of the article, customs treatment, where and how it is made (e.g., in a separate facility), uses and marketing channels."[52] The first, second, and fourth of these factors are factors that have been looked to in most applications of the "like product" concept by GATT/WTO panels. The impression that these factors defined a "like product" analysis was reinforced by the ITC's explicit conclusion that domestic broom corn brooms were "like" imported broom corn brooms. When juxtaposed against the apparent "like product" orientation of the ITC's factor analysis and the explicit "likeness" finding as to broom corn brooms, the ITC's ultimate conclusion that domestic plastic brooms could *not* be included in the relevant domestic industry would quite naturally be read as a finding that plastic brooms were "not like" broom corn brooms, especially since that conclusion had been explained by stressing the differences between plastic and broom corn brooms. That implication was further reinforced by the fact that the ITC never mentioned any other legal standard under which the finding as to plastic brooms might have been made.

62. In their first submission to the Panel, both parties framed the legal issue before the Panel on the basis of the same assumption about what the ITC had ruled. Both parties defined the question before the panel as a question of whether the ITC's conclusion was or was not a correct application of the "like product" concept. Mexico argued specifically that "[p]lastic and [b]roomcorn [b]rooms [a]re '[l]ike [p]roducts.'"[53] The United States summarized an important conclusion in its submission: " . . . the ITC reasonably concluded that the product "like" imported broom corn brooms was domestic broom corn brooms."[54] The Panel itself shared this assumption during and immediately after the September 9, 1997 oral hearing, to the extent of drafting a set of questions asking the parties for greater precision in their legal arguments about the meaning of the "like product" concept.

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52 Id., at pages I-9 and I-10, footnote 5.

53 Initial Submission submitted by the United Mexican States, at paragraph 76 (heading).

54 Counter Submission of the United States of America, at paragraph 92.

63. During the course of further deliberation and analysis, it became clear to the Panel that the ITC had never explicitly stated that its conclusion excluding plastic brooms from the domestic industry was in fact based on a "like product" analysis. When describing the five factors the ITC traditionally applies in defining "domestic industry," the ITC never actually stated that these five factors were addressed to the issue of whether the products in question were "like products." Instead the ITC stated that these factors were addressed to the issue of whether the products in question were "like or directly competitive products."[55] This description of the issue in terms of the bare statutory language leaves it unclear whether the five factors are somehow addressed to one or both of two separate issues — "likeness" or "direct competitiveness" — or whether these factors are addressed to yet another distinctive legal test for which the phrase "like or directly competitive" is merely a term of art -- a legal test which is neither "likeness" nor "direct competitiveness," but which looks to one or more other concepts, for example a concept such as "industry." The ITC's ultimate conclusion did nothing to clarify this ambiguity. Its ultimate conclusion was stated simply by restating the conclusion that domestic producers of broom corn brooms, and those alone, are the relevant "domestic industry" in this case.

64. Mexico's written answers to the Panel's questions drew the Panel's attention to this ambiguity in the ITC's explanation of its conclusions, but Mexico continued to request the Panel to rule on the question of whether plastic brooms were "like" imported broom corn brooms.[56] As an initial matter, Mexico's request was legally proper. It can be argued that the ultimate conclusion the ITC did clearly reach — that plastic brooms were not part of the domestic industry for purposes of the serious injury analysis — necessarily raises a "like product" issue about the relationship between broom corn brooms and plastic brooms. Both parties appear to agree that, under GATT/WTO law, U.S.-made plastic brooms could *not* be excluded from being considered as part of the same "domestic industry" as U.S.-made broom corn brooms if those plastic brooms were "like" imported broom corn brooms.[57] If this were so, then the ITC's ultimate conclusion excluding plastic brooms from the relevant domestic industry could not be correct as a matter of GATT/WTO law unless plastic brooms were "not like" broom corn brooms.

65. The Panel gave careful consideration to the question of whether it was possible to reach a conclusion about whether plastic brooms were "like" or "not like" imported broom corn brooms,

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55 The relevant statement read, "In determining whether there are one or more domestic industries corresponding to producers of a like or directly competitive product, the Commission traditionally has followed a 'product line' approach, taking into account such factors as the physical properties of the article, customs treatment, where and how it is made (e.g. in a separate facility), uses, and marketing channels." Id. at I-9--I-10.

56 Response to the Questions of the Panel to the Parties, submitted by the United Mexican States, at page 2.

57 To be precise, this argument appears to rest on the further assumption that domestic and imported broom corn brooms are identical products (as both parties agree they are). This being so, domestic plastic brooms that are "like" imported broom corn brooms must necessarily also be "like" domestic broom corn brooms, and this in turn means that there can be no basis for separating plastic brooms and broom corn brooms into separate domestic industries.

even though it was unclear whether the ITC's ruling was in fact based on the "like product" concept. The Panel considered whether the factors examined by the ITC in its analysis were factors that could have been relevant to an analysis of "like product," whether the ITC failed to consider factors essential to a "like product" analysis, whether the ITC's conclusions as to particular factors would have been legally adequate as a matter of "like product" analysis, and whether both the ITC's subsidiary conclusions and its overall conclusions could be considered reasonable under the applicable standard of review.

66. In attempting to perform this analysis, the Panel carefully examined the way in which the "like product" concept had been defined in prior GATT/WTO decisions, and noted, in particular the degree of discretion accorded to governments and panels in applying those definitions. It noted, for example, that, as stated in the *Japan--Taxes on Alcoholic Beverages* case, a factor test has been used:

> The Panel noted that previous panel and working party reports had unanimously agreed that the term "like product" should be interpreted on a case by case basis. The Panel further noted that previous panels had not established a particular test that had to be strictly followed in order to define likeness. Previous panels had used different criteria in order to establish likeness, such as the product's properties, nature and quality, and its end-uses; consumers' tastes and habits, which change from country to country; and the product's classification in nomenclatures.[58]

The Panel also noted that the Appellate Body in the same case had explained the degree of discretion involved in applying the factor test just described:

> In applying [the first three factors listed in the previous quotation] to the facts of any particular case, and in considering other criteria that may also be relevant in certain cases, panels can only apply their best judgment in determining whether in fact products are "like". This will always involve an unavoidable element of discretionary judgment.[59]

And the Panel likewise noted the extent to which the Appellate Body's definition of "likeness" indicated that the definition can vary from WTO provision to WTO provision according to the legal context in which it is being used:

> The accordion of "likeness" stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of

58 *Japan--Taxes on Alcoholic Beverages*, WT/DS8/R (1996) (Panel Report), at paragraph 6.21.

59 *Japan--Taxes on Alcoholic Beverages*, WT/DS8/AB/R (1996) (Appellate Body) at pages 20-21.

> those places must be determined by the particular provision and the circumstances that prevail in any given case to which that provision may apply.[60]

67. As the Panel worked through this analysis, it became clear that the issue of legal correctness — whether the analysis offered by the ITC in support of its ultimate conclusion would have been erroneous in one or more respects if it had been offered in support of the legal conclusion that plastic brooms were "not like" boom corn brooms — would depend on whether the ITC's appraisal and weighting of the various factors was within the range of discretion permitted by the case-by-case approach and the multi-factor definitions employed in the GATT/WTO definitions of "like product."

68. The Panel, however, was forced to conclude that it would not be proper, or even logically coherent, to resolve points of issue on the ground that the ITC could have so decided in the exercise of discretion permitted under these "like product" definitions when there was no way of knowing whether the ITC was in fact applying such a "like product" standard or was consciously employing the type of discretion it permits. In short, an attempt to review the ITC's determination on this hypothetical basis, *as though* it had been a "like product" determination, would be an untenable way to review a safeguards decision under NAFTA Chapter Twenty. The Panel's ultimate conclusion, therefore, was neither that the ITC's decision was legally correct or incorrect as an application of the "like product" concept, but rather that the ITC's legal explanation was simply inadequate to permit review on this issue.

69. A GATT panel confronted a similar situation in the *Polyacetal Resins* case, where it was asked to review an antidumping determination by the Korean Trade Commission (KTC) that failed to make clear the grounds on which the KTC had determined "material injury." The panel stated:

> If the determination before the Panel were the result of affirmative findings based on different standards of injury, a necessary condition of effective review by the Panel of the consistency of these findings with the [1979 Antidumping Code] would be that the determination contain specific conclusions with regard to each of these standards and sufficient reasoning to explain how the factors discussed in the determination were relevant to each particular standard. Accordingly, in order for the Panel to be able to review the KTC's injury determination against the criteria of Article 3 [of the 1979 Antidumping Code], the Panel first had to satisfy itself that this determination was sufficiently clear with regard to the standard(s) of injury on which the KTC had based its conclusions. This question was therefore properly before this Panel, regardless of whether or not the United States had raised it in this form during the prior stages of the dispute settlement process.[61]

70. The *Polyacetal Resins* panel concluded that KTC's failure to make clear the basis of its decision violated the provisions of Article 8.5 of the 1979 Antidumping Code requiring

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60 Id. at page 21.

61 *Korea--Anti-Dumping Duties on Imports of Polyacetal Resins from the United States,* ADP/92 (1993) at paragraph 217.

investigating authorities to include in their public determination "the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities, and the reasons and basis therefor."[62] Moreover, as explained in the text quoted above, the panel felt compelled to reach this conclusion even though the fatal ambiguity of the KTC determination had not been raised by the complaining party prior to the panel proceeding itself.

71. In the present case, the panel is compelled to reach the same conclusion. A clear explanation of the legal basis for determinations such as the ITC's "domestic industry" determination is an essential condition of effective review of safeguard measures by a Chapter Twenty panel, and effective review, in turn, is essential to the realization of the NAFTA Preamble's objective to "establish clear and mutually advantageous rules governing [the Parties'] trade." Accordingly, the inadequacy of the ITC's explanation of its "domestic industry" determination must be held to be equally inconsistent with the parallel provisions of Annex 803.3(12) of the NAFTA agreement, which requires that safeguard determinations provide "reasoned conclusions on all pertinent issues of law and fact." Likewise, even though the inadequacy of the ITC's determination in this regard had neither been raised before the later stages of this proceeding nor fully briefed by the parties,[63] the Panel was compelled to rule on this issue in order to discharge its responsibility to rule on claims of legal error that had been properly raised under one or more of the several possible meanings of this ambiguous determination.

72. Accordingly, the Panel therefore *determines* that in this respect the ITC's determination on the issue of "domestic industry" is inconsistent with the United States obligations under NAFTA, Annex 803.3(12) of the NAFTA Agreement.

73. As noted above, the ITC's decision is also unclear as to one other aspect of the legal definition of "domestic industry"— the meaning to be given to the particular phraseology of the

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62 Id., at paragraphs 223-224.

63 As noted in paragraphs 44-47 above, Mexico did call attention on several occasions to the fact that, in the absence of any further findings or explanations, the ITC's conclusion that plastic brooms were not "like or directly competitive" with imported broom corn brooms was open to a variety of different interpretations, each leading to a different claim of legal error. The Panel considered that these various claims of legal error amounted to a further claim of legal error that, in view of the ambiguities and omissions in the ITC's explanation of the legal basis of its "domestic industry" determination, its explanation of its legal ruling was simply too incomplete and unclear to be a legally adequate basis for taking a safeguard measure in the first place.

In its Comments to the Initial Panel Report, the United States argued that Mexico had waived reliance on the requirements of Annex 803.3(12) by having dismissed the relevance of Annex 803.3(12) to the legal adequacy of the ITC's factual analysis of the five factors it had listed as its criteria of decision. Comments of the United States of America on the Initial Panel Report" (January 16, 1998) at page 5, citing Comments on the United States Government Reply to the Questions of the Panel, Submitted by: United Mexican States (October 22, 1997) at paragraphs 21-23. The Panel considered that the statement in question was addressed to the proper legal criteria for measuring the adequacy of particular factual determinations, and not the criteria governing the legal adequacy of the investigative authority's explanation of the legal basis for its decision.

definition which uses two separate terms, "like" and "directly competitive," separated by the disjunctive "or."

74. The terms "like" and "directly competitive" may be interpreted as expressing two separate and distinct legal tests — the former requiring a certain degree of physical and functional similarity in addition to market interchangeability and the latter focusing on market interchangeability alone. Under this interpretation, all "like" products would be "directly competitive,' but some products that are not "like" could still be "directly competitive."

75. If these two terms do in fact represent separate and distinct legal concepts, some clarification would be needed as to the legal consequences of a situation in which one domestic product is found to be "like" the imported product, but another domestic product is found "not like" but "directly competitive."

76. The ITC's report does not indicate whether the ITC regards "like" and "directly competitive" as separate legal tests, or whether it views "like or directly competitive" as a single term of art for a single legal test having its own distinctive content. Mexico's final submission included a list of cases in which the ITC had used the language "like or directly competitive" as if it were one concept.[64] The way the ITC describes its five-factor "product line" approach in this case is likewise suggestive of that unitary concept.[65] A statement by one individual commissioner suggests a view that "like" and "directly competitive" are separate tests, stating that "if there is an industry producing an article that is 'like' the imported article, it is usually unnecessary to consider whether there are also industries producing 'directly competitive' articles, absent specific allegations that producers of directly competitive articles are also injured."[66] And one of the dissenting commissioners concluded that plastic brooms should be part of the same domestic industry because they were "directly competitive."[67]

77. In sum, while it is clear that the ITC ruled that plastic brooms were not part of the relevant domestic industry, the reasoning in its determination never explained how the ITC interpreted the term "directly competitive" in reaching that result. It neither deals with the consequences that would follow if plastic brooms were found to be "not like" but still "directly competitive" with broom corn brooms, nor does it exclude that possibility. Without further explanation, this aspect of the decision is also unreviewable and thus also fails to meet the requirements of NAFTA Article 803 Annex 803.3(12).

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64 Supplementary Written Submission, submitted by the United Mexican States, at paragraph 31.

65 ITC Report, at footnote 5.

66 Id., at footnote 3.

67 Id. at I-53.

IV. CONCLUSIONS AND RECOMMENDATIONS

78. The safeguard measures currently in force pursuant to Proclamation 6961,[68] having been based on an ITC determination that fails to provide "reasoned conclusions on all pertinent issues of law and fact," constitutes a continuing violation of United States obligations under NAFTA. This measure has already been in force for two years. The Panel therefore *recommends* that the United States bring its conduct into compliance with the NAFTA at the earliest possible time.

Signed in the original by:

Paul O'Connor (Chair)
Paul O'Connor (Chair)

John H. Barton
John H. Barton

Raymundo Enriquez
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Robert E. Hudec
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Submitted to the disputing Parties on January 30, 1998

68 61 Fed. Reg. 64431 (Dec. 4, 1996).