

**ARGENTINA– SAFEGUARD MEASURES ON IMPORTS OF  
FOOTWEAR**

***Report of the Panel***

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## I. INTRODUCTION

1.1 On 3 April 1998, the European Communities requested consultations with the Government of Argentina under Article XXII:1 of the GATT 1994 ("GATT") and pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Article 14 of the Agreement on Safeguards with regard to provisional and definitive safeguard measures imposed by Argentina on imports of footwear.

1.2 The European Communities and Argentina held consultations on 24 April 1998, but failed to reach a mutually satisfactory solution.

1.3 On 10 June 1998, pursuant to Article 6 of the DSU, the European Communities requested the establishment of a panel with standard terms of reference.

1.4 At its meeting on 23 July 1998, the DSB established a panel pursuant to the request by the European Communities (WT/DS121/3).

1.5 At that DSB meeting, parties agreed that the Panel should have standard terms of reference. The terms of reference of the Panel are the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS121/3, the matter referred to the DSB by the European Communities in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

1.6 On 15 September 1998, the Panel was constituted as follows:

Chairman: Mr. John McNab  
Members: Ms. Claudia Orozco  
Ms. Laurence Wiedmer

1.7 Brazil, Indonesia, Paraguay, Uruguay and the United States reserved their rights to participate in the Panel proceedings as third parties.

1.8 The Panel met with the parties on 30 November – 1 December 1998 and 3 February 1999. It met with the third parties on 1 December 1998.

1.9 The Panel submitted its interim report to the parties on 21 April 1999. On 10 May 1999, both parties submitted comments on the interim report, and Argentina requested that an interim review meeting be held. On 20 May 1999, the Panel held the interim review meeting with the parties. The Panel submitted its final report to the parties on 4 June 1999.

## II. FACTUAL ASPECTS

2.1 This dispute concerns the application of provisional and definitive safeguard measures on imports of footwear by Argentina. Following a request made on 26 October 1996 by the Argentine Chamber of the Footwear Industry (CIC) for the application of a safeguard measure on footwear, and pursuant to Resolution MEYOSP No. 226/97<sup>1</sup>, a safeguard investigation on footwear was initiated. At the same time, a provisional measure was imposed. The opening of the safeguard investigation

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<sup>1</sup> Published in the *Boletín Oficial* of 24 February 1997. The Resolution was adopted on 14 February 1997 and became effective on 25 February 1997.

and the implementation of a provisional safeguard measure were notified to the Committee on Safeguards in a communication dated 21 February 1997.<sup>2</sup> In a communication dated 5 March 1997, a copy of Resolution 226/97 was transmitted to the Committee on Safeguards.<sup>3</sup>

2.2 On 25 July 1997 Argentina notified the Committee on Safeguards, pursuant to Article 12.1(b) of the Agreement on Safeguards, of the determination of serious injury made by the National Foreign Trade Commission ("CNCE").<sup>4</sup> On 1 September 1997, Argentina notified the Committee on Safeguards of the intention of the Argentine authorities to impose a final safeguard measure under Article 12.1(c) and Article 9 (footnote 2) of the Agreement on Safeguards.<sup>5</sup> Consultations between Argentina and the European Communities and the United States took place on 9 September 1997 pursuant to Article 12.3 of the Agreement on Safeguards.<sup>6</sup>

2.3 On 12 September 1997, Argentina published<sup>7</sup> a definitive safeguard measure, under Resolution 987/97, in the form of minimum specific duties on certain imports of footwear identified in Annex I of the Resolution, effective as of 13 September 1997. On 26 September 1997, Argentina transmitted to the Committee on Safeguards a copy of Resolution 987/97.<sup>8</sup> In a communication dated 26 September 1997, Uruguay, as Pro Tempore President of MERCOSUR<sup>9</sup> and on behalf of Argentina, notified under Article 12.1(c) and footnote 2 to Article 9 the definitive safeguard measure imposed by Resolution MEYOSP 987/97.<sup>10</sup>

2.4 On 31 December 1993, Resolution n° 1696/93 of the Argentine Ministry of Economy, Public Works and Public Services had introduced minimum specific duties on certain footwear imported into Argentina.<sup>11</sup> On the date of their original intended expiry (31 December 1994), the minimum specific duties were extended for one year by Article 15 and Annex XII of Decree 2275/94<sup>12</sup>. They were again prolonged until 31 December 1996 by Article 9 of Decree 998/95<sup>13</sup> and then until 31 August 1997 by Resolution 23/97 of 7 January 1997.<sup>14</sup> Various amendments were also made to the duties over the period.<sup>15</sup> Argentina adopted a Resolution repealing the minimum specific duties on imports of footwear<sup>16</sup> on 14 February 1997, the same day that Argentina adopted Resolution

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<sup>2</sup> G/SG/N/6/ARG/1, G/SG/N/7/ARG/1, 25 February 1997, Exhibit EC-11.

<sup>3</sup> G/SG/N/6/ARG/1Suppl.1 and G/SG/N/7/ARG/1/Suppl.1, 18 March 1997, Exhibit EC-12.

<sup>4</sup> G/SG/N/8/ARG/1, Exhibit EC-16.

<sup>5</sup> G/SG/N/10/ARG/1, G/SG/N/10/ARG/1, 15 September 1997, Exhibit EC-17, with corrigendum dated 18 September 1998, Exhibit EC-18.

<sup>6</sup> In accordance with Article 12.5 of the Agreement on Safeguards, the results of the consultations were notified to the Committee in a communication dated 10 September 1997, G/SG/14-G/L/195.

<sup>7</sup> *Boletín Oficial*, No. 28,729, 12 September 1997.

<sup>8</sup> G/SG/N/10/ARG/1/Suppl.1, G/SG/N/11/ARG/1/Suppl.1, 10 October 1997, Exhibit EC-20.

<sup>9</sup> The Southern Common Market (MERCOSUR) was formed on 26 March 1991, when four Latin American countries (Argentina, Brazil, Paraguay and Uruguay) signed a treaty in Asuncion, providing for the creation of a common market among the four participants.

<sup>10</sup> G/SG/N/10/ARG/1/Suppl.2, G/SG/N/11/ARG/1/Suppl.2, G/SG/14/Suppl.1 and G/L/195/Suppl.1, 22 October 1997.

<sup>11</sup> Exhibit EC-1. The Resolution is dated 28 December 1993 and published in the Official Journal of the Argentine Republic of 30 December 1993, to enter into force the next day.

<sup>12</sup> Exhibit EC-2. Published in the Official Journal of the Argentine Republic of 30 December 1994, to enter into force on 1 January 1995.

<sup>13</sup> Exhibit EC-3.

<sup>14</sup> Exhibit EC-4.

<sup>15</sup> Similar minimum specific duties also applied to textiles and clothing. The minimum specific duties on textiles and clothing were the subject of WTO complaints by the United States (WT/DS56) and the European Communities (WT/DS77). The Panel in those disputes excluded minimum specific duties on footwear from its examination because these had been eliminated before the panel was formed.

<sup>16</sup> Resolution 225/97, Exhibit EC-5.



MEYOSP 226/97<sup>17</sup>, referred to above, initiating the safeguard proceedings and imposing provisional measures in the form of minimum specific duties on imports of footwear.

2.5 On 28 April 1998, Argentina published Resolution 512/98<sup>18</sup> modifying Resolution 987/97.

2.6 On 26 November 1998, Argentina published MEYOSP Resolution 1506/98<sup>19</sup>, further modifying Resolution 987/97. On 7 December 1998, Argentina published SICyM Resolution 837/98<sup>20</sup>, implementing Resolution 1506/98.

### III. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES

3.1 The European Communities requests the Panel to find that "Argentina has violated Articles 2:1, 4:2(a), 4:2(b), 4:2(c), 5:1, 6, 12:1 and 12:2 Agreement on Safeguard[s] and Article XIX:1(a) of GATT 1994."

3.2 The European Communities argues that:

"All of the above violations, except for the violation of Article 5:1, relate to the way in which the investigation was conducted or the way in which procedural obligations were carried out by Argentina. Accordingly, any change to the measure which Argentina may introduce will only affect the violation of Article 5:1 (necessity of the measure and adequacy of the adjustment plan) and not the remaining violations."

"Accordingly, the EC submits that Argentina's safeguard measures on imported footwear, however they may be adapted or adjusted in the meantime, should be removed."

3.3 In particular, "[b]ecause of the continued changes in the safeguard measures, the European Communities requests the Panel to find all Argentine measures based on the safeguard investigation subject of this dispute to be contrary to Argentine WTO obligations."

3.4 Argentina requests the Panel:

- (a) "to give consideration to the issues of procedure raised in its first written submission" (section IV.A). First, Argentina "[does] not consider that the DIEMs applied to footwear and now revoked should be discussed by the Panel. [Argentina] therefore respectfully request the Panel not to take into account any of the claims made by the EC in this respect". Second, "Argentina respectfully requests the Panel not to make any ruling on Resolution 512/98, which was never the subject of consultations between the European Communities and Argentina and is not included in the terms of reference which the DSB adopted for the Panel's proceedings, although these were the subject of detailed discussions at two consecutive meetings of the DSB";
- (b) "to reject the EC's request for a preventive ruling by the Panel on any change that Argentina might make to the measure";
- (c) "to reject the request that the panel "find" that Argentina, in conducting its investigation, has failed to comply with the different provisions that the EC claims to

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<sup>17</sup> Exhibit EC-6.

<sup>18</sup> Exhibit EC-28.

<sup>19</sup> Exhibit EC-32.

<sup>20</sup> Exhibit EC-35.

have been violated, in particular its obligations under Articles 2.1, 4.2(a), 4.2(b), 4.2(c), 6, 12.1 and 12.2 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994";

- (d) "to reject the EC's request that any change to the measure which Argentina may introduce only affect the alleged violation of Article 5.1 and not the remaining alleged violations";
- (e) "to reject the EC's request that the Panel "recommend" that however the measure may be adjusted, it should be removed."

#### **IV. PROCEDURAL ISSUES AND REQUESTS FOR PRELIMINARY RULINGS<sup>21</sup>**

##### **A. ARGENTINA'S REQUESTS REGARDING THE PANEL'S TERMS OF REFERENCE**

###### **1. Minimum Specific Import Duties (DIEMS)**

- (a) The European Communities' Account of the "Factual and Procedural History" of the Dispute

4.1 As part of its description of the "factual and procedural history" of this dispute, the European Communities asserts the following:

On 31 December 1993 Resolution n° 1696/93 of the Argentine Ministry of Economy, Public Works and Public Services introduced minimum specific duties on certain footwear imported into Argentina<sup>22</sup>. The text of this Resolution is annexed as Exhibit EC-1. The justification given for this measure in the first Preamble was the low price of certain imports and the resulting injury caused to the Argentine industry. It was stated to be of a temporary nature and to be linked to an investment plan for the adjustment and specialisation of the industry. Indeed, Article 6 of the measure specified that the minimum specific duties were to expire on 31 December 1994 and that there was a "possibility of a single non-renewable extension of six months" provided that the injury persisted and the adjustment justified it.

However, the protection proved easier to introduce than to remove and the duties have in effect been in force ever since. On the date of their original intended expiry and on the eve of the entry into force of the WTO Agreements, they were extended for one year by Article 15 and Annex XII of Decree 2275/94<sup>23</sup> (Exhibit EC-2). They were again prolonged until 31 December 1996 by Article 9 of Decree 998/95 (Exhibit EC-3) and then again prolonged until 31 August 1997 by Resolution 23/97 of 7 January 1997 (Exhibit EC-4). Various amendments were also made to the duties over the period.

Similar minimum specific duties also applied to textiles and apparel. They were all in principle calculated by multiplying a "representative international price" by the applicable *ad valorem* customs duty<sup>24</sup>. A minimum specific duty became payable where its application resulted in a duty higher than would have resulted from the application of

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<sup>21</sup> Except as otherwise noted, the footnotes and citations, and the emphasis in the text are as contained in the parties' submissions.

<sup>22</sup> The Resolution is dated 28 December 1993 and published in the Official Journal of the Argentine Republic of 30 December 1993, to enter into force the next day.

<sup>23</sup> Published in the Official Journal of the Argentine Republic of 30 December 1994, to enter into force on 1 January 1995.

<sup>24</sup> See the description of the system given at paragraph 6.18 of the Report of the Panel and 49 of the Appellate Body Report in *Argentina - Certain Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* referred to below.

the applicable *ad valorem* customs duty (in principle for all goods priced below the “representative international price”). The levels of specific duties which were reached, surpassed in certain cases 200 per cent *ad valorem* equivalent, clearly breaching Argentina's bound rate of 35 per cent *ad valorem*, provided in Argentina's Schedule LXIV. In effect, Argentina was applying a safeguard measure without following any of the required procedures laid down in the WTO Agreement applicable after 1 January 1995.

The regime of minimum specific duties applied by Argentina did not fail to provoke international protests and both the EC and the US commenced dispute settlement proceedings. The US requested consultations on 4 October 1996 (WT/DS56) which gave rise to the Panel and Appellate Body Reports *Argentina - Certain Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*<sup>25</sup>. The European Communities, which was a third party in the US proceeding, requested its own Panel under Article 10.4 Dispute Settlement Understanding (DSU) on 10 September 1997 (WT/DS77). This gave rise to a Panel proceeding *Argentina - Measures Affecting Textiles and Clothing*, which is currently suspended.

When it became clear that the Panel requested by the US would be established, Argentina repealed the minimum specific duties on imports of footwear while maintaining such duties on imports of clothing and textiles (Resolution 225/97 –Exhibit EC-5) and simultaneously initiated safeguard proceedings and imposed provisional measures in the form of minimum specific duties on imports of footwear (Resolution 226/97 – Exhibit EC-6). These decisions were both adopted on 14 February 1997 and both entered into force the day after their publication in the Official Journal of the Argentine Republic, that is on 25 February 1997, the very day the panel was established by the DSB in case WT/DS56. The minimum specific duties, which were imposed as a provisional safeguard measure were virtually identical to the minimum specific duties which had just been repealed.

This was a manoeuvre that proved successful for Argentina, in the sense that footwear was excluded from the WTO Panel in case WT/DS56<sup>26</sup>, which therefore only considered the illegality of the minimum specific duties for textiles and apparel, as well as an Argentine statistical tax. The minimum specific duties in that case were held to violate Article II:1(b) GATT 1994 in so far as they exceeded the bound rate of 35 per cent *ad valorem*. These minimum specific duties were identical in form and nature to the minimum specific duties on footwear.

The opening of the safeguard investigation and the implementation of a provisional safeguard measure were notified to the Committee on Safeguards on 21 February 1997 (document G/SG/N/6/ARG/1, G/SG/N/7/ARG/1, Exhibit EC-11).<sup>27</sup>

On 25 July 1997 Argentina notified (document G/SG/N/8/ARG/1, Exhibit EC-16) the Committee on Safeguards, pursuant to Article 12:1(b) Agreement on Safeguards, of the

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<sup>25</sup> WT/DS56/R of 25 November 1997, confirmed and partially modified on Appeal - WT/DS56/AB/R and WT/DS56/AB/R Corr.1 of 27 March 1998, (AB-1998-1).

<sup>26</sup> See paragraph 6.15 of the Panel Report in *Argentina - Certain Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*.

<sup>27</sup> On 5 March 1997 Argentina informed the Committee on Safeguards of the content of Resolution 226/97 (document G/SG/N/6/ARG/1/Suppl.1, G/SG/N/6/ARG/1/Suppl. 1 dated 18 March 1997, Exhibit EC-12) in an additional notification.

determination of serious injury made by the NFTC (National Foreign Trade Commission).

On 1 September 1997 Argentina notified the Committee on Safeguards of the intention of the Argentine authorities to impose a final safeguard measure under Article 12:1(c) and Article 9 (footnote 2) Agreement on Safeguards (see document G/SG/N/10/ARG/1, G/SG/N/10/ARG/1, dated 15 September 1997, Exhibit EC-17, with corrigendum dated 18 September 1998, Exhibit EC-18).

On 12 September 1997 Argentina published in the Official Journal of the Argentine Republic No. 28,729 a definitive safeguard measure in the form of minimum specific duties on imports of footwear, effective as of 13 September 1997, under Resolution 987/97.

On 26 September 1997 Argentina transmitted to the Committee on Safeguards (see document G/SG/N/10/ARG/1/Suppl.1, G/SG/N/11/ARG/1/Suppl.1 dated 10 October 1997, Exhibit EC-20) a copy of Resolution 987/97. The resolution imposed as from 13 September 1997 a definitive safeguard measure on certain imports of footwear, listed in Annex I of the Resolution. This definitive safeguard measure was in the form of minimum specific duties, in many cases identical to the provisional duties and the former Article II GATT-illegal duties.

(b) Argument of Argentina

4.2 Referring to the European Communities' account of the "factual and procedural history" of this dispute in paragraph 4.1, *supra* Argentina states that the European Communities endeavours to introduce the question of the DIEMs applied to footwear, which were revoked almost two years before, calling them "Article II GATT-illegal duties", indicating that they were "clearly breaching Argentina's bound rate of 35 per cent *ad valorem*...", and suggesting that in practice they constituted a safeguard measure.

4.3 In this connection, Argentina notes that discussion of the DIEMs that applied to footwear in the past and have now been revoked is not covered by the terms of reference of this Panel. These DIEMs cannot be the subject of review under the WTO's dispute settlement system because the measure is not in force and discussing it would not meet the objective of securing "a positive solution to a dispute" (Article 3.7 of the DSU).

4.4 Argentina asserts that the EC qualification of the DIEMs applied to footwear as "GATT-illegal duties" should clearly be rejected. The DIEMs in question have now been revoked and were not the subject of any recommendation by the DSB concerning their consistency or inconsistency with the rules of the WTO, the only body authorised to declare the illegality of a measure within the multilateral trading system.

4.5 Argentina asserts that in *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, the United States requested the Panel to rule on the legality of the footwear DIEMs. The panel, however decided not to accede to the United States request, considering that:

"...in the absence of clear evidence to the contrary, we cannot assume that Argentina will withdraw the safeguard measure and reintroduce the specific duties measure in an attempt to evade Panel consideration of its measures. We must assume that WTO Members will perform their treaty obligations in good faith, as they are required to do by the WTO Agreement and by international law. We consider, therefore, that there is no evidence that the minimum specific import duties on footwear will be reintroduced.... Consequently, we will

not review the WTO compatibility of the specific duties which used to be imposed on footwear and which have, since the establishment of this Panel, been revoked...".<sup>28</sup>

4.6 Argentina contends that the European Communities also tried to discuss the legality of the DIEMs within the dispute settlement system when it requested the establishment of a panel on *Argentina – Measures Affecting Imports of Textiles and Clothing*. The original document (WT/DS77/3) indicated that the European Communities requested the DSB to establish a panel to find that the imposition of DIEMs on footwear violated Article II.1(b) of GATT. As reflected in the Minutes of the DSB meeting on 25 September 1997<sup>29</sup>, however, Argentina rejected the inclusion of this measure in the Panel's terms of reference because the measure did not exist and consequently this was a moot point that could not be dealt with in the framework of the DSU. As a result, the European Communities withdrew its objection to the DIEMs on footwear and submitted a revised version of its request for the establishment of a panel.<sup>30</sup> At the same meeting, other Members of the DSB expressed their concern that the European Communities' request was equivalent to setting up a "preventive panel" by trying to include in the terms of reference any other measure that might be adopted in the future.

4.7 Therefore, Argentina does not consider that the DIEMs applied to footwear and now revoked should be discussed by this Panel, and requests the Panel not to take into account any of the claims made by the European Communities in this respect.

(c) Argument of the European Communities

4.8 The European Communities observes that Argentina began the implementation of a comprehensive liberalisation programme by the beginning of this decade. It signed in 1991 the Treaty of Asuncion, with the aim of creating a customs union with Brazil, Paraguay and Uruguay. However, in 1993 Argentina decided to introduce restrictive trade measures to protect its industry from the liberalisation measures: it introduced minimum specific duties for a number of products, including footwear, as well as textiles and apparel. The duties of the latter two, which are not within the terms of reference of the present case, have already been declared WTO-illegal by a previous Panel and the Appellate Body earlier this year.

4.9 The European Communities asserts that Argentina realised as early as 14 February 1997 that these minimum specific duties could not be in conformity with its international obligations under the WTO and decided to abolish them for footwear<sup>31</sup> and replace them with the present safeguard measure.

4.10 The European Communities clarifies that it is not asking the Panel to declare the former minimum specific duties on footwear -- which have been abolished since February 1997 -- WTO-illegal. The European Communities has no intention of opening up a debate on whether those duties for footwear violated Article II:1(b) GATT or not. These duties were revoked just before the panel in *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* was established. Consequently, that panel, and no other panel afterwards, was in a position to review the WTO compatibility of the minimum specific duties for footwear, even though those duties were identical to those applied at that time by Argentina for textiles. This is expressly recognised in paragraph 6.15 of that panel report where it stated that, "when reviewing the import regime applied to textiles and apparel, [we may] refer to some examples of transactions involving footwear because the type of duties used at the time by Argentina for textiles, apparel and footwear was the same".

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<sup>28</sup> Document WT/DS56/R, paragraphs 6.14 and 6.15, page 86.

<sup>29</sup> Document WT/DSB/M/37.

<sup>30</sup> Document WT/DS77/3/Rev.1/Corr.1.

<sup>31</sup> Resolution 225/97, see Exhibit EC-5.

## 2. Resolution MEYOSP 512/98, Resolution MEYOSP 1506/98, and Resolution SICyM 837/98, and panel recommendations on "hypothetical future measures"

(a) Arguments of Argentina

(i) *Resolution MEYOSP 512/98 and Resolution MEYOSP 1506/98*

4.11 In connection with the European Communities' claims concerning Resolution MEYOSP 512/98 and 1506/98, Argentina maintains that these regulations are not covered by the terms of reference of this Panel (document WT/DS121/3). These terms of reference only cite and include the measures contained in Resolution MEYOSP 226/97 and Resolution MEYOSP 987/97. Resolutions 512/98 and 1506/98 are foreseen modifications to the measure adopted by Resolution MEYOSP 987/97. Argentina recalls the decision of the Appellate Body in *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, which states that: "its [Mexico's] panel request did not identify the final anti-dumping duty as the 'specific measure at issue', as is required by Article 6.2 of the DSU". Likewise, Argentina argues, in this case the European Communities failed to identify and could not identify Resolution 512/98 or 1506/98 as the "specific measures at issue".

4.12 Moreover, Argentina asserts, Resolution MEYOSP 512/98 is part of a context in which private individuals have brought legal proceedings contesting the safeguard before the Argentine courts. The existence of these legal proceedings was not notified to the WTO either, because they are not covered by the obligations under Article 12, although this did in fact modify the safeguard measure by limiting its scope through the granting of an exception for the largest importers. To recap, Resolution MEYOSP 512/98 was adopted in order to preserve a situation that was considered necessary in terms of imports at the time the measure was imposed so as to allow the industry to adjust and the liberalisation calendar to be pursued in accordance with the original notification.

4.13 Argentina therefore requests the Panel not to make any ruling on Resolution 512/98, which was never the subject of any consultations between the European Communities and Argentina and is not included in the terms of reference which the DSB adopted for the Panel's proceedings, although the terms of reference were the subject of detailed discussions at two consecutive meetings of the DSB.

4.14 In the hypothetical case of the Panel rejecting the special preliminary ruling requested by Argentina, Argentina states that, in compliance with Article 9 of Resolution MEYOSP 987/97, Argentina duly notified to the WTO, and with a view to advancing the review, issued Resolution 512/98. The result of this review showed that the objective of limiting imports in order to "remedy the injury and facilitate adjustment" was not being achieved. Rather, according to the conclusions of the report prepared by the Secretary of Industry, Trade and Mining, the status of the safeguard measure, after 15 months in force, was unusual in that there had been an increase in footwear imports during that period as compared to the previous period. Imports increased rather than slowing down, maintaining their level or decreasing and enabling the measure to fulfil its objectives of remedying the injury and facilitating adjustment in the meaning of Article 5 of the AS. Thus, the adjustment plan presented by the domestic industry could neither be implemented, nor could it achieve its planned objectives. Consequently, Argentina states, it found itself in a situation that was not covered by the hypothesis set forth in Article 7.4 of the Agreement on Safeguards. That Article, which provides for reviews and progressive liberalisation of the safeguard measure, presupposes that the measure in force is achieving its objective. In the case of Argentine footwear imports, the objective of the safeguard measure was not being achieved, and it was necessary to amend it in order to comply with the provisions of Article 5.1 of the Agreement. This led to the decision to adopt Resolution 1506/98, which currently regulates the safeguards situation, and does not come under the terms of reference contained in document WT/DS121/3.

4.15 In response to a Panel question regarding how Argentina reconciles its arguments that resolutions 512/98 and 1506/98 are based on and flow out of Article 9 of Resolution 987/97 on the one hand, and that these resolutions are outside the Panel's terms of reference because they are new measures, Argentina indicated that it does not refer to two new measures. Rather, these are foreseen modifications to the measure adopted by Resolution MeyOySP 987/97. These modifications do not, in Argentina's opinion, come within the terms of reference of the Panel, which cite only Resolution 987/97 (see para. 4.11, *supra*).

(ii) *Panel recommendations on "hypothetical future measures"*

4.16 Argentina notes that the European Communities requests the Panel "... to find all Argentine measures based on the safeguard investigation subject of this dispute to be contrary to Argentine WTO obligations".<sup>32</sup> Argentina further notes that the European Communities, states that "... *any change to the measure which Argentina may introduce* will only affect the violation of Article 5.1 (necessity of the measure and adequacy of the adjustment plan) and not the remaining violations"<sup>33</sup> and that "... the European Communities submits that Argentina's safeguard measures on imported footwear, *however they may be adapted or adjusted* in the meantime, should be removed".<sup>34</sup> Argentina considers that these claims are hypotheses regarding future measures that have no place in the WTO dispute settlement system.

4.17 Argentina argues, first, that the Panel's terms of reference set out in document WT/DS121/3 do not contain the words "all Argentine measures based on the safeguard investigation subject of this dispute". Second, as stated in the Appellate Body's Report on the case of *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*:

"... Article 6.2 of the DSU requires that *both* the 'measure at issue' and the 'legal basis for the complaint' (or the 'claims') be identified in a request for the establishment of a panel. As we understand the Panel, it would, in effect, suffice, under Article 6.2 of the DSU, for a panel request to identify only the 'legal basis for the complaint', without identifying the '*specific* measure at issue'. This is *inconsistent with the plain language of Article 6.2 of the DSU*."<sup>35</sup>

Argentina submits that if the claims refer to future measures and the measures at issue cannot therefore be identified, it is not possible to rule on their legality. This is why, under Article 6.2 of the DSU, the European Communities cannot question the investigation as such and obtain a ruling whereby ("*all* Argentine measures based on the safeguard investigation subject of this dispute [are found] to be contrary to Argentine WTO obligations").

4.18 Furthermore, Argentina continues, as stated by Panel in the case of *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*: "We must assume that WTO Members will perform their treaty obligations in good faith, as they are required to do by the WTO Agreement and by international law".<sup>36</sup> No provision in the DSU allows recommendations to be made on future or hypothetical measures or the establishment of preventive panels. The contrary would imply a violation of the provisions of Article 3.7 of the DSU, namely that "... the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements".

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<sup>32</sup> *Supra*, para. 3.3.

<sup>33</sup> *Supra*, para. 3.2.

<sup>34</sup> *Ibid.*

<sup>35</sup> Document WT/DS60/AB/R, paragraph 69, page 24.

<sup>36</sup> WT/DS56/R, paragraph 6.14, page 86.

A supposed future measure cannot be withdrawn before it exists, neither can it be deemed inconsistent with the provisions of the WTO Agreements.

4.19 Argentina considers that this interpretation is also reaffirmed by Article 19.1 of the DSU, which, referring to recommendations by panels, states that "... where a panel ... concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement". It should be noted that the verb is used in the present tense, i.e. "is inconsistent" and not in the subjunctive ("might be inconsistent").

4.20 Argentina also asserts, first, that the terms of reference of the Panel as set forth in document WT/DSB/121/3 are perfectly clear as regards the scope of these proceedings and the content of the dispute as presented before the Panel; and second, as the Appellate Body stated in the *Bananas III* case, the DSU requires claims to be specified in a way that allows the respondent and third parties to understand the legal basis of the complaint.<sup>37</sup>

4.21 According to Argentina, the condition imposed by the DSU in Article 6.2, that Members should explicitly identify their complaints in the request for the establishment of a panel, is justified by the need to be able to argue and rebut arguments on the basis of concrete and real claims, and thus be able to arrive at a conclusion as to whether or not a given action is consistent with the obligations of a given agreement. Argentina queries how it is possible to verify or observe the consistency or inconsistency with a provision of the Agreement on Safeguards of a measure applied by a Member if it is described in such vague terms as "however they may be adjusted in the meantime".<sup>38</sup> The DSU does not provide for the kind of "preventive" panel which seems to be behind the European Communities' request to this Panel to rule on an issue which was never included in the terms of reference.

4.22 Argentina therefore requests the Panel not to rule on any future or hypothetical measures alluded to by the European Communities in its first submission without any further details.

(b) Argument of the European Communities

4.23 The European Communities argues that the measures the subject of the present proceeding are the provisional safeguard measure introduced on 25 February 1997 and the definitive safeguard measures introduced by Resolution 987/97.<sup>39</sup> This Resolution contained in its Annex I a timetable for the progressive liberalisation of the restrictive measure. Just before the first liberalisation was to take effect, at the end of April 1998, Argentina postponed it with Resolution 512/98.<sup>40</sup> The date of May 1<sup>st</sup> 1998, when the first step of the progressive liberalisation was foreseen, was put back until the 15<sup>th</sup> of December 1998. Furthermore, Argentina modified Article 9 of Resolution 987/97 by introducing the possibility of further changes in the liberalisation schedule. The most recent Resolution adopted by Argentina in this respect is Resolution 837/98, which the European Communities now puts forward as Exhibit EC-35. This latest Resolution, published in the Argentine Official Journal of 7 December 1998, implements certain aspects of Resolution 1506/98 and establishes a quota-management system based on trimesters.

4.24 According to the European Communities, Argentina has stated that the subsequent Resolutions are not new measures, but merely applications of the adjustment procedure. As such, the European Communities submits, they are of course covered by this Panel's procedures. In any event, even if they are amendments, they equally become null and void from the moment that the original Resolution falls.

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<sup>37</sup> WT/DS27/AB, paragraph 143.

<sup>38</sup> *Supra*, para. 3.2.

<sup>39</sup> Document G/SG/N/10/ARG/1/Suppl.1, G/SG/N/11/ARG/1/Suppl.1, Exhibit EC-20.

<sup>40</sup> See Exhibit EC-28.



4.25 The European Communities maintains that this claim falls within the terms of reference<sup>41</sup>, since the original measure (*i.e.* the definitive safeguard measure imposed under Resolution 987/97) is specifically mentioned by the European Communities in its Request for the Establishment of a Panel.<sup>42</sup> The European Communities states that it is clear that this measure is still in existence, be it in a somewhat different format than previously notified by Argentina. Therefore, the European Communities' claim is in conformity with Article 6:2 DSU, since the measure at issue was properly identified by the European Communities as 'the definitive safeguard measure' imposed by Argentina under 'Resolution 987/97'. The present case differs in that respect from '*Guatemala - Cement*'<sup>43</sup>, where Mexico had not identified the final anti-dumping duty as the measure at issue.

4.26 Thus, the European Communities requests the Panel to recommend the removal of the original safeguard measure set out in Resolution 987/97, so as to automatically render null and void the subsequent application of that Resolution as well as modifications to this measure.

4.27 The European Communities asserts that the late November 1998 modification of the safeguard measures was drastic.<sup>44</sup> The European Communities contends that the original safeguard measures were *based on* an *investigation* initiated on 25 February 1997, which, in the European Communities' view, was flawed for more than one reason. The subsequent changes to these measures are modifications of the original safeguard measure and are claimed by Argentina to be *based on the same investigation and findings*.

4.28 The European Communities recalls that it has requested that the Panel rule that Argentina's safeguard measures on imported footwear, however they may be adapted or adjusted in the meantime, should be removed. The European Communities observes that Argentina has objected to this request, claiming that it goes beyond the Panel's terms of reference. The European Communities notes that it is not seeking an extension of the terms of reference. It is merely noting, and asking the Panel to note, that once the original measures mentioned in the request for the establishment of the Panel are removed, the amendments which have been made to them will also disappear.

4.29 The European Communities underlines that Argentina has argued that the Resolutions 512/98 and 1506/98 are a simple application of Article 9 of the original safeguard measures and thus an integral part of that measure.<sup>45</sup> According to the European Communities, Argentina must therefore accept that these Resolutions suffer the same fate as the principal measure. The European Communities states, in addition that, first, Resolutions 512/98 and 1506/98 concern the very same safeguard measure which was introduced by Resolution 987/97 (*i.e.* Argentina's safeguard measures on footwear adopted following the submission of a complaint by Argentina's CIC in October 1996). The former Resolutions are mere modifications of the same safeguard measure, and should be repealed together with Resolution 987/97, since all are affected by the same fundamental shortcomings, which the European Communities has brought forward. That is, these Resolutions are a modification and an 'application' of the original Resolution, and therefore if the basic Resolution becomes null and void, then -- automatically -- the subsequent modifications in application of it fall as well.

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<sup>41</sup> According to Argentina (see para. 4.18) the terms of reference do not contain the words "all Argentine measures based on the safeguard investigation subject of this dispute."

<sup>42</sup> Exhibit EC-26.

<sup>43</sup> Report by the Appellate Body on '*Guatemala - Anti-Dumping Investigation regarding Portland Cement from Mexico*', WT/DS60/AB/R, 2 November 1998, at paragraph 86. Argentina claims in its reply to question 35 by the Panel that the EC failed to identify the specific measure at issue and refers in this respect to the '*Guatemala - Cement*' case.

<sup>44</sup> The European Communities submitted, during the first meeting of the Panel with the parties, the text of Resolution 1506/98, of 16 November 1998 (Exhibit EC-32) which modified the safeguard measures being reviewed by this Panel.

<sup>45</sup> *Supra*, paras. 4.11-4.15.

4.30 Second, Resolutions 512/98 and 1506/98 modify the original Resolution to render Argentina's safeguard measures on footwear more stringent. The European Communities submits that no provision in the Agreement on Safeguards permits that type of modification. Accordingly, such modifications *per se* are illegal. The European Communities argues that it is clear from the wording of Article 7.4 of the Agreement on Safeguards ("shall progressively liberalise") that safeguard measures must be "progressively" liberalised at regular intervals during the period of application. A safeguard measure *cannot*, during its period of application, be made *more restrictive* than the measure which was originally notified. For the European Communities, the safeguard measure can only be relied upon in exceptional circumstances and its provisions therefore should be interpreted strictly.

4.31 The European Communities submits that if it were possible for a WTO Member to maintain a safeguard regime which had been condemned by a Panel, by introducing a series of increasingly stricter Resolutions, this would amount to a justification of an *abus de droit*. Indeed, if such practice were allowed to stand, then the security and predictability of the multilateral trading system, which was agreed upon by all Members in 1994, would be seriously jeopardised and the European Communities and other Members would be required to shoot at a moving target.

4.32 Regarding Argentina's arguments concerning Article 7:4 Agreement on Safeguards, the European Communities notes that Argentina has sought in effect unilaterally to modify the content of the Agreement on Safeguards by introducing a new requirement which should be fulfilled before Article 7:4 would apply. Argentina reads in the Agreement on Safeguards a condition that only if the 'objective of the safeguard measure is achieved', this provision becomes applicable, and speaks of a 'hypothesis' and a 'presupposition' on which Article 7:4 would be based.

4.33 The European Communities states that it has grave difficulties with this approach by Argentina. The text of Article 7:4 Agreement on Safeguards is crystal clear and does in no way leave room for such unwarranted interpretation. It reads in the first sentence: 'the Member applying the measure shall progressively liberalise it'. Nowhere in the text of the Agreement on Safeguards can a provision be found which makes this obligation dependent on whether or not the 'objective is being achieved' of the safeguard measure and Argentina does not put forward any evidence which would support its position.

4.34 The European Communities also argues that in case the duration of the measure would be extended to over three years, the second sentence of Article 7:4 requires the conduct of a *mid-term review* and requires the Member as a result of this review either to withdraw [the measure] or increase the pace of liberalisation.' The drafters left out the possibility that the measure would be made stricter, and Argentina should therefore not be allowed to somehow read this option in the text.

4.35 The European Communities states that Argentina confirms that the new Resolutions should not be seen as 'new measures', and argues that should Argentina desire to apply new safeguard measures, it would be required to comply with all the conditions contained in the Agreement on Safeguards, including the carrying out of a new and separate investigation (Article 3). Moreover, Argentina would be obliged (Article 7:5) to await the expiration of a two-year period of non-application of safeguard measures. Argentina did not follow this option, since it merely modified (through Resolutions 512/98 and 1506/98) the same safeguard measures (Resolution 987/97) which were imposed as the result of the October 1996 complaint by the domestic industry.

4.36 The European Communities also takes issue with Argentina's statement that Resolution 1506/98 'currently regulates the safeguards situation'. The European Communities notes that Argentina forgets to mention Resolution 837/98 (published in the Argentine Official Journal on the 7<sup>th</sup> of December 1998<sup>46</sup> which is the latest 'regulation' of the safeguard measure on footwear. The European Communities questions why in its second submission Argentina decided not to include

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<sup>46</sup>Exhibit EC-35

information on the latest modification in the safeguard regime on the 19<sup>th</sup> of January 1998 (the date of transmission of the rebuttals), whereas such change had been made public six weeks before.

B. SUBMISSION OF EVIDENCE: EXHIBIT ARG-21

4.37 At the end of the first meeting of the Panel, Argentina sought to submit to the Panel one copy of the entire record of its safeguard investigation on footwear. Argentina added that the copy could be left with the WTO Secretariat for the parties to the dispute to consult. The Panel, upon being informed that no copy would at the same time be provided to the European Communities, indicated to the parties that it could not accept the documents, as in the Panel's view, this would constitute an *ex parte* submission, which is not permitted by the DSU (Article 18.1). In presenting its second written submission, Argentina again sought to submit, in a single copy to the Panel only, the same documentation, as an annex identified as Exhibit ARG-21. The Panel again declined to accept the documentation, for the reasons given previously, which it indicated in a letter to the parties. In the same letter, the Panel sought the views of the parties as to the best way to proceed. The European Communities responded that the submission of the evidence in question at such a late stage in the proceeding should not be permitted. Argentina indicated that it was at that time preparing a copy of the documentation for the European Communities, and would submit the documentation to the Panel and the European Communities once the copy was ready. The Panel informed the parties that it would accept the documentation so long as it was submitted no later than the date of the second meeting of the Panel, with a copy at the same time to the European Communities, and that this same deadline would apply to any other new evidence to be submitted by either party. The Panel also informed the parties that each party would be given an opportunity to comment on any new evidence submitted by the other party.

4.38 Argentina submitted the documentation identified as ARG-21, and provided a copy to the European Communities, on the day before the second meeting of the Panel. At the second meeting, Argentina objected to the fact that the documentation had not been accepted at the time it was presented as an annex to Argentina's second written submission; in the view of Argentina, this constituted a unilateral decision by the Secretariat, that only the Panel was able to take. The Panel recalled that its original decision regarding this evidence, taken at the end of the first substantive meeting, had not changed and explained that the Secretariat had operated on that basis. The European Communities stated that it considered the rejection of ARG-21 at the time the second submission was presented to have been perfectly correct in the light of Article 18.1 of the DSU.

4.39 At the second meeting, the Panel indicated that, in keeping with its earlier ruling that each party would be given an opportunity to comment on any new evidence submitted by the other party, the European Communities would have a period in which to submit written comments regarding ARG-21, which was the only new evidence submitted. At the request of the European Communities, Argentina provided a list of those pages of ARG-21, pertaining to the various factors addressed in the investigation, that had not already been submitted as annexes to submissions by Argentina and that Argentina considered to be relevant to the resolution of this dispute. The European Communities commented that none of the listed pages contained any assessment or discussion of the relevance of the factors or issues regarding causality or any of the other determinations made in this investigation, but rather contained only raw data and accounting information. Thus, for the European Communities, these pages did not support any change in the European Communities' previous conclusions regarding the present dispute.

## V. MAIN ARGUMENTS OF THE PARTIES CONCERNING THE ISSUES ARISING UNDER THE AGREEMENT ON SAFEGUARDS AND THE GATT 1994<sup>47</sup>

### A. ARTICLE XIX:1(A) OF GATT 1994 – "UNFORESEEN DEVELOPMENTS"

#### 1. Argument of the European Communities

5.1 The European Communities argues that it clearly results from the wording of Article XIX:1(a) GATT that in order to allow the imposition of a safeguard measure, not any increase in imports is relevant, but only those which result from both "unforeseen developments" and "compliance with GATT obligations", including tariff liberalisation according to a party's Schedule of Concessions. Since tariff concessions and other obligations are an additional element to "unforeseen developments", it necessarily follows that liberalisation cannot constitute by itself such unforeseen developments. The European Communities submits that Argentina's trade liberalisation, in particular within the MERCOSUR and WTO framework, was a conscious commercial policy. The development in trade since 1991 – particularly since the signing of the Treaty of Asuncion – is the natural result of the commercial policy followed by the Argentine government and that this and the illegality of the trade protection measures which preceded the safeguard measures the subject of these proceedings, were in no way unforeseen<sup>48</sup>. Argentina therefore violated Article XIX:1(a) GATT.

5.2 The European Communities submits that Article XIX of GATT, and in particular the requirement in Article XIX:1(a) of GATT, that safeguard measures only be taken in the event of "unforeseen developments", has never been repealed or modified. Accordingly, there is no doubt that this requirement remains fully applicable, even if not repeated in the Agreement on Safeguards.

5.3 The European Communities asserts that increased imports as a consequence of tariff concessions agreed for footwear cannot be considered "unforeseen" within the meaning of Article XIX:1(a) GATT<sup>49</sup>. If it were otherwise, a WTO Member would be allowed to withdraw the very benefits which it had agreed to when entering into tariff commitments. This would neither be consistent with a good faith interpretation of that provision nor with the liberalisation aims pursued by the GATT and the WTO Agreement overall.<sup>50</sup> For the European Communities, the sequence of events is clear: first, an unforeseen development is to take place; second, as a result of this unforeseen development an increase in imports occurs. An increase in imports can (by definition) not be the result of an increase in imports. Argentina's argument is thus circular.

5.4 In addition, the European Communities emphasises, safeguard measures are by definition "emergency" measures. The very nature of a safeguard measure is to tackle an urgent situation which was not expected. The safeguard mechanism is *not* an instrument of medium to long-term trade policy, as Argentina has applied it. Once more, this fact is demonstrated by the long investigation period from 1991-1995. It is revealing that even Argentina, in its own report, noted<sup>51</sup> that the big increase in imports occurred "immediately after the opening up of the economy which began in 1989/90."

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<sup>47</sup> Except as otherwise noted, the footnotes and citations, and the emphasis in the text in this section are as contained in the parties' submissions.

<sup>48</sup> Indeed, the prime objective of concluding a customs union or a free trade area is, according to the text of Article XXIV:4 GATT 1994, "*to facilitate trade between the constituent territories.*"

<sup>49</sup> This also reflects a generally accepted tenet of economic theory, i.e. that tariff protection can be measured in advance according to specific formulas: see B. Hoekman, M. Kostecki, *The Political Economy of the World Trading System*, Oxford, 1995, pp. 88, 93.

<sup>50</sup> See the Preambles of the Agreement establishing the World Trade Organization and of GATT 1994, both referring to "*reciprocal and mutually advantageous agreements directed to the substantial reduction of tariffs and other barriers to trade.*"

<sup>51</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 3.

5.5 Nor, according to the European Communities, can the necessity of removing the Article II GATT-illegal measures be considered an "unforeseen development". This is in fact nothing more than the implementation of agreed trade liberalisation, which, as has just been explained, is a separate condition of Article XIX:1(a) GATT, and cannot itself constitute an "unforeseen development". The European Communities submits therefore that, by imposing safeguard measures in the absence of an increase in imports of footwear resulting from "unforeseen developments", Argentina violated the obligations which it assumed under Article XIX:1(a) GATT.

5.6 The **Panel** asked the European Communities to comment on the meaning that the European Communities would give to the language of Article 2 of the Agreement on Safeguards in the light of the language of Article 1 and 11.1 of the Agreement and the second and fourth recitals of the preamble. The European Communities responded that Article XIX GATT and the Agreement on Safeguards set out the requirements which must be fulfilled before a safeguard measure can be taken. There is substantial overlap between the conditions set out in Article XIX GATT and the conditions set out in the Agreement on Safeguards, including in its Article 2. However, none of the provisions of the Agreement on Safeguards, including Article 1, Article 11:1, nor the second and fourth recital, allow for any of the additional conditions set out in Article XIX to be ignored.

5.7 For the European Communities, one way of understanding the requirement of "unforeseen developments" is to consider that the continuum starting with trade liberalisation, running into unforeseen developments which result in increased imports which occur under conditions which are such that serious injury results.<sup>52</sup> This starts with loss of sales, continues with loss of sales and production, falling capacity utilisation, losses and finally unemployment. In fact one might say that unforeseen developments is a defining feature of safeguard measures since it defines the circumstances in which they may become justified.

5.8 The European Communities notes that Article 1 of the Agreement on Safeguards establishes "*rules*" for the application of safeguard measures. However, it does not establish "*the rules*" or "*the only rules*" for the application of safeguard measures. Therefore, the Agreement on Safeguards is not intended to be the exclusive source of safeguard rules. The Agreement on Safeguards elaborates on a number of the conditions mentioned in Article XIX which should be fulfilled before a measure can be taken. However, the Agreement on Safeguards does not elaborate on all of the conditions set out in Article XIX GATT. Some of those conditions, such as "*as a result of unforeseen developments*" or "*the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions*", are not repeated, but this can by no means have as a consequence that they are made invalid.

5.9 For the European Communities, the non-repeating of these two conditions can be explained by the intention of the Agreement on Safeguards to provide more detailed explanation of some of the conditions mentioned in Article XIX, which were not further defined at the time. Conditions such as "serious injury" or "threat of serious injury" or "causation" are elaborated upon further in the Agreement on Safeguards and defined in much greater detail than before.

5.10 The European Communities asserts that Article 1 Safeguard Agreement does not define what a safeguard measure is but expressly refers to Article XIX GATT. If Article XIX tells what a safeguard measure is (an "emergency" measure, to be taken in case of "unforeseen developments") and the Safeguard Agreement tells how to apply it, the consequence must be that the Safeguard Agreement is not exhaustive.

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<sup>52</sup> The European Communities adds that the continuing need for unforeseen developments is also clear from Article 1 of the Agreement on Safeguards. According to the EC, the Agreement on Safeguards lays down conditions and explains how to apply safeguard measures but Article XIX defines what they are.

5.11 In the view of the European Communities, Article 11:1 Agreement on Safeguards requires that safeguard action conforms to both Article XIX GATT *and* to the Agreement on Safeguards. Paragraph (a) sets out that Members considering taking a safeguard measure should apply the conditions of Article XIX *in accordance with* the Agreement on Safeguards. Therefore, this paragraph requires that, for example, if "serious injury" is to be demonstrated, this should be done *in accordance with* the more elaborated provisions set out in this respect in Article 4:1(a) and 4:2(a) Agreement on Safeguards. This paragraph does not state that the conditions mentioned in Article XIX GATT -- but not repeated in the Agreement on Safeguards -- should be ignored. Indeed, paragraph (c) of Article 11:1 confirms that Article XIX is still fully applicable beside the Agreement on Safeguards.

5.12 According to the European Communities, the second recital strengthens this argument. It explains that the aim of the Agreement on Safeguards is not to replace Article XIX, but instead that it has the objective of *clarifying* and *reinforcing* this provision. For example, a term such as "serious injury" is clarified by Article 4:1(a) and 4:2(a) Agreement on Safeguards. These more detailed elaborations have the effect of reinforcing the safeguard mechanism: with the text of the Agreement on Safeguards in place, it is now much clearer which steps should be undertaken by a Member before "serious injury" is proved to exist. Given this clarity, Panels are now in a much better position to verify whether all of the relevant factors were evaluated.

5.13 Finally, regarding the fourth recital, it is the view of the European Communities that this provision reaffirms that the comprehensive Agreement on Safeguards is applicable to *all Members* and is *based on* the basic principles of GATT. Therefore, all WTO Members -- not just a sub-set -- are required to comply with the Agreement on Safeguards, which incorporates some of the more fundamental concepts contained in the GATT. This recital cannot be interpreted in such a way as to have the Agreement on Safeguards *replace* Article XIX GATT, nor can it be read in such a way as to allow for some of its conditions to be ignored."

5.14 In response to a question from the panel regarding whether Article XIX of GATT and the Agreement on Safeguards provide for conflicting, cumulative or alternative conditions, the European Communities responded that there is no conflict between Article XIX GATT and the Agreement on Safeguards, and that the conditions are cumulative. The Appellate Body in *The Appellate Body in 'Guatemala – Cement'* defined the notion of "conflict" as follows:

"... In our view, it is only where the provisions of the DSU and the special or additional rules and procedures of a covered agreement cannot be read as *complementing* each other that the special or additional provisions are to *prevail*. A special or additional provision should only be found to *prevail* over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a *conflict* between them. ..."<sup>53</sup>

5.15 Therefore, in line with the argumentation by the Appellate Body, the European Communities submits that, as long as adherence to the Agreement on Safeguards does not lead to a violation of Article XIX GATT (or vice versa), they both apply, complementing each other. Therefore, the requirement that imports must have increased "*as a result of unforeseen developments*" applies in addition to the other conditions set out in Article 2:1 Agreement on Safeguards. In other words, this is a separate condition and should have been demonstrated by Argentina. Since it has failed to do so, the European Communities submits that Argentina did not comply with Article XIX GATT.

5.16 The European Communities submits that in the same terms the interpretative note to Annex IA to the WTO Agreement provides that:

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<sup>53</sup> Appellate Body Report, *Guatemala - Anti-Dumping Investigation regarding Portland Cement from Mexico*, WT/DS60/AB/R, 2 November 1998, at paragraph 65.

"In the event of a conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex IA [...], the provision of the other Agreement shall prevail to the extent of the conflict."

5.17 The European Communities fails to see how Article XIX GATT, to the extent that it requires that the increase in imports must result from "unforeseen developments", could be said to be in conflict with the provisions of the Agreement on Safeguards."

5.18 In response to a Panel request for comments on the relevance, if any, of previous panel and Appellate Body reports addressing the relationships between various agreements and provisions, e.g., *Brazil Desiccated Coconut*, *Guatemala-Cement* (dealing with DSU Article 1.2 as opposed to the General Interpretative Note to Annex I A), *Indonesia-Cars*, *EC-Bananas III* or *EC-Hormones*, the European Communities stated regarding '*Brazil - Measures Affecting Desiccated Coconut*' that the Report of the Panel, upheld by the Appellate Body, supports the European Communities' view that the GATT and the Agreement on Safeguards "represent an inseparable package of rights and disciplines that must be considered in conjunction".<sup>54</sup> (emphasis added)

5.19 The European Communities notes the quotation by the United States in its third party submission of the following passage from that panel report:

"Article VI of GATT and the SCM Agreement represent a new and different package of rights and obligations, as among WTO Members, regarding the use of countervailing duties. [...] The SCM Agreements do not merely impose additional substantive and procedural obligations on a potential user of countervailing measures. Rather, the SCM Agreements and Article VI together define, clarify and in some cases modify the whole package of rights and obligations of a potential user of countervailing measures."<sup>55</sup>

5.20 The European Communities notes and agrees with the US statement in this respect that the "new package" made up by the Agreement on Safeguards and Article XIX GATT is different from Article XIX GATT 1947. The European Communities disagrees with the United States' interpreting the "new package" as consisting of the Agreement on Safeguards *only*. This, in fact, is the exact opposite of what the Appellate Body meant when it stated (see quote above) that the GATT provision and the specific agreement *together* "define, clarify and in some cases modify the whole package of rights and obligations".

5.21 The European Communities in this respect notes the following further comments from the Coconut Panel Report. On the applicability of the GATT within the WTO system, the Panel considered the following passage<sup>56</sup>:

"It is evident that both Article VI of GATT 1994 and the SCM Agreement have force, effect and purpose within the WTO Agreement. That GATT 1994 has not been superseded by other Multilateral Agreements on Trade in Goods ("MTN Agreements") is demonstrated by a general interpretative note to Annex 1A of the WTO Agreement<sup>57</sup>.

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<sup>54</sup> Panel Report, *Brazil – Measures Affecting Dessiccated Coconut*, WT/DS22/R, 17 October 1996, at paragraph 227.

<sup>55</sup> Appellate Body Report, *Brazil – Measures Affecting Dessiccated Coconut*, WT/DS22/AB/R, 21 February 1997, at page 16.

<sup>56</sup> Panel Report, *Brazil – Measures Affecting Dessiccated Coconut*, WT/DS22/R, 17 October 1996, at paragraph 227.

<sup>57</sup> Footnote omitted.

The fact that certain important provisions of Article VI of GATT 1994 are neither replicated nor elaborated in the SCM Agreement further demonstrates this point.<sup>58</sup>

5.22 In this regard, the European Communities recalls that in that case the Panel did not have to decide on the precise content of the "new package", that is, on whether and to what extent the GATT provision at issue (Article VI) had been modified as a result of the relevant Agreement in Annex 1 A (the Agreement on Subsidies and Countervailing Measures). In fact, the Panel concluded for the inapplicability of the whole relevant "package" to the case before it.<sup>59</sup>

5.23 Regarding *'Guatemala - Anti-Dumping Investigation regarding Portland Cement from Mexico'*, the European Communities notes its comments above. The European Communities sees no 'conflict' between Article XIX GATT and the Agreement on Safeguards, for the same reasons as the Appellate Body did not see a 'conflict' between a provision in the DSU and a provision in the Anti-Dumping Agreement: if Argentina would comply with the "unforeseen developments" condition, it would not violate any provision of the Agreement on Safeguards.

5.24 Regarding *'Indonesia - Cars'*, the European Communities refers to what the Panel in that case said in paragraphs 14.97 - 14.100. The question before the Panel was whether Article III:2 GATT was -- or was not -- applicable to the dispute. Indonesia had argued that there was a conflict between this provision and the SCM Agreement, in that the respective obligations were mutually exclusive. However, the Panel disagreed and found that they were not mutually exclusive. The Panel ruled that:

"It is possible for Indonesia to respect its obligations under the SCM Agreement without violating Article III:2 since Article III:2 is concerned with discriminatory product taxation, rather than the provision of subsidies as such. Similarly, it is possible for Indonesia to respect the obligations of Article III:2 without violating its obligations under the SCM Agreement since the SCM Agreement does not deal with taxes on products as such but rather with subsidies to enterprises. At most, the SCM Agreement and Article III:2 are each concerned with different aspects of the same piece of legislation (footnote omitted)."

5.25 Similarly, in the European Communities' view it is possible for a WTO Member to respect its obligations under the Agreement on Safeguards without violating Article XIX GATT, in particular with respect to the requirement of "unforeseen developments". Given that they are not mutually exclusive, Article XIX GATT is applicable to the present dispute.

5.26 Regarding *Bananas III*, the European Communities notes that the Appellate Body had to decide whether both Article X:3(a) GATT and Article 1:3 Agreement on Import Licensing Procedures applied with regard to the EC import licensing procedures<sup>60</sup>. Notwithstanding the fact that the Appellate Body found that "*there are distinctions between [the] two articles*" (i.e. that the two provisions read differently), and at the same time that they have "*identical coverage*" (i.e. that they regulate the same aspect of the same case in point), the Appellate Body did not consider that they conflicted and thus that the Interpretative Note to Annex IA applied. Consequently, the Appellate

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<sup>58</sup> Footnote 60 reads: "For example, the SCM Agreement does not replicate or elaborate on Article VI:5 of GATT 1994, which proscribes the imposition of both an anti-dumping and a countervailing duty to compensate for the same situation of dumping and export subsidization, nor does it address the issue of countervailing action on behalf of a third country as provided for in Article VI:6(b) and (c) of GATT 1994. If the SCM Agreement were considered to supersede Article VI of GATT 1994 altogether with respect to countervailing measures, these provisions would lose all force and effect. Such a result could not have been intended."

<sup>59</sup> Panel Report, paras 231, 257.

<sup>60</sup> Appellate Body Report, *EC - Regime for the Importation, Sale and Distribution of Bananas*, 9 September 1997, WT/DS27/AB/R, paragraph 199 (and following).



Body found that both Article X:3(a) GATT and Article 1:3 Agreement on Import Licensing Procedures were applicable.

5.27 The European Communities submits that the hypothesis considered in the above parts of Appellate Body Report is different from the one at issue in the present dispute. In fact the Agreement on Safeguards and Article XIX of GATT do not overlap, in the sense that the "unforeseen developments" requirement is additional and therefore complementary to the matter regulated in the Agreement on Safeguards. In any event, even if these provisions overlapped, the above-mentioned case law makes clear that the GATT provision is not eliminated by the system, but rather remains in force and is applicable cumulatively with the Agreement on Safeguards

5.28 The European Communities further notes that the Appellate Body in *Bananas III* also addressed the relationship between Article XIII GATT and the Agreement on Agriculture<sup>61</sup>, notably to decide "whether the provisions of the Agreement on Agriculture allow market access concessions on agricultural products to deviate from Article XIII of GATT."<sup>62</sup> The European Communities had argued in this respect that concessions made pursuant to the Agreement on Agriculture prevailed over Article XIII of GATT, based on Articles 4:1 and 21:1 of the former Agreement<sup>63</sup>. The Appellate Body however upheld the Panel's conclusion that the Agreement on Agriculture "does not permit the European Communities to act inconsistently with the requirements of Article XIII of GATT."<sup>64</sup> The European Communities submits that, likewise, the Agreement on Safeguards does not authorise Argentina to act inconsistently with the requirements of Article XIX GATT. Indeed, the contrary is the case, since Article 11:1(a) Agreement on Safeguards requires Members to take action "which conforms with the provision of that Article".

5.29 Finally, regarding '*Hormones*', the European Communities refers to paragraphs 8.31 and 8.32 of the Panel Report in this case, which state that:

"both the SPS Agreement and GATT apply to this dispute, we next examine the relationship between these two agreements. The parties to the dispute present diverging views with respect to whether we should first address GATT or the SPS Agreement. However, neither of the parties claims that the relevant provisions of the SPS Agreement and the GATT are in conflict. Therefore, we do not need, as a preliminary matter, to address the General Interpretative Note". (emphasis added).

5.30 Given this statement by the Panel, the European Communities submits that this case is not relevant for the present dispute, since none of the parties had claimed that a conflict existed between provisions in the two agreements and the Panel confirmed that both agreements applied to the dispute.

## **2. Argument of Argentina**

5.31 Argentina observes that the European Communities submits that "the development of trade since 1991 - particularly the signing of a Treaty of Asunción - is the natural result of the commercial policy followed by the Argentine Government and that this and the illegality of the trade protection measures which preceded the safeguard measures the subject of these proceedings, were in no way unforeseen".<sup>65</sup> Argentina considers this statement by the European Communities to be irrelevant, from the legal point of view, to whether Argentina fulfilled, in this case, the requirements laid down

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<sup>61</sup> *Id.*, at paragraph 153 (and following).

<sup>62</sup> *Id.*, at paragraph 155.

<sup>63</sup> *Id.*, at paragraph 153.

<sup>64</sup> *Id.*, at paragraph 158.

<sup>65</sup> *Supra*, para. 5.1.

by the Agreement on Safeguards for the application of a safeguard measure. In Argentina's view, a correct interpretation of the legal relationship between Article XIX of the GATT and the Agreement on Safeguards would indicate that the WTO disciplines contain no obligation relating to "unforeseen developments" as the European Communities claims.

5.32 Argentina notes that at various points in its submission, the European Communities repeats that the objective of a safeguard measure, under Article XIX of the GATT, is protection in case of emergencies and "unforeseen circumstances".<sup>66</sup> According to this interpretation, if a WTO Member decides to apply a safeguard it must show that the imports increased sharply during the most recent period. Argentina further notes that the European Communities maintains that Article XIX:1(a) of the GATT is applicable to the case in that the increase in imports allowing the imposition of a safeguard measure must result from "unforeseen developments" and Argentina violates that provision by failing to demonstrate that the imports were the result of unforeseen developments.

5.33 Argentina maintains that the Article XIX requirement whereby imports must be the result of unforeseen developments has not been valid since the entry into force of the WTO Agreement on Safeguards. Indeed, the Agreement on Safeguards, which interprets Article XIX of the GATT, makes no reference in Article 2 (conditions for the application of a safeguard measure), or in any other article, to the need for the increase in imports to be the result of "unforeseen developments". Argentina maintains that the Safeguards Agreement has precedence over Article XIX, and that consequently it should not be obliged to fulfil a requirement of this article that has not been established in the Safeguards Agreement.

5.34 Argentina argues that the fact that this requirement was not included in the Agreement on Safeguards, a multilateral agreement designed to "clarify and reinforce the disciplines of GATT, and specifically those of its Article XIX" in order to produce a "structural adjustment" (as stated in the preamble to the Agreement) cannot be considered as unintended or as an oversight. The omission must be interpreted as a result of the "structural adjustment", a deliberate intention not to include the requirement in the Agreement on Safeguards in order to ensure that this tool could be used in cases in which imports of a product fulfilled the conditions laid down in Article 2, even when the increase in imports was not the result of unforeseen developments, but in general "of such conditions as to cause or threaten to cause serious injury".

5.35 Argentina contends that this discrepancy between the Agreement on Safeguards and Article XIX of the GATT with respect to the requirements for the application of a safeguard must be resolved in accordance with the General Interpretative Note to Annex 1A which stipulates that: "In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the "WTO Agreement"), the provision of the other agreement shall prevail to the extent of the conflict." According to Argentina, in the case at issue, there is a clear and specific conflict between Article XIX of the GATT and the Agreement on Safeguards (as per Annex 1A of the WTO Agreement) since the former contains a condition which is not contained in the AS, an agreement intended to clarify and reinforce the Article XIX.

5.36 Argentina submits that in public international law, for there to be a conflict between two treaties, the three following conditions must be met: firstly, the parties to the treaty in question must be the same; secondly, the treaties must have the same substantive purpose; and thirdly, the provisions must be contradictory in the sense that they impose obligations that are mutually exclusive. Argentina maintains that in the case at issue, the three conditions are met: (1) Argentina and the European Communities, as Members of the WTO, are both parties to the Agreement on Safeguards and the GATT; (2) the Agreement on Safeguards and Article XIX of the GATT have the same substantive purpose, clearly set forth in the preamble to the Agreement on Safeguards, to "clarify and

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<sup>66</sup> See, e.g., para. 5.195.

reinforce the disciplines of the GATT, and specifically those of its Article XIX"; (3) the provisions of Article XIX and Article 2 of the Agreement on Safeguards are contradictory in that Article XIX establishes a condition (that imports should be the result of "unforeseen developments") which Article 2 of the Agreement on Safeguards does not establish. The inconsistency lies in the fact that one of the provisions contains a condition which was not taken up by the provision that "clarifies" and interprets it.

5.37 According to Argentina, the fact that the term "unforeseen developments" does not appear in the text of the Agreement on Safeguards can only be taken as a conscious and deliberate removal of a standard set by Article XIX of the GATT.

5.38 Argentina points out that the actual meaning of the term "unforeseen developments" was ambiguous and subjective (to what extent is an event unforeseen?). For example, in the "Hatters' fur" case the United States considered the change in fashion for women's hats, a highly subjective and cyclical development, to be an "unforeseen development". In this case, the Panel stated that:

"The term 'unforeseen development' should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated."<sup>67</sup>

5.39 Argentina submits that what it is "reasonable" to expect at a time when a concession is being negotiated continues to be an ambiguous and subjective concept. Consequently, Argentina reasons, under the General Interpretative Note to Annex 1A, the Agreement on Safeguards must prevail over Article XIX in not requiring compliance with a condition provided for under Article XIX but not included in the Agreement on Safeguards.

5.40 In the alternative, on the basis of the criterion established by the Working Party and mentioned above, Argentina argues that even if this requirement is still considered enforceable as a condition for applying a safeguard measure (a hypothesis which Argentina does not accept), it would be difficult to imagine that the Argentine authorities could have predicted in 1991, when it unilaterally opened up its economy, an increase in imports of anywhere near 157 per cent.

5.41 In response to a request from the Panel that Argentina comment on whether it viewed the concepts of "conflict" (to which Argentina referred in its first written submission) and "difference" (to which Argentina referred in its oral statement at the first substantive Panel meeting) as synonymous and to specify the way in which there exists a "conflict" (defined as the case of two mutually exclusive or contradictory obligations in the sense that one obligation cannot be met without violating the other) between the "unforeseen developments" condition of Article XIX and the conditions provided for in Article 2 and other articles of the Agreement on Safeguards, Argentina stated that with respect to the validity of the "unforeseen developments" requirement of Article XIX, there is a conflict between the provisions of that Article and the Agreement on Safeguards. Argentina states that the reference by Argentina to a "difference" in its oral submission should simply be understood as a reference to a conflict of provisions which always implies a difference between them (there is a "genus to species" relationship between the concept of "difference" between provisions and the concept of "conflict" between provisions, the former being general and the latter specific).

5.42 Argentina asserts that the Agreement on Safeguards was developed to interpret Article XIX and, as stipulated in its preamble, it recognises the need to clarify and reinforce Article XIX as well as

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<sup>67</sup> Report on the intersessional working party on the complaint of Czechoslovakia concerning the withdrawal by the United States of a tariff concession under Article XIX of the GATT, November 1951, CP/106, page 4.

the importance of structural adjustment. Argentina considers that there is a conflict of provisions in this case, since the Article XIX "unforeseen circumstances" requirement has not been taken up in the Safeguards Agreement in spite of the fact that it had painstakingly repeated the other requirements of Article XIX.1(a). This requirement cannot be fulfilled, and not fulfilled, at the same time. The absence of any mention of this requirement in Article 2 of the AS is evidence of the fact that the "unforeseen circumstances" requirement no longer applies with respect to the application of a safeguard measure.

5.43 Moreover, according to Argentina, Article 11.1(a) of the AS specifically establishes that action under Article XIX of the GATT must conform with "the provisions of that Article *applied in accordance with this Agreement*" (referring to the AS) (emphasis added by Argentina). This last reference makes it clear that Article XIX has been subsumed into the Agreement on Safeguards to the extent that it conforms with that Agreement.

5.44 Argentina does not agree that the concept of conflict defined as *the case of two mutually exclusive or contradictory obligations in the sense that one obligation cannot be met without violating the other* can be applied to this case. This criterion was raised in paragraph 65 of the Report of the Appellate Body in *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico* in connection with the effort to establish whether there was a discrepancy between the rules of procedure contained in the DSU and in Article 17 of the Anti-Dumping Agreement.

5.45 Argentina submits that this definition of "conflict" of provisions is not applicable in the case of a conflict between a provision which interprets another provision. In such cases, a conflict cannot be considered to exist only when compliance with one provision implies violation of the other, but *must be understood to exist also if the interpretative provision includes or excludes a requirement or condition established in the interpreted provision*.

5.46 According to Argentina, in the case at point, where the AS excludes a requirement established in Article XIX it is wrong to consider that there is no conflict simply because the requirements of Article XIX could be cumulated with Article 2 of the AS. If the AS, whose intention, as we have mentioned, was to interpret and *clarify* Article XIX, did not include in its provisions the "unforeseen development" requirement, it is clear that the negotiators had the intention of leaving it aside as from the entry into force of the interpretative provision. Article XIX and Article 2 of the AS are not complementary provisions as in the *Guatemala - Anti-Dumping Investigation* case, - indeed, there is a qualitative difference when we are dealing with the relationship between an "interpretative" provision and an "interpreted" provision. The omission of this requirement in the AS conflicts with the inclusion of the requirement in Article XIX, and in accordance with the General Interpretative Note to Annex 1A, the AS must prevail.

5.47 For Argentina, it should also be borne in mind that in fact, the CNCE found in its final determination that there had been unforeseen circumstances when it states that "The pressure exercised by imports was unforeseen in its rapid progress in the market during a period in which the country's economy was beginning to suffer from macroeconomic difficulties."<sup>68</sup> Imports achieved and preserved a considerable share of the domestic market, and even in 1995, they continued to preserve their share in a rapidly declining market.<sup>69</sup> The rapid growth in imports at the beginning of the period was also unforeseen, and particularly significant since the rate of growth was much higher than that of overall imports between 1991 and 1993.<sup>70</sup>

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<sup>68</sup> Exhibit ARG-2, Act No. 338, page 47.

<sup>69</sup> Exhibit ARG-3, CNCE Technical Report, Table 20a (sheet 5501) and Table 21a (sheet 5505).

<sup>70</sup> Exhibit ARG-2, Act No. 338, page 25.

5.48 Finally, in Argentina's view, the significance of the different impacts of imports on the footwear industry could not have been foreseen. The comparative GDP data clearly shows that the footwear industry was affected disproportionately in relation to the manufacturing sector as a whole.<sup>71</sup>

### 3. Response by the European Communities

5.49 The European Communities observes that Argentina dismisses the European Communities' claim that it had not demonstrated the existence of any "unforeseen developments", as required by Article XIX:1(a) GATT, and that, according to Argentina this issue should be decided by invoking the *General Interpretative Note to Annex IA*, which sets out the appropriate steps to take in case of a "conflict" between a provision of GATT and a provision of another Agreement in Annex IA. Argentina claims that in the present case such "conflict" exists, since Article XIX contains a condition which is not contained in the Agreement on Safeguards<sup>72</sup>.

5.50 The European Communities takes issue with Argentina's position. Even if the three conditions for a "conflict" mentioned by Argentina<sup>73</sup> would exist in the framework of the WTO<sup>74</sup>, there are in the present case no two mutually exclusive or contradictory obligations, in the sense that one obligation cannot be met without violating the other. The latter criterion was developed in *'Indonesia - Cars'*<sup>75</sup> and *'Guatemala - Cement'*<sup>76</sup> and is equally applicable as a criterion in the present case. The European Communities sees no reason why a WTO Member would not be able to respect on the one hand the obligations set out in the Agreement on Safeguards while at the same time complying with the "unforeseen developments" requirement set out in Article XIX:1(a) GATT.

5.51 The European Communities comments on Argentina's reply to questioning of the Panel<sup>77</sup>, noting that Argentina made a number of statements with which the European Communities takes issue. The European Communities observes that Argentina claims that the above-mentioned definition of "conflict" does not apply in the present case, which concerns a conflict between a provision and a provision which interprets that provision. Argentina states that "a conflict cannot be considered to exist only when compliance with one provision implies violation of the other, but *must be understood to exist also if the interpretative provision includes or excludes a requirement or condition established in the interpreted provision.*" (emphasis added).

5.52 The European Communities submits that this new criterion by Argentina adds nothing to the above-mentioned traditional criterion, which Argentina accepts. First, if the interpretative provision (the Agreement on Safeguards) were to include a requirement or condition established in the interpreted provision (Article XIX GATT), there can by definition be no "conflict". For example, the requirement that the domestic industry must suffer "serious injury" is a condition established in Article XIX:1(a) GATT and was included and further defined, and in that sense "subsumed" (in the words of the US) in Article 2 and 4 of the Agreement on Safeguards. If a WTO Member complies with the "serious injury" requirement in the Agreement on Safeguards, it automatically complies with the same requirement set out in Article XIX GATT and therefore no conflict exists. Second, if the

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<sup>71</sup> Exhibit ARG-3, CNCE Technical Report, Table 6, sheet 5431, and Chart 7, sheet 5434.

<sup>72</sup> The US in this respect claims that "[t]he requirements of Article XIX of GATT 1994 are "subsumed" by the Agreement on Safeguards. See *infra*, para. 6.44-6.47.

<sup>73</sup> *Supra*, para. 5.36.

<sup>74</sup> The three conditions in international law were outlined in the Report by the Panel on *'Indonesia - Certain Measures Affecting the Automobile Industry'*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, 2 July 1998, at footnote 549.

<sup>75</sup> Report by the Panel on *'Indonesia - Certain Measures Affecting the Automobile Industry'*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, 2 July 1998, see paragraphs 14.97 - 14.100.

<sup>76</sup> Report by the Appellate Body on *'Guatemala - Anti-Dumping Investigation regarding Portland Cement from Mexico'*, WT/DS60/AB/R, 2 November 1998, at paragraph 65.

<sup>77</sup> See *supra*, para. 5.45.

interpretative provision (the Agreement on Safeguards) were to *exclude* a requirement or condition established in the interpreted provision (Article XIX GATT), there would be no difference with the traditional "conflict" situation: in that case there would be an obligation in one provision which cannot be met without violating the other. Therefore, Argentina's argumentation does not add anything to the traditional criterion developed in *'Indonesia - Cars'* and *'Guatemala - Cement'* and thus must be disregarded.

5.53 Moreover, the European Communities asserts, Argentina bases its conclusion on the wrongful assumption that the Agreement on Safeguards interprets Article XIX GATT in a full and comprehensive way<sup>78</sup>. This is not correct.<sup>79</sup> The Agreement on Safeguards establishes "rules" for the application of safeguard measures. However, it does not establish "the rules" or "the only rules". The fact that some of the conditions of Article XIX, such as "as a result of unforeseen developments", are not repeated in the Agreement on Safeguards cannot have as a consequence that they are automatically made invalid.<sup>80</sup>

5.54 The European Communities maintains that the wrongful assumption by Argentina leads it to unsubstantiated conclusions in its reply to the Panel. For example, Argentina claims<sup>81</sup> that it is somehow "clear" that the negotiators had the intention of leaving the "unforeseen developments" requirement aside with the entry into force of the Agreement on Safeguards. However, Argentina fails to provide any evidence for this claim. If Argentina were to be allowed to ignore certain legal requirements which are included in the text of an International Agreement without demonstrating, on the basis of any evidence, that there was a *common intention* of the parties to delete the requirement from the text, this would seriously jeopardise the security and predictability of the multilateral trading system.<sup>82</sup>

5.55 The European Communities cannot accept Argentina's *alternative* argument where Argentina claims to have fulfilled the "unforeseen developments" requirement by stating that "it would be difficult to imagine that the Argentine authorities could have predicted in 1991, when it unilaterally opened up its economy, an increase in imports of anywhere near 157 per cent." The European Communities asserts that according to the text of Article XIX:1(a) GATT, the increase of imports must occur "as a result of unforeseen developments". In other words, a certain development, unknown at the time that the tariff concession was made, must have occurred, and as a result of this development imports must have increased. Therefore, by definition, the increase in imports itself can never be the development as a result of which imports increased. Such circular interpretation would effectively empty the "unforeseen developments" requirement of its content, which according to the Appellate Body<sup>83</sup> is not allowed, since "an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".

5.56 The European Communities notes that Argentina has argued that the magnitude of the increase in imports could not have been foreseen. The European Communities notes that this

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<sup>78</sup> Argentina uses the wording "interpretative" provision and "interpreted" provision in its reply to the Panel question, thereby falsely assuming that there is an all-encompassing overlap between the Agreement on Safeguards and Article XIX GATT 1994.

<sup>79</sup> European Communities' reply to Panel questioning, *supra*, para. 5.6. See in particular the European Communities' comments concerning Article 1, 11:1, the second recital and the fourth recital Agreement on Safeguards.

<sup>80</sup> See also the European Communities' response to questioning by the Panel, *supra*, para. 5.8.

<sup>81</sup> *Supra*, para. 5.46.

<sup>82</sup> The Appellate Body in *EC - Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, 5 June 1998, at paragraph 84 stated: "These *common intentions* cannot be ascertained on the basis of the subjective and unilaterally determined "expectations" of one of the parties to a treaty."

<sup>83</sup> Report by the Appellate Body on *'United States - Standards for Reformulated and Conventional Gasoline'*, WT/DS2/9, 20 May 1996, at page 23.

argument does not stand, basing itself on the text of Article XIX:1(a) GATT, which reads "If, *as a result of* unforeseen developments [...] any product is being imported [...] in such increased quantities [...]" (emphasis added).

5.57 Thus, according to the European Communities, the sequence of events is clear: first, an unforeseen development is to take place; second, *as a result of* this unforeseen development an increase in imports occurs. According to the European Communities, this logical sequence, based on the text of Article XIX, makes clear that Argentina's argument is circular: an increase in imports can (by definition) not be the result of an increase in imports. In fact, Argentina's argument would result in reducing the term "unforeseen developments" to redundancy or inutility.

5.58 Indeed, according to the European Communities, unforeseen developments is at the beginning of the continuum of events that may justify safeguard measures. This starts in fact with trade liberalisation which runs into unforeseen developments which causes an increase of imports in the presence of such conditions (notably price) that serious injury can be caused, starting with loss of sales, than loss of production, falling capacity utilisation leading to losses and finally unemployment.

5.59 The European Communities argues that, in the light of this explanation, the continuing need for unforeseen developments is also clear from Article I of the Safeguards agreement. This provision states that it provides "rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX GATT." In other words, according to the European Communities, the Agreement on Safeguards lays down conditions and explains how to apply safeguard measures but Article XIX GATT defines *what they are*. Therefore, the European Communities argues that, in the present case, not only was there no increase in imports, but the preliminary requirement of unforeseen developments which is needed to give rise to such increase was entirely missing since the imports of footwear was being carefully controlled by the application of Argentina's system of DIEMs.

5.60 The European Communities does not understand Argentina's statement<sup>84</sup> that "the problem of the concept of 'unforeseen developments' is that it renders the Agreement on Safeguards practically irrelevant, depriving WTO Members of a useful tool which plays an essential role as a form of reinsurance in dealing with import growth situations." The European Communities notes that Argentina adds<sup>85</sup> that "[t]his is contrary to the principle of encouraging trade liberalisation."

5.61 The European Communities is unable to see how the "unforeseen development" requirement, which has been present in the text of the GATT since 1947, could suddenly have such a sweeping result and render the entire safeguard regime unworkable. On the contrary, Article XIX and the Agreement on Safeguards strongly encourage trade liberalisation, by reassuring those WTO Members which engage in tariff negotiations that, if imports were to increase to such an extent that the domestic industry were to suffer "serious injury", temporary relief is available which would allow for adjustment. However, in order to prevent misuse of the safeguards regime, a number of reasonable conditions (set out in Article XIX and the Agreement on Safeguards) will need to be fulfilled before the regime can be invoked. The European Communities does not require anything more from Argentina than mere compliance with a condition which has already existed for over 50 years. According to the European Communities, such request is fully justified and does not put in jeopardy the "principle of encouraging trade liberalisation".

5.62 In response to questioning by the Panel about how the European Communities would prove or demonstrate that a given development was "unforeseen" in the sense of Article XIX:1, the European Communities stated that it concurs with the interpretation of the term 'as a result of unforeseen

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<sup>84</sup> *Infra*, para. 5.65.

<sup>85</sup> *Id.*

developments' which is given by the members of the Working Party on "*Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement*". These members agreed

"that the term 'unforeseen development' should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated"

Therefore, the European Communities submits that the requirement is fulfilled if: 1. a development occurred *after* the negotiation of the relevant tariff concession; and 2. it was *not reasonable to expect* that negotiators -- at the time of the tariff concession -- *could and should have foreseen* that the development was to occur. The European Communities noted that the 'unforeseen development' must be the cause of the increased imports, which in turn causes 'serious injury'.<sup>86</sup>

#### 4. Rebuttal by Argentina

5.63 Argentina takes issue with the remarks made by the European Communities concerning the general trade liberalisation process in Argentina, and the MERCOSUR integration process in particular, a policy which the European Communities describes as deliberate and whose results Argentina should have foreseen.

5.64 Argentina submits that if the European Communities' interpretation were followed, this would contradict the preambles to the Agreement Establishing the World Trade Organization and to the GATT, on which the European Communities bases its arguments. Indeed, countries grant each other mutual and reciprocal benefits designed to reduce tariffs and other barriers to trade. These benefits are granted in the framework of the multilateral disciplines in force, which include the safeguard measure as a tool for alleviating situations where the results of these concessions in fact go further than could reasonably be foreseen. In other words, Argentina could have foreseen and calculated an increase in imports (for example, up to a level of about 11 million pairs), but could never have foreseen an increase of a magnitude of 21.7 million pairs when it granted the "mutual benefit on the

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<sup>86</sup> The European Communities offered some examples to clarify what kind of 'developments' could be considered as 'unforeseen'. First, the Working Party on "*Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement*" based itself on the change in demand in the importing country for particular types of hat body, the production of which required much more labour than did the production of plain-finished hat bodies. As a result (primarily of this higher labour content and of the high level of wages in the importing country's hat body industry, which was not matched by correspondingly high output), manufacturers of the importing country were unable to produce special finishes which could compete with similar imported hat bodies, which were entering the country at reduced rates since the 1947 tariff negotiations. As a result, the overseas suppliers were able to secure by far the greater part of the increasing market for special finishes, and the volume of imports increased accordingly. The Working Party therefore concluded

"that the fact that hat styles had changed did not constitute an 'unforeseen development' within the meaning of Article XIX, but that the effects of the special circumstances of this case, and particularly the degree to which the change in fashion affected the competitive situation, could not reasonably be expected to have been foreseen by the United States authorities in 1947." (emphasis added)

Second, another example of an 'unforeseen development' which could not reasonably have been expected is the collapse of the Soviet Union in the beginning of the 1990's, the subsequent dire need for hard currency by the newly formed governments, the resulting rise in world stock of unwrought aluminium, the sharp drop in prices and a sudden increase in imports into the Community of that product and led to safeguard measures. Another example of what could be considered an 'unforeseen development' is the sudden closure of third country markets or the inability of certain importing countries (due, for example to a financial crisis) which leads to a re-routing of traditional flows and a need to find new markets for existing products.



basis of reciprocity", since an increase of that magnitude would have implied the liquidation, pure and simple, of the sector.

5.65 In other words, Argentina argues, leaving aside the different legal views defended before this Panel by the United States and Argentina on the one hand, and by the European Communities on the other, the problem of the concept of "unforeseen developments" is that it renders the Agreement on Safeguards itself practically irrelevant, depriving WTO Members of a useful tool which plays an essential role as a form of reinsurance in dealing with import growth situations. For Argentina, precisely the problem of definition of the "unforeseen" concept is the reason that, after fifty years, there is practically no example of applied safeguard measures. This is contrary to the principle of encouraging trade liberalisation in accordance with the objectives contained in the preambles to the Agreement Establishing the WTO and to the GATT.

5.66 Argentina further submits that, as regards the EC assertion that "by definition, the increase in imports itself can never be the development as a result of which imports increase"<sup>87</sup>, even if this were considered valid, and in Argentina's view it is not, Article XIX does not require the identification of the unforeseen circumstances as such, but only "unforeseen developments", the clear manifestation of which, in this case, was the evaluation by the Argentine authorities at the time of liberalisation of tariffs in the sector which yielded unforeseen results in that the magnitude of the flow of imports resulting from the liberalisation was considerably greater than expected.

B. INTERPRETATION AND APPLICATION OF ARTICLE 2.1 OF THE AGREEMENT ON SAFEGUARDS – "THE MERCOSUR QUESTION"

1. **Argument of the European Communities**

5.67 The European Communities takes issue with the fact that the Argentine authorities have conducted an analysis on the basis of figures for *all* imports -- from MERCOSUR countries and from non-MERCOSUR countries -- while applying a safeguard measure only with respect to non-MERCOSUR countries. The European Communities fails to understand how logically, throughout the analysis of injury and causation, imports from MERCOSUR countries can be *included* in the figures, while the subsequent safeguard measure *excludes* MERCOSUR countries from its application.<sup>88</sup>

5.68 The European Communities clarifies that it does not challenge -- as such -- the exclusion of MERCOSUR imports of footwear from the scope of the safeguard measure imposed. However, such exclusion should necessarily entail the exclusion of MERCOSUR imports from the "increased imports", "serious injury" and "causality" analyses, as required by Article 2.1 of the Agreement on Safeguards, which Argentina did not do. This error is of particular importance, because MERCOSUR

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<sup>87</sup> *Supra*, para. 5.55.

<sup>88</sup> In response to a Panel question, the European Communities states that there is an inherent link between the conduct of the *analysis* of the conditions and the making of the *determinations* on the one hand and the *scope* of the intended safeguard measure on the other hand. If, already prior to the initiation of the investigation, it is known that the scope of the safeguard measure will exclude certain countries, then imports from these countries should necessarily be excluded from the determinations. In the case of MERCOSUR, a policy decision has been taken that one member will never apply a safeguard measure against another member. Accordingly, since MERCOSUR countries will be excluded from the scope of the safeguard measure, intra-Mercosur imports are to be excluded from the determinations. The European Communities believes that the Agreement on Safeguards does not contain an obligation on the investigating authority to conduct a disaggregated analysis of imports. A WTO Member is free to group all imports together in order to determine whether the product is being imported into its territory in such increased quantities and under such conditions as to cause or threaten to cause serious injury. However, it should exclude from its determinations the imports from those countries which -- at the end -- will necessarily be excluded from the scope of the measure.

imports account for the largest percentage of imports in Argentina (Argentine data for 1996<sup>89</sup> show that that 7.5 million pairs were imported from MERCOSUR countries, while only 5.97 million pairs were imported from non-MERCOSUR countries, i.e. a total of 13.47 million pairs).<sup>90</sup> Furthermore, the European Communities notes the fact that since 1993<sup>91</sup> imports from non-MERCOSUR countries have actually *decreased*, not increased. Safeguard measures should only be allowed in exceptional circumstances, and as emergency measures, so as to allow the domestic industry relief from sharply increased imports. In the view of the European Communities, it is therefore wholly inappropriate to impose a safeguard measure if imports showed a declining trend.

5.69 The European Communities alleges that Argentina wrongly interprets the condition of "increased imports" in Article 2.1 of the Agreement on Safeguards: it has made its determinations and findings on the basis of figures for all imports – from MERCOSUR countries and from non-MERCOSUR countries – while applying a safeguard measure only with respect to non-MERCOSUR countries. The European Communities states that MERCOSUR imports should have been excluded from Argentina's increased imports, injury and causality determinations. According to the European Communities, Argentina, given that it is precluded from applying safeguard measures to other MERCOSUR members, violated Article 2.1 of the Agreement on Safeguards by including imports from MERCOSUR countries in its determinations. The Agreement on Safeguards, like Article XIX:1(a) of GATT, sets out a number of conditions which need to be complied with before a WTO Member can take a safeguard measure. The condition of "increased imports", which is not further defined in the Agreement, should, according to the European Communities, be interpreted according to the scope of the safeguard measure to be taken. For the European Communities, the question to be answered here is the following: if from the outset it is known that no measure will be applied to other MERCOSUR countries, should or should not their imports be included in the determinations concerning the scope of the measure.

5.70 The European Communities states as a preliminary matter, first that although it believes the above-mentioned issue is an important principle on which the Panel should rule, the Panel should also note that this matter is not determinative for the final outcome of this case. Indeed, whether the statistics of *total* imports (including imports from MERCOSUR countries) are considered or whether exclusively statistics of *extra-zone* imports are considered, in both cases did imports not increase. Therefore, in both cases did Argentina not comply with a key requirement of Article 2.1 of the Agreement on Safeguards and was thus not allowed to impose safeguard measures.

5.71 Second, the European Communities does not question the right of a member of a customs union to exclude other members of that customs union from the scope of a safeguard measure. What the European Communities objects to (a concern fully shared by the United States<sup>92</sup>), is "Argentina's use of the MERCOSUR imports for its increased-imports analysis when there was *no possibility* that those imports could be included in any safeguard action, even where those imports are demonstrably the cause of the injury suffered by the domestic industry." In the view of the European Communities, safeguard measures do not as such affect the establishment and the nature of a customs union or free-trade area. According to the European Communities, Article XXIV GATT permits the members of a customs union or free trade area to decide whether, when applying a safeguard measure pursuant to Article XIX GATT and the Agreement on Safeguards, to exempt the other members of the customs union or free trade area from the measure. This option, however, has to be carried out in a consistent manner: for example, if -- as is the case in the present dispute -- a member of a customs union has the obligation not to impose safeguard measures on the other members of the customs union, it should necessarily exclude intra-zone imports from the determinations on which the application of safeguard measures is based. The European Communities refers the Panel to the Treaty of Asuncion

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<sup>89</sup> See Exhibit EC-16, Document G/SG/N/8/ARG/1, Table I, at page 21.

<sup>90</sup> EC-Graph-1.

<sup>91</sup> EC-Graph 1.

<sup>92</sup> *Infra*, para. 6.37.

(L/7370/Add.1) which contains the decision concerning the non-application of safeguards within the customs union as of 31 December 1994.

5.72 In reaction to Argentina's reply to questions by the Panel (para. 5.102), the European Communities submits that Argentina is permitted on the basis of Article XXIV GATT to exclude MERCOSUR countries from the application of a safeguard measure. Argentina therefore was equally permitted to conclude an agreement with Paraguay, Brazil and Uruguay, that safeguard measures would not apply to MERCOSUR countries. The European Communities disagrees however with Argentina that Article 2.1 Agreement on Safeguards (and its footnote) should be interpreted as to allow for a "methodology" whereby MERCOSUR imports would be included in a determination of "increased imports" while not applying measures to those countries.

5.73 According to the European Communities, Argentina has, in answering a Panel question, attempted to explain why it believed it was "reasonable" to consider intra-zone imports in the present case<sup>93</sup>. It had said in its notification that such imports (in spite of different duties applied to MERCOSUR members and non-MERCOSUR members) should be considered "for injury analysis purposes since in the absence of DIEM or protective measures there would be at least an equal flow of imports from the world into the Argentine Republic". The European Communities notes that Argentina's response to the Panel also indicates that (para. 5.112):

"Although import duties are different for trade within MERCOSUR than for imports from outside MERCOSUR, this difference does not alter the established fact that the levels of imports of all origins were increasing and both *would have continued to increase*, as happened with imports from MERCOSUR, *if the specific duties had not been imposed*. The *logical conclusion* was that the increases *would have continued* in the absence of the DIEMs, and the increase in imports from MERCOSUR was simply a further confirmation of this conclusion." (emphasis added by the European Communities).

5.74 The European Communities maintains that it is clear from this statement that Argentina based its measure not on the *actual* and present existence of an increase in imports, but on a *hypothetical* increase in imports, which is not allowed under Article 2.1 of the Agreement on Safeguards. In addition, no explanation is given by Argentina for the calculation that there would be "at least an equal flow of imports" from the rest of the world, in spite of the differences in tariff levels for imports from MERCOSUR countries and from non-MERCOSUR countries<sup>94</sup>. The European Communities agrees with the United States<sup>95</sup> that "the effect of Argentina's action is to penalise producers from third countries for the [alleged] injurious imports emanating from MERCOSUR."

5.75 The European Communities objects to a statement made by Argentina on page 23 of its notification of its finding of injury (Exh. EC-16), where Argentina explains why it believed that it was "reasonable" to consider intra-zone imports in the present case:

The Commission decided to investigate total imports, differentiating between those originating in Mercosur and those from the rest of the world. As has been pointed out, a good deal of the former are the result of imperfect substitution of imports from the rest of the world consequent upon the diversion of trade created by the DIEM. Therefore, it is reasonable to consider them on equal terms for injury analysis

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<sup>93</sup> For the European Communities, this constitutes a *de facto* acknowledgement by Argentina that imports from non-MERCOSUR countries should normally have been excluded from the increased-imports determination if no safeguard measure would apply to them in the future.

<sup>94</sup> Exhibit EC-16, at page 8.

<sup>95</sup> *Infra*, para. 6.38.

purposes since in the absence of DIEM or protective measures there would be at least an equal flow of imports from the rest of the world into the Argentina Republic.

In the view of the European Communities, this statement is a de facto acknowledgement by Argentina that imports from non-Mercosur countries should normally have been excluded from the increased imports determination if no safeguard measure would apply to them in the future.

5.76 In other words, according to the European Communities, since the minimum specific duties had been in place for some years and had reduced imports from third countries, Argentina estimated that those third-country imports would have increased by roughly the number of current imports from MERCOSUR countries. The European Communities strongly objects to this sort of calculation as a justification. For the European Communities, the quoted statement makes clear that Argentina based its measure not on an *actual* increase of imports but on a *hypothetical* increase, which Argentina conveniently equalled to imports from MERCOSUR countries. The European Communities submits that, in addition to having no legal grounds to apply such a calculation, there is absolutely no basis to assume that current MERCOSUR imports represent even a crude estimate of the increase in imports which would occur if the minimum specific duties were removed.

## **2. Argument of Argentina**

### **(a) Introduction**

5.77 Regarding the EC statements about imports from MERCOSUR countries, Argentina asserts that the European Communities has obfuscated the true problem in this particular case, manipulating its arguments as though Argentina was obliged to exclude MERCOSUR imports from the analysis of injury if MERCOSUR was subsequently excluded from application of the measure. Argentina contends that, in order to win its argument, the European Communities must show that such an obligation is required under the Agreement on Safeguards. According to Argentina, the European Communities deflects attention from an essential point, namely the lack of any specific provision in the Agreement on Safeguards providing that, in the case of customs unions, if members of the union are to be excluded from a measure, the investigation must be conducted according to the methodology set out by the European Communities.

5.78 Argentina submits that if a WTO agreement is specifically recognised by the Members as having more than one possible interpretation, and, in the absence of a single interpretation, a Member adopts a measure within the scope allowed by the text, the measure must be considered to be in conformity with the agreement. The very nature of public international law supports this statement (in public international law delegation of sovereignty cannot be assumed).

5.79 Argentina submits that the footnote to Article 2.1 of the Agreement on Safeguards is the result of the maximum consensus achieved by the negotiators during the Uruguay Round. The replies by the United States to the Panel in this connection mention texts and alternatives discussed during the negotiation *on which, in the end, no agreement was ever reached*. The result of this situation is the footnote to Article 2.1 of the Agreement on Safeguards, which confirms the agreement on the disagreement concerning the relationship between Article XIX and Article XXIV of the GATT.

5.80 Argentina asserts that, as provided in the DSU, a panel may not "add to or diminish the rights ..." under the Agreement on Safeguards. Consequently, the Panel cannot impose a single "methodology", as proposed by the European Communities, when there is no agreement among the Members on a definitive interpretation of the rights and obligations laid down in both Articles (relationship between Articles XIX and XXIV of the GATT, as stated in footnote 1 to Article 2.1 of the Agreement on Safeguards).

5.81 According to Argentina, the footnote to Article 2.1 expressly states that there is no agreement between the parties concerning the way in which to conduct the analysis of injury in the case of a safeguard measure applied by a customs union on behalf of a Member States, and the Panel may neither comment nor prejudge matters that are not covered by the GATT/WTO disciplines.

5.82 Argentina maintains that the European Communities has no backing for its "methodology"<sup>96</sup>, which has no basis either in the language of the agreements or in customary practice. Article 31.2 of the Vienna Convention on the Law of Treaties specifically states that the context for the interpretation of a treaty includes its text. Nothing in the text of the Agreement on Safeguards explicitly requires application of the methodology suggested by the European Communities. In fact, the text itself shows that an analysis of the circumstances must be made with respect to *imports*, with no indication of any limitations except for footnote 1, on which there is no agreement among Members regarding the application of the measures in question and Article XXIV. The only specific requirements concerning analysis of injury itself are in Articles 2 and 4. No article defines or limits the concept of "imports" in any way.

5.83 Argentina argues that where the Agreement on Safeguards seeks to make an exception or regulate a particular situation, it does so explicitly, for example, in the provision on excluding developing countries from the application of safeguard measures. When the negotiators of the WTO Agreements wished to exclude or include a rule or exception, they did so explicitly. This is the case for developing countries, which are included in the analysis of the impact of injury and then excluded if they meet the requirements of Article 9 of the Agreement on Safeguards. In response to an EC question, Argentina stated that even though Article 9 permits the possibility of excepting developing countries from a measure, the imports of those countries are always included in the investigation of injury. Consequently, there is no reason for making any exception in respect of the methodology for conducting the overall analysis of injury when the Agreement is silent on the matter.

(b) The criterion supported by the European Communities

5.84 Argentina points out that the European Communities' argument is not based on a criterion of legality but a criterion of "logic".<sup>97</sup> Obligations under the WTO Agreement do not stem from a simple concept of "logic" but from a logic based on multilaterally agreed disciplines that necessarily reflect a balance of interests reached through negotiation. In the opinion of certain Members of the WTO, some of the disciplines negotiated may lack economic logic or be inconsistent with other disciplines (the discussions in the Working Group on the Interaction between Trade and Competition Policy are an example).

5.85 Argentina states that it has, for example, drawn attention to the harmful and distorting effect of subsidies on the efficient allocation of resources at the global level. The Cairns Group has been quite outspoken in the negotiations on agriculture, but there is a "peace clause". According to Argentina, the European Communities' protection structure is an example of "the outcome of negotiations" as against logic. Each discipline is negotiated in a global context of conflicting interests and the result is embodied in agreements, in which it is sometimes difficult to see the economic logic. The system cannot correct the alleged lack of economic logic in the agreements via the dispute settlement mechanism. The provisions of agreements, even if they lack economic logic, are being and must be observed "dura Lex sed Lex". In turn, however, requiring observance of the agreements does not mean that they can generate obligations that have not been agreed multilaterally by the Members, through the mechanisms available under public international law. In other words, the content of a

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<sup>96</sup> (Note: "Methodology" is the appropriate term because it indicates greater discretionary power on the part of the national authorities).

<sup>97</sup> Argentina refers to the EC argument in para. 5.40.

"covered agreement", under which disputes can be resolved through the DSB, encompasses *everything and only everything on which the Members of the WTO have collectively agreed*.

5.86 Argentina states that one cannot read into the text of a treaty anything that the treaty itself does not spell out, still less in cases where a treaty explicitly states that there is no common interpretation or that the scope of the relationship between two provisions cannot be prejudged. There is only an obligation on the parties if the common intention of the parties is set out in a text that can be interpreted literally and consistently with its purpose and object. This principle is clearly confirmed in the rulings of the Appellate Body.<sup>98</sup>

5.87 In Argentina's view, if one were to follow the reasoning which emerges, for example, from the European Communities' reply to Panel questioning ...*"If, already prior to the initiation of the investigation, it is known that the scope of the safeguard measure will exclude certain countries, then imports from these countries should necessarily be excluded from the determinations"*... one would start by determining the "target of the safeguard measure" and subsequently begin to conduct the corresponding injury, thereby altering the sequence of the text of the Agreement on Safeguards. This text establishes first the obligation to determine the increase in imports (Article 2) and then to analyse the determining factors for the verification of injury (Article 4.2(a)), to establish the causal relationship (Article 4.2(b)) and then, finally, to define the measure (Article 5.1).

5.88 Argentina alleges that since the European Communities recognises that Argentina has the right to conduct the investigation as it did, the European Communities' problems would seem to be with the measure itself, and it should therefore be questioning the measure under Article 5.1. Argentina does not think that it is appropriate to adduce the existence of an obligation that Article 2.1 does not provide for and that the practice of GATT and WTO Members never endorsed, particularly when the problem raised by the European Communities would not appear to be one of methodology of the investigation, but of the measure applied as a consequence of such methodology. In fact, Argentina argues, the European Communities reduces the scope of its own questioning on failing to find support in Article 2.1 by recognising that what Argentina has done is "failed to construct a safeguard measure that addressed the imports that were causing the injury".<sup>99</sup> This must be the only reason for which the EC pleadings separate the claims relating to injury from the measure itself.

(c) Applicable provision: Meaning of the text

(i) *Application to the claim by the European Communities*

5.89 Argentina, noting the European Communities' statement that it does not challenge the exclusion of MERCOSUR from the scope of the measure as such<sup>100</sup> (which in Argentina's view the European Communities could hardly do, ignoring one of the Community's constant practices since the creation of the GATT). Argentina disagrees with the European Communities' argument that such exclusion necessarily entails the obligation to exclude MERCOSUR imports from the analysis of "serious injury", "increased imports", and "causality", required by Article 2.1.

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<sup>98</sup> "The purpose of treaty interpretation under Article 31 of the Vienna Convention is to ascertain the common intentions of the parties. These common intentions cannot be ascertained on the basis of the subjective and unilaterally determined 'expectations' of one of the parties to a treaty". *European Communities – Customs Classification of Certain Computer Equipment*, Report of the Appellate Body, WT/DS68/AB/R, page 31. The finding of the Appellate Body in *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* was similar: "The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the Vienna Convention. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the imputation into a treaty of concepts that were not intended". WT/DS50/AB/R, paragraph 45, emphasis added.

<sup>99</sup> *Infra*, para. 5.124.

<sup>100</sup> *Infra*, para. 5.116.

5.90 Argentina submits that, first, Article 2.1 refers to the "conditions" under which goods are imported and which have to be analysed for the purposes of applying the safeguard measure. The imports must have increased ("*han aumentado*" *in the past tense in the Spanish text*, "is being imported" *in the present continuous tense* in the English text, according to Article 2.1) "in such increased quantities", "absolute or relative to domestic production" (there must be an increase), "under such conditions" (not any type of imports), as to "cause or threaten to cause serious injury".

5.91 In Argentina's view, these requirements, literally all of them, refer to the "Conditions" laid down in Article 2.1 for application of the measure, but NONE of them mentions the investigation as such. None of these provisions prescribes who is to investigate, how to investigate, how to collect information, what basis to use, etc. Article 2.1 itself states "... if that Member has determined, pursuant to the provisions set out below ...". The provisions *below* in the Agreement are the way in which the investigation should be conducted in Article 3 and the other substantive conditions laid down in Articles 4 *et seq.* of the Agreement on Safeguards.

5.92 Argentina contends that, as far as the investigation is concerned, the European Communities has not claimed that, *by including MERCOSUR in the analysis, Argentina failed to respect Article 3*, which specifically prescribes the terms of the investigation ("pursuant to procedures previously established").

(ii) *Literal interpretation of Article 2.1 and footnote 1*

5.93 Argentina states that the European Communities, in describing the elements of the alleged non-compliance with Article 2.1, strangely enough *excludes* a reference to the footnote, which in fact describes the way in which the "Conditions" set out in Article 2.1 must be analysed in the case of a safeguard applied by a customs union (on behalf of a member State in this particular case). That is, the European Communities states "*Article 2.1, Agreement on Safeguards (footnote omitted) reads as follows*".<sup>101</sup> According to Argentina, this omission of the footnote is not unintentional or a mistake. It is in fact necessary in order to avoid the discussion of the key element in determining whether or not Argentina erred in verifying the injury requirements, taking into account imports from MERCOSUR.

5.94 Argentina submits that Article 2.1 concerns "Conditions" for application of a safeguard measure, whereas footnote 1 to this Article clarifies the situation in the case of customs unions. The footnote specifies how a customs union should act in such cases and at the same time preserves the rights both of the customs union and of the other Members of the WTO. Argentina asserts that, among the obligations set out in the footnote that are relevant to this dispute, the third sentence is important:

"When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious injury or threat thereof shall be based on *the conditions existing in that member State* and the measure shall be limited to that member State" (emphasis added by Argentina).

5.95 According to Argentina, the footnote simply clarifies the scope of the general obligation contained in Article 2.1 to verify the existence of the "Conditions" concerning imports when a customs union applies a safeguard measure on behalf of a member State.<sup>102</sup> The text is crystal clear in

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<sup>101</sup> *Infra*, para. 5.144.

<sup>102</sup> In response to a **Panel** question, Argentina stated that the notion of "conditions" with reference to the requirements for the determination of injury is relevant throughout the text of the Agreement. In Argentina's view, the essence of the way in which the Agreement treats the notion of "conditions" with respect to the requirements for the determination of injury lies in the fact that the Agreement does not contain any proposed limitations to the "conditions" that must exist, nor does it provide for any limitations with respect to the

imposing the obligation that all the requirements for determining injury shall be based on the *conditions existing in that member State*. The footnote does not provide that intra-zone imports should be excluded nor does it say, for example, whether, in order to determine the threat of injury, estimated imports resulting from the possible convergence of a tariff in the adaptation regime (the transitional stage in the establishment of a customs union) should be taken into account.

5.96 Argentina maintains that the conditions of footwear imports in Argentina have a MERCOSUR component that cannot be ignored.<sup>103</sup> If one accepts the European Communities' interpretation, this would mean failing to comply with the requirement to verify all of the "Conditions", as required for customs unions in the footnote itself. Argentina argues that the footnote does not specify which "conditions" must be taken into account. It does not establish a threshold which triggers the obligation. The obligation has effect *de jure* and applies to all the conditions that must be analysed when a measure is imposed by a customs union on behalf of a member State.

5.97 Argentina poses as an example the United States, one of the major users of safeguard measures, which analyses injury considering imports on a global basis (as Section 202 is a global safeguards law, the ITC considers imports of any origin when determining which imports have increased). The United States then examines which members of NAFTA should be excluded. This investigation is conducted separately from the global analysis of injury and decisions are based on Section 311(a) of the NAFTA Implementation Act. If the International Trade Commission decides that a member of NAFTA should be excluded, the determination of global injury will result in measures that do not apply to the member or members of NAFTA. In the *Wheat Gluten* case, the United States excluded Canada from the measures, citing the requirement to apply the NAFTA, even though Canada had been the third largest supplier of wheat gluten to the United States over the whole period of the investigation. (The United States verified that imports from Canada had decreased.) Related to this case and in the light of the level of Canadian wheat gluten exports to the United States, it is not understandable why the European Communities affirms (para. 5.123) that Canadian exports did not cause injury. Argentina asks which were the EC criteria to arrive at this conclusion, and which percentage related to total imports constitutes a threshold acceptable to exclude a partner of a free trade zone from a measure.

5.98 Argentina states that when the European Communities made use of the retaliation option afforded by Article 8.2 of the Agreement on Safeguards (G/L/251, G/SG/N/12/EEC/1), it did not calculate the possible increase in exports from Canada as a result of the favourable effects of Canada's exclusion from application of the measure, which led to a loss of the European Communities' market share in the United States. According to Argentina, if the European Communities followed its own "logic", it should have asked the United States why they attributed injury to their third largest supplier yet excluded it from the measure. They did not contest this point in the Committee on Safeguards, however, nor did they take this injury into account for the purposes of the proposed retaliation. These are double standards which are more demanding for developing countries applying safeguards than the standards imposed among developed countries.

5.99 Argentina also wonders how it is possible to be so demanding and impose a requirement not contained in the Agreement when, for example, it is EC practice to extend anti-dumping measures in

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"imports" or other indicators of injury as defined in Article 2. The reference to imports in Article 2 and in the footnote is to "all" imports, and there is no distinction between the conditions and requirements in the two cases.

<sup>103</sup> In response to a Panel request for clarification of this statement, **Argentina** stated that this assertion must be placed in its context, i.e. the considerations concerning "conditions" referred to in footnote to Article 2.1 and, specifically, the "conditions existing in that member State" which must be taken into account in accordance with the third sentence of the footnote. These conditions include the imports whose evolution must be examined and the possible increase in such imports causing serious injury. This statement refers to the fact that in considering the "conditions" existing in a member State of a customs union (in this case Argentina), the footwear imports to be considered comprise footwear that enters the country from other member States of the MERCOSUR customs union and footwear which enters from other countries, i.e. from the rest of the world.



force to new countries which join the Community, as reflected in the Note on the meeting of the Committee on Regional Trade Agreements.<sup>104</sup>

5.100 For Argentina, it is neither compatible with the text nor the object and purpose of the Agreement on Safeguards (Article 2.1 and the footnote) "to require" a form of evaluation of the "conditions" of imports which Article 2.1 of the Agreement on Safeguards does not contain, when the European Communities' practice in applying another agreement on rules (anti-dumping) is to extend the measure without any investigation, or, in the case of safeguards, to grant "more favourable treatment" to developed partners in its investigations.

(iii) *Object and purpose of the footnote*

5.101 Argentina submits that the object and purpose of the footnote can only be to create the least possible distortion to trade flows and at the same time to eliminate the restrictions on intra-zone trade and help the customs union, or one of its members, to use a legitimate tool such as safeguards. For Argentina, the footnote will create the least possible distortion of trade since in principle a safeguard measure will have a lesser effect on global trade flows if it is applied by a member State and not by a customs union as a single entity. For Argentina, the objective of the footnote is to eliminate restrictions on intra-zone trade (and safeguards would be restrictions on intra-zone trade) precisely because Article XIX was specifically excluded from the list in Article XXIV.8(a)(i). According to Argentina, if a customs union were obliged to apply a safeguard measure to imports from other members of the union, this would be contrary to the objective of Article XXIV, namely that "duties and *other restrictive regulations of commerce* ... are eliminated with respect to substantially all the trade ...".

5.102 In response to questioning by the Panel concerning whether Article XXIV:8 of the GATT prohibits the maintenance or introduction of safeguard measures between the member States of a customs union or free-trade area, Argentina replies that Article XXIV:8 does not prohibit the maintenance or introduction of safeguard measures, but, in conjunction with the footnote to Article 2.1, it clearly permits members of a customs union to exempt their partners from the application of a safeguard measure. Argentina underlines that under Article XXIV:8, the obligations arising from the MERCOSUR agreements, which establish a common trade policy instrument in respect of safeguards (CMC decision 17/96), require Argentina not to apply safeguard measures to its partners in the customs union.<sup>105</sup> Argentina explains that, in the case of a customs union, subparagraphs 8(a)(i) and (ii) of Article XXIV indicate that the application of safeguard measures must be carried out by the customs union as such or on behalf of one of its member States, in keeping with the provisions of the WTO Agreement on Safeguards. A customs union such as MERCOSUR, which has agreed on the adoption of a common trade policy instrument in respect of safeguards against imports from third countries (CMC decision 17/96), does not maintain any safeguard measures on trade between its member States. And indeed, this is consistent with Article XXIV:8(a). Argentina asserts that the elimination of the restriction (in this case a safeguard), for which the required time-period differs according to the integration process concerned, is operative as from the

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<sup>104</sup> Document WT/REG/22/M/1, paragraphs 39, 41-43.

<sup>105</sup> Argentina points out that the Treaty of Asunción and the Common Regulation, adopted by Decision 17/96 of the Common Market Council, preclude States party to MERCOSUR from applying safeguard measures to trade in goods between them. Article 98 of the said Regulations stipulates that when safeguard measures are applied, imports from member States of the customs union must be excluded. Secondly, the interpretation of Article XXIV:8(a) set forth above has been amply confirmed by GATT practice, since the safeguard is a restriction in the terminology used in the Panel's question, a restriction which Article XXIV:8(a) entitles Members to remove. Consequently, the basis for the measure adopted by Argentina is MERCOSUR, formed under the Treaty of Asunción, which is an agreement under Article XXIV and, in particular, under paragraph 8 thereof, which has been incorporated into the Agreement on Safeguards through footnote 1 to Article 2.1 of that Agreement.

moment at which the customs union is constituted. There would be no reason for the elimination of the restriction to be authorised only at the end of the period since it is the elimination itself that the Article authorises, leaving it up to the Members to decide on the timing in accordance with the progress achieved in establishing the customs union.

5.103 Argentina states that in December 1996, the Council of Ministers of MERCOSUR adopted Decision 17/96 establishing the Common Regulation on the Application of Safeguard Measures to Imports from Non-Members of MERCOSUR.<sup>106</sup> Under the transitional provisions of these Regulations, until 31 December 1998 each State Party shall apply its domestic legislation with respect to safeguards, and if it applies a measure shall so inform the pro-tempore Presidency of MERCOSUR so that it may notify the WTO Committee on Safeguards. The same provision also stipulates that such measures as may be taken by a State party to MERCOSUR shall be adopted on behalf of MERCOSUR and shall not apply to imports of the other States party. Argentina points out that by Decision 19/98 of the Common Market Council (December 1998) it was decided to extend the period of validity of the transitional provisions until 31 December 1999.

5.104 In response to questioning by the **Panel** concerning the significance of the fact that footnote 1 to Article 2 immediately follows the word "Member", **Argentina** states, first, the footnote does not refer to Article 2 as a whole, but is a footnote to Article 2.1. If it referred to Article 2 as a whole, the note would have been placed either after the title "Article 2" or after the word "conditions" identifying the article. Moreover, Argentina asserts, the placement of the footnote, originally following the words "contracting parties" in drafts of the Uruguay Round text (as pointed out by the United States in its replies to the Panel)<sup>107</sup>, was necessary because the text applied only to the contracting parties of the GATT, and the European Communities were never a contracting party.

5.105 Argentina states that customs unions are presented to the WTO through a decision by the WTO Member countries that form part of them, and once they have been examined in the light of Article XXIV of the GATT and Article V of the GATS, the WTO General Council concludes that they are not in opposition to those provisions. Argentina asserts that MERCOSUR has been a customs union since 1 January 1995, when it adopted a common external tariff, and was presented as such to the WTO, which initiated the process of examination on the basis of Article XXIV of the GATT. This process is currently in its final stage. The countries making up the MERCOSUR Customs Union are Argentina, Brazil, Paraguay and Uruguay. MERCOSUR has its Common Regulations on Safeguards in Relation to Third Countries (Decision CMC 17/96), notified to the WTO in the context of the Working Party on MERCOSUR set up in the framework of the Committee on Regional Trade Agreements and the Committee on Safeguards. Argentina points out that in the Committee on Safeguards, Argentina provided details of the MERCOSUR review process in the Committee on Regional Trade Agreements, where it answered specific questions concerning the common safeguards regime. The Common Regulations on Safeguards establish a period of transition for the full entry into force of all of its provisions and establish that during that period, investigations will be conducted by the authorities of the State Party, in which case the measures are applied by the Customs Union on behalf of that State Party. Thus, Argentina asserts, it is odd that the European Communities should qualify the MERCOSUR phenomenon as a "curiosity" and the Customs Union as a "nascent" process.<sup>108</sup>

5.106 Argentina disagrees with the European Communities that neither one of the Argentine Resolutions 226/97 and 987/97 (the only ones at issue in this case) mentions Decision CMC 17/96. Article 8 of Resolution 987/97 specifically indicates that the meeting of the MERCOSUR CMC in December 1997 was to consider the measure in the light of the Common Regulations on Safeguards approved by that Decision.

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<sup>106</sup> Exhibit ARG-19.

<sup>107</sup> *Infra*, para. 6.32.

<sup>108</sup> *Infra*, para. 5.113.

5.107 Argentina contends that to interpret the footnote to Article 2.1 as applying only to customs unions that are Members *per se* of the WTO would be to deprive the third sentence of the footnote, which states that nothing in the agreement prejudices the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT, of its effectiveness. The specific reference to Article XXIV makes it clear that the customs unions referred to in the footnote are not only those that are Members of the WTO *per se*, since Article XXIV does not apply only to customs unions that are Members of the WTO. Argentina notes that Article XXIV, paragraph 8 does not draw any distinction between customs unions that are "WTO Members" and those that are "WTO non-members", but defines a customs union as the substitution of a single customs territory for two or more customs territories, so that duties and other restrictive regulations of commerce are eliminated with respect to substantially all trade between the constituent territories of the union. MERCOSUR fits the definition of Article XXIV, paragraph 8, and therefore constitutes a customs union under WTO rules.

(iv) *Effectiveness of the footnote*

5.108 Argentina submits that if one were to accept the European Communities' interpretation, this would prevent a Member of the WTO from availing itself of the right given by Article XXIV and at the same time complying with the obligation in the footnote to take into account the conditions under which the goods are imported. Furthermore, if one were to accept the European Communities' interpretation, the second requirement which the European Communities' submission seeks to impose unilaterally on the agreement ("largest percentage") would deprive the footnote of its effectiveness as there might be a sought-after increase in imports when a customs union is established, an increase that must be calculated in each case, while at the same time the existence of imports from outside the zone which cause or threaten to cause injury can be verified.

(v) *Scope of the obligation contained in the footnote*

5.109 Argentina submits that even if its interpretation is deemed to be incorrect, in the case of customs unions all these considerations on the scope of the disciplines are governed by the last sentence of the footnote to Article 2 of the Agreement on Safeguards:

"Nothing in this Agreement prejudices the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994."

According to Argentina, this text specifies the extent to which there is a "common" determination on the part of the Members of the WTO "to be bound by the terms of a treaty" (in the sense of the Vienna Convention on the Law of Treaties). On this basis, any obligation that is added unilaterally or by means of interpretation cannot in any way be considered as forming part of the "covered agreements" within the meaning of Article 1.1 of the DSU.

(vi) *Meaning of the phrase "and the measure shall be limited to that member State" in the second sentence of the footnote*

5.110 In response to questioning by the Panel regarding the meaning of the phrase "and the measure shall be limited to that Member states" in the second sentence of the footnote to Article 2.1, Argentina notes that the phrase must be read with the full sentence: "When a safeguard measure is applied (i.e. when the customs union applies a safeguard measure) on behalf of a member State, all of the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and *the measure shall be limited to that member State.*" According to Argentina, it is by reading the sentence in full and considering its place in the context of the footnote to Article 2.1 that its meaning and correct interpretation can be determined. The sentence refers to the

situation which could arise when a customs union applies a safeguard measure on the basis of conditions investigated within a member State.

5.111 In other words, according to Argentina, the sentence specifically refers to the fact that a safeguard measure can only be applied in the territory of a member State in which serious injury or threat thereof has been determined. In the case at issue, for example, since it was the conditions in Argentina that were investigated, the safeguard measure could not have been adopted by MERCOSUR in respect of all of the footwear imports into the MERCOSUR customs union, but only for imports entering Argentina, the member of the customs union in which serious injury was determined. Thus, in Argentina's view, the safeguard measure imposed by MERCOSUR on behalf of Argentina is perfectly consistent with the sentence of Article 2.1 mentioned by the Panel since it applies only to footwear imports entering the Argentine market, and not those entering MERCOSUR as a whole. If one of the member States has carried out an investigation in accordance with the Agreement on Safeguards, has proved that the conditions set forth in Article 2.1 have been met and has shown that there is serious injury to the domestic industry or a threat thereof in accordance with Article 4 of the Agreement on Safeguards, a decision can be made to apply a safeguard measure on behalf of that member State.

5.112 In answer to a panel question concerning the basis for the statement in Act 338 that "in the absence of minimum specific duties or protective measures there would be at least an equal flow of imports from the rest of the world into the Argentine Republic" in the light of *inter alia* the tariff differential between MERCOSUR and non-MERCOSUR goods, Argentina states that the Commission decided to investigate total imports, differentiating between those originating in MERCOSUR and those from the rest of the world. Argentina submits that a good deal of the former are the result of imperfect substitution of imports from the rest of the world consequent upon the diversion of trade created by the DIEM. Therefore, it is reasonable to consider them on equal terms for injury analysis purposes since in the absence of DIEM or protective measures there would be at least an equal flow of imports from the rest of the world into the Argentine Republic. Argentina further indicates that although import duties are different for trade within MERCOSUR than for imports from outside MERCOSUR, this difference does not alter the established fact that the levels of imports of all origins were increasing and both would have continued to increase, as happened with imports from MERCOSUR, if the specific duties had not been imposed. The logical conclusion was that the increases would have continued in the absence of the DIEMs, and the increase in imports from MERCOSUR was simply a further confirmation of this conclusion.

### 3. Response of the European Communities

5.113 The European Communities submits that the footnote to Article 2.1 of the Agreement on Safeguards is not applicable and, in any case, does not have the meaning given to it by Argentina. The footnote is not applicable because it relates to the application of a safeguard measure *by a "customs union"*. Argentina is of course part of a nascent customs union, MERCOSUR. However, it is not MERCOSUR which took the measure the subject of this case but Argentina. It is not MERCOSUR which conducted the investigation, it was Argentina. Some of the notifications were made by MERCOSUR Members but this seems more of a curiosity than anything else and it is in any event Argentina which is defendant in the present case, not MERCOSUR or the other notifying Members. In fact, Argentina has acknowledged that MERCOSUR is not able to apply for the time being safeguard measures in the absence of legislation and procedures to do so. This was confirmed by the joint oral statement of Brazil, Paraguay and Uruguay.<sup>109</sup>

5.114 In any event, the European Communities submits, the footnote does not have the meaning Argentina claims. Footnote 2 of Article 2.1 can be divided into three parts: first, where a customs union applies a safeguard measure as a single unit; second, where a safeguard measure is applied on

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<sup>109</sup> *Infra*, para. 6.6.

behalf of a member State; and third, a statement regarding the relationship between Article XIX and paragraph 8 of Article XXIV of GATT. The European Communities states that the first part of the footnote is clearly not relevant for this case, and Argentina has not claimed that it is. This part deals with safeguard measures taken by a customs union as a single unit, on the basis of the conditions existing in the customs union as a whole: injury and causation have to be determined on the basis of the increase in imported products from outside the customs union. The situation of the relevant industry within the entire territory of the customs union has to be analysed. The second part deals with the situation where a safeguard measure is taken for one of the members of a customs union. In that case, according to the text, injury and causation have to be determined on the basis of the situation existing in that member and the situation of the relevant industry within the territory of the member has to be analysed.

5.115 Therefore, the European Communities continues, the object and purpose of the first two parts of the footnote are clear from the text: when a measure is taken for the customs union as a whole, the injury determination should be done on the basis of the conditions relevant for the entire territory of a customs union; when the measure is taken for a single member, this determination should be done on the basis of the conditions present in the territory of the member. In other words, no safeguard measure can be taken for the customs union as a whole if the conditions only concern one of its members. Alternatively, no member can take a safeguard measure by itself if the conditions were investigated for the customs union as a whole. For the European Communities, that is what the first and second part of the footnote do, and nothing more. The European Communities observes that the text of the footnote contains no similar exception as was allowed in Article 9 of the Agreement on Safeguards.

5.116 Finally, the European Communities states, the third part of the footnote makes clear that the text of the Agreement on Safeguards cannot prejudice the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT. In other words, the question of whether the Agreement on Safeguards would necessarily "eliminate" duties and other restrictive regulations of commerce between the constituent territories of the customs union, as set out in Article XXIV, is left open. The European Communities states that the historic explanation of this phrase is to be found in the disagreement which existed amongst GATT members at the time of the negotiation of the Agreement on Safeguards with respect to whether or not Article XXIV GATT would allow a member of a customs union or a free trade area to exclude the other members of such preferential trade regime from the application of the safeguard measures. The negotiated solution to this question was to maintain the *status quo*, i.e. the Agreement on Safeguards does not, on its own, provide new or additional elements to solve this interpretative question. The European Communities does not address this issue in the present dispute. It leaves this question open, in line with the text of the third part of the footnote. The European Communities does not challenge – as such – the exclusion of MERCOSUR imports of footwear from the scope of the safeguard measure. However, nothing in the third part of the footnote says anything about an exception which would allow an approach which includes imports from members of the customs union in the investigation while excluding those members from the safeguard measure. It is this inconsistency which the European Communities cannot agree to and which it asks the Panel to condemn.

5.117 The European Communities points out that Argentina presents this issue in its first submission as a question of "methodology" ("*methodology* is the appropriate term because it indicates greater discretionary power on the part of the national authorities"). The European Communities disagrees with Argentina that this issue is a question of "methodology", which necessarily would allow for wide discretionary practices by WTO Members: it is a matter of correct *legal interpretation* of the meaning of the phrase "being imported in such increased quantities so as to cause serious injury" set out in Article 2.1 of the Agreement on Safeguards. It cannot vary at the discretion of Members.

5.118 The European Communities asserts that in order to interpret this phrase, it should be read in its *context*. The immediate context in which this phrase is placed is Article 2.1 of the Agreement on Safeguards, which sets out the requirements which should be fulfilled before "[a] Member may apply a safeguard measure to a product." This provision underlines the inherent link between the *requirements* (including increased imports) and the *measure* itself: the importance with which the requirements present themselves determine the scope of the safeguard measure. This link is also confirmed by another provision, which equally forms part of the context of the phrase "being imported in such increased quantities so as to cause serious injury": Article 5.1 of the Agreement on Safeguards. The European Communities asserts that the United States states correctly that, "in order for a safeguard measure to be effective, and to comport with Article 5:1, *it must affect the imports that are causing the injury.*"

5.119 In this respect, the European Communities accepts the US position<sup>110</sup> that Argentina was free to *investigate* all imports into its territory, so as to have full information on the different sources from which the product entered. However, Argentina should subsequently have refrained from using the import statistics from MERCOSUR countries for its *determination* that the product was "being imported in such increased quantities", while knowing beforehand that the scope of the safeguard measure could not include imports from MERCOSUR countries.

5.120 According to the European Communities, a similar reasoning applies to the legal interpretation of the terms "requirements" and "conditions" in the second part of the footnote to Article 2.1 of the Agreement on Safeguards, even though the European Communities does not recognise that the footnote in the present case is relevant. The second part of this footnote reads:

"When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State."

The European Communities submits that these two terms equally refer (*inter alia*) to the phrase "being imported in such increased quantities so as to cause serious injury"<sup>111</sup>, so that the above-mentioned interpretation applies.

5.121 The European Communities takes issue with a comment made in the joint oral statement during the first substantive Panel meeting by Brazil, Paraguay and Uruguay in this respect. According to these countries, "what happens after the investigation has been concluded is a *separate matter*. Other rights and obligations come into effect."<sup>112</sup> (emphasis added) The European Communities does not see the reason why a clear distinction should be made between the investigation (and in particular the *determination* that imports have increased) and the scope of the measure. In the European Communities' view the matter is *not separate*, but is *inherently linked*, as argued before.

5.122 Furthermore, the European Communities asserts, Argentina's interpretation of Article 2.1 unjustifiably reflects the content of Article 9 of the Agreement on Safeguards. Argentina argues that Article 9 is an exception in the Agreement on Safeguards : "Where the Agreement on Safeguards seeks to make an exception or regulate a particular situation, it does so explicitly". The European Communities agrees with this statement, but comes to the opposite conclusion to Argentina. The

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<sup>110</sup> *Infra*, para. 6.37.

<sup>111</sup> The very close link between the *conditions* and the *measure* is confirmed by the "mirror-like" use of these terms in the last sentence of the second part of the footnote: "conditions existing in that member State and the measure shall be limited to that member State." In other words, the conditions are a pre-requisite for the measure, while the measure is the direct consequence of the existence of the conditions: they are thus "inherently linked".

<sup>112</sup> *Infra*, para. 6.7.

European Communities states that Article 9 of the Agreement on Safeguards makes clear that the imports of developing country members are included in the determination but that those developing country members can be excluded from the safeguard measure when such imports are considered *negligible* (i.e. below 3 per cent).<sup>113</sup> Therefore, the Agreement on Safeguards introduces here, on an exceptional basis and for a limited quantity of imports, the possibility of including certain imports in the investigation while excluding certain countries from the measure. The European Communities submits that neither Article 2.1 nor its footnote provide for such an exception in the case of a customs union. Argentina is unable in its reply to a question by the European Communities to indicate where in the Agreement on Safeguards a similar exception can be found (allowing for the inclusion of imports from customs union members in the determination of the investigation and subsequent exemption of customs union members from the measure)<sup>114</sup>. The European Communities therefore submits that Argentina has imputed a *concept* into the Agreement on Safeguards which was not intended and has never been the subject of the *common intention* of the parties<sup>115</sup>.

5.123 Finally, the European Communities argues, Argentina has relied on an example of a recent safeguard measure taken by the United States regarding wheat gluten, which excluded Canada from the measure, to justify its practice.<sup>116</sup> Although the European Communities states that this Panel cannot address the legality of the safeguard measure imposed on wheat gluten by the United States, it nevertheless notes that the US wheat gluten case is radically different to the present. The United States made separate determinations concerning imports from NAFTA members and concluded that imports from that source and, in particular, Canada did not cause injury. If Argentina had acted in the same way as the United States, it would not have been able to come to the conclusion it did. In addition, the European Communities notes that United States in its third party statement to the Panel<sup>117</sup> did *not* side with Argentina, but instead strongly rejected Argentina's practice as unwarranted, thereby rendering Argentina's argumentation invalid.

5.124 According to the European Communities, Argentina investigated imports from *all sources* and had determined that "serious injury" had been caused by *all imports* (including imports from MERCOSUR countries). However, it subsequently failed to construct a safeguard measure that addressed the imports that were causing the injury<sup>118</sup>. The European Communities therefore agrees with the US<sup>119</sup> that what is "troubling is Argentina's use of MERCOSUR imports for its increased-imports analysis when there was *no possibility* that those imports could be included in any safeguard action, even where those imports are demonstrably the cause of the injury suffered by the domestic industry." Moreover, if Argentina had acted in the exactly the same way as the US has done, Argentina would not have been able to come to the conclusion it did.

5.125 The European Communities states that a more relevant example of third country practice is evidenced by Exhibit EC-33, which is a notification dated 28 July 1998 by Australia, announcing the

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<sup>113</sup> If imports from developing country members are, collectively, more than the 9 per cent threshold, this would allow the WTO Member taking the measure to block imports from developing country members. If their share of imports is below the threshold, the harm done by this segment is considered non-substantial and developing countries members can be given preferential treatment.

<sup>114</sup> Instead, Argentina relies exclusively on "Article 2:1 and the footnote thereto" to explain its procedural steps. These provisions however, as discussed before, do not allow for a similar exceptional procedure as foreseen in Article 9.

<sup>115</sup> Appellate Body Report, EC - Customs Classification of Certain Computer Equipment, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, 5 June 1998, at page 31, 32. Appellate Body Report, India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R, 19 December 1997, at paragraph 45.

<sup>116</sup> *Supra*, para. **Error! Unknown switch argument..**

<sup>117</sup> *Infra*, section VI.C.

<sup>118</sup> See also US argument, *infra*, para. 6.33-6.39.

<sup>119</sup> *Infra*, para 6.37.

initiation of a safeguard investigation regarding swine meat. Australia under paragraph 3(ii) lists the total imports of the product in question. In doing so, it expressly excludes the imports from New Zealand from the total number of imports. In addition, it announces that it will exclude New Zealand from the action under the Safeguard Agreement, since New Zealand is a member of the '*Australia – New Zealand Closer Economic Relations Trade Agreement*'. A further example may be found in Article 3 of the Central American Regulations on Safeguard Measures (Document G/SG/N/1/CRI/2, Exhibit EC-36), which provides that "[t]he safeguard measures which these Regulations refer shall apply to imports from third countries." Furthermore, Article 6 of these Regulations provides that "[t]he purpose of the investigation procedure shall be to determine whether or not it is appropriate to apply safeguard measures when a product is being imported into the territory of a State Party from third countries [...]".

5.126 In addition, and with respect to Argentina's continuous references in its replies to the questions by the Panel to MERCOSUR's Common Regulations on Safeguards in Relation to Imports from Third Countries (Decision CMC 17/96), the European Communities submits that the text of neither Resolution 226/97 nor Resolution 987/97 indicates that these Regulations have been adopted pursuant to Decision CMC 17/96.

5.127 Furthermore, the European Communities reiterated that both *total imports* and *extra-zone imports* into Argentina had decreased since 1993. Therefore, according to the European Communities, in both cases did Argentina not comply with a key requirement of Article 2:1 Agreement on Safeguards. Therefore, according to the European Communities, the so-called "Mercosur Question" is important as a principle, but the answer to it is not determinative for the outcome of this case.

5.128 The European Communities stated that the issue is a question of correct legal interpretation of the phrase "*being imported in such increased quantities so as to cause serious injury*". Articles 2:1 and 5:1 Agreement on Safeguards underscore the inherent link between the requirements (one of which is increased imports) and the measure itself. As the US correctly stated, "in order for a safeguard measure to be effective [...] it must affect the imports that are causing the injury." In fact, according to the European Communities, what Argentina has done in the present case is to penalise European producers and other third country producers for the alleged injurious imports from Mercosur countries.

5.129 The European Communities recalls Argentina's statement<sup>120</sup> that the result of following the EC's view is that "we would find ourselves in a situation where we would start by determining the 'target of the safeguard measure' and subsequently begin to conduct the corresponding injury [analysis] thereby altering the sequence of the AS text".

5.130 In the view of the European Communities, Argentina was of course free to (and indeed *should*) *investigate* all imports into its territory, so as to put together a complete file on the level of imports from all different sources. For the European Communities there is however a difference between conducting an investigation and making a *determination* that the product was "being imported in such increased quantities" in the framework of Article 4:2(a) Agreement on Safeguards: whereas the investigation could be considered as a mere collection of information, the determination is the legal basis on which a safeguard measure is built. According to the European Communities, the determination of "increased imports" is inherently linked with the scope of the safeguard regime applied subsequently.

5.131 The European Communities submits that this distinction between the investigation on the one hand and the determination on the other is also the reason why the wheat gluten case was rejected by the United States as a justification for Argentina's procedure. According to the European

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<sup>120</sup> *Supra*, para. 5.87.



Communities, if Argentina had applied the same procedure as the United States in the wheat gluten case, then Argentina would not have been able to come to the conclusion it did. The European Communities submits that Exhibits EC-33 and 36 demonstrate that its reasoning is correctly applied by a number of other WTO Members.

5.132 The European Communities notes that Argentina has itself altered the sequence of the Agreement on Safeguards. Together with Brazil, Paraguay and Uruguay, Argentina signed the Treaty of Asuncion and decided subsequently never to apply safeguard measures internally. In other words, according to the European Communities, Argentina beforehand determined the target for all safeguard measures. It therefore knew, when it began its analysis in 1997, that, whatever the outcome was of the analysis, it could never apply a safeguard measure towards the other three members of Mercosur. In such a situation, Argentina should not have included footwear imports from those three countries in its determination

5.133 Furthermore, the European Communities argues that Argentina misquotes the content of the footnote to Article 2.1 when it states that "the footnote to Article 2:1 expressly states that there is no agreement between the parties concerning the way in which to conduct the analysis of injury in the case of a safeguard measure applied by a customs union on behalf of a Member State."<sup>121</sup> The European Communities is unable to find in the text any such reference and it invites Argentina to indicate where these words are used. On the other hand, the European Communities asserts that Argentina is correct where it states that this footnote "confirms the agreement on the disagreement concerning the relationship between Article XIX and Article XXIV of the GATT."<sup>122</sup> However, that is something very different from what Argentina claims.

5.134 Finally, the European Communities asserts that the placement of the footnote to Article 2:1 Agreement on Safeguards immediately after the term "Member" reflects the historic origin and purpose of this clause. According to the European Communities, this footnote, which concerns the application of a safeguard measure by a customs union, was specifically designed to deal with the case of the EC. The European Communities, as a Member of the WTO, may -- in accordance with the requirements set out in Article XIX GATT and the Agreement on Safeguards -- apply a safeguard measure in its own right, i.e. as a customs union, either as a single entity or on behalf of a member State.

5.135 In the present dispute, according to the European Communities, the safeguard measure was not taken by a customs union, but by Argentina. According to the European Communities the footnote is therefore not applicable in the present dispute, since the footnote refers specifically to a "customs union". Although Argentina is part of a nascent customs union -- Mercosur -- it was not Mercosur which took the safeguard measure and conducted the investigation, it was Argentina.

C. DEFINITIVE SAFEGUARD MEASURE

**1. Standard of Review**

(a) Argument of the European Communities

5.136 The European Communities submits that the role of a panel is not to engage in a *de novo* review. Such review was never requested by the European Communities. The European Communities believes that the provisions which should be relied upon in this respect are Article 11 DSU and Articles 4.2(a) and (c) of the Agreement on Safeguards. In particular, a panel should make an objective assessment of whether or not the national authorities correctly considered each of the

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<sup>121</sup> *Supra*, para. 5.81.

<sup>122</sup> *Supra*, para. 5.79.

relevant factors mentioned in Article 4.2(a) of the Agreement on Safeguards; whether the national authorities made a "detailed analysis of the case under investigation" and whether they made a proper "demonstration of the relevance"<sup>123</sup> of the factors examined", as set out in Article 4.2(c) of the Agreement on Safeguards.

5.137 The European Communities takes issue with the statement by Argentina that the European Communities "wishes the Panel to reconsider [the] evidence [collected in the CNCE's file], conduct new analyses, prepare new reports and reach new conclusions."<sup>124</sup>

5.138 The European Communities notes that throughout Argentina's first written submission, there are assertions that the investigation established that the conditions of the Agreement on Safeguards were fulfilled. The European Communities submits that although the Panel cannot reinvestigate the economic data included in Argentina's report, it can and should verify if the conclusions relating to the requirements of the Agreement on Safeguards *follow* from that economic data. In this case, they simply do not. The European Communities submits that the "objective assessment of the facts" referred to in Article 11 DSU cannot be satisfied by verifying *what conclusions* the investigating authority came to but must include *how* it came to those conclusions, that is to say *its reasoning*. The European Communities recalls that the Panel Report '*Brazil – Milk Powder*', also established that it is not sufficient for an authority to refer to the evidence it considered and state its conclusion. In the words of that panel: "It was incumbent upon the investigating authorities to provide a reasoned opinion explaining how such facts and arguments had led to their finding."<sup>125</sup>

5.139 The European Communities can, to a large extent, agree with the US statement<sup>126</sup> regarding the appropriate standard of review in this case. The European Communities submits that a panel would be assured of arriving at an 'objective assessment' of the matter in dispute if it applied a standard of review (developing on what the panels have said in *Underwear*<sup>127</sup> and *Wool Shirts*<sup>128</sup>) that examines whether (1) the domestic authority has examined all relevant facts, including each of the factors listed in Article 4:2(a) Agreement on Safeguards; (2) adequate explanation has been provided of how the facts supported the determination made; and (3) consequently, whether the determination made is consistent with the international obligations of the Member.

5.140 The European Communities disagrees with Argentina's claims<sup>129</sup> that the two panel reports which were cited by the European Communities (*US – Underwear* and *US – Wool Shirts*) cannot give guidance for the present case, since the standards, criteria and the scope for safeguard measures in the Agreement on Textiles are different, requiring a much more precise investigation than is required for the Agreement on Safeguards. The observations by the respective panels which the European Communities has cited are highly relevant comments of a general nature, and are not strictly confined to safeguard measures taken within the framework of the Agreement on Textiles. The two panels confirmed the argument put forward by the European Communities that no safeguard measure should be based on inconsistent or inadequate information. If the Member taking the measure bases itself on incomplete, vague or imprecise information in its investigation, then the high threshold set by Article 4.2(a) of the Agreement on Safeguards, which speaks of "factors of an objective and quantifiable nature", cannot be considered as met. The text of Article 6.3 of the Agreement on Textiles does not even set the threshold so high, since it speaks of "changes in such relevant economic variables".

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<sup>123</sup> See also Panel Report on '*Brazil - Milk Powder*', at paragraph 286.

<sup>124</sup> *Infra*, para. 5.142.

<sup>125</sup> See Panel Report, *Brazil – Milk Powder*, at paragraph 286.

<sup>126</sup> *Infra*, para. 6.22-6.26.

<sup>127</sup> Panel Report, *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/R, 8 November 1996, at paragraph 7.13.

<sup>128</sup> Panel Report, *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R, 6 January 1997, at paragraphs 7.13 - 7.15 and 7.51 - 7.52.

<sup>129</sup> *Infra*, para. 5.143.

Therefore, if two panels under the Agreement on Textiles did not accept the information provided by the United States as sufficient, then surely this Panel should not accept the information by Argentina as such.

(b) Argument of Argentina

5.141 Argentina states that it does not expect the Panel to carry out a *de novo* review since this is not its function, and in this respect, Argentina agrees with the statement by the European Communities that the role of a panel is not to engage in a *de novo* review". Argentina does, however, expect the Panel to analyse objectively the entire file including Exhibit ARG-21, to pay particular attention to the various citations and references and to confirm that Argentina complied with its obligations under the Agreement on Safeguards.

5.142 According to Argentina, the EC position in the present dispute ignores the evidence collected in the CNCE's file, as well as the analyses and reports drawn up on that basis. Argentina believes that the European Communities wishes the Panel to reconsider this evidence, conduct new analyses, prepare new reports and reach new conclusions. Argentina emphasises that there is a precedent, the *United States – Salmon* case, where it was found that the Panel should not reconsider the evidence analysed by the investigating authority.<sup>130</sup>

5.143 Argentina states that the decisions of the Panels in the cases *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear* and *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, cannot provide guidance when analysing serious injury in an investigation under the Agreement on Safeguards. This is because the standards and criteria are different, as is the scope of the investigation. For example, in the case of the ATC, the authorities analyse a very specific product and an equally specific supplier. The analysis must necessarily be very precise both regarding the product and the country investigated. Nevertheless, it should be noted that, with regard to the review standard, the Panel stated that "[t]he relative importance of particular factors including those listed in Article 6.3 of the ATC is for each Member to assess in the light of the circumstances of each case" (paragraph 7.52 of the panel report). In the preceding sentence, the Panel noted that "[t]his is not to say that the Panel interprets the ATC as imposing on the importing Member any specific method either for collecting data or for considering and weighing all the relevant economic factors upon which the importing Member will decide whether there is need for a safeguard restraint" (paragraph 7.52 of the panel report). The Panel goes on to indicate how the specific factors peculiar to the ATC (but not the Agreement on Safeguards) should be considered.

**2. Article 2.1 of the Agreement on Safeguards: Alleged failure to demonstrate an "increase" in imports and alleged failure to analyse the "conditions" under which the imported products investigated entered the import market**

(a) "Increased imports"

(i) *Argument of the European Communities*

5.144 The European Communities recalls that Article 2:1 Agreement on Safeguards (footnote omitted) reads as follows:

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<sup>130</sup> The Panel considered that, although different weight could be accorded to certain facts, this was not a sufficient ground to find that a determination of material injury based on such facts was not based on positive evidence within the meaning of Article 3.1. Thus, the question of whether a determination of injury was based on positive evidence was distinct from the question of the weight to be accorded to the facts by the investigating authorities. Panel Report, *United States – Salmon* Panel (paragraph 494). See also Panel Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R.

"A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such *increased quantities*, absolute or relative to domestic production, and *under such conditions* as to *cause or threaten to cause serious injury* to the domestic industry that produces like or directly competitive products." (emphasis added).

Therefore, according to the European Communities, the safeguard investigation by Argentina needed to establish that footwear was being imported into its territory in such *increased quantities*, absolute or relative to Argentine footwear production, and *under such conditions* as to *cause or threaten to cause serious injury* to the Argentine footwear industry. In the view of the European Communities, the investigation did not sufficiently address or demonstrate these requirements.

5.145 The European Communities asserts that the most serious deficiency of the Argentine measure is that proceedings were initiated and measures imposed, even though imports from non-MERCOSUR countries did not increase since 1993. Therefore, the European Communities submits that the requirement of Article 2.1 of the Agreement on Safeguards -- that products are "being imported in increased quantities, absolute or relative to domestic production" -- is not met.

5.146 The European Communities argues that the notification issued by Argentina on 25 July 1997<sup>131</sup>, clearly demonstrates that imports into Argentina from non-MERCOSUR countries decreased substantially every year in volume terms since 1993 (16.70 millions of pairs) until 1996 (5.97 millions of pairs) and in value terms since 1994. Therefore, according to the European Communities, if total imports would have been the reason for the alleged harm suffered by the domestic industry, surely the *main source* of those imports in 1996, the year that this industry asked for protection, came from Mercosur countries. Instead, non-Mercosur countries are bearing the full burden of the safeguard measure, while Mercosur countries are now able to establish themselves unhindered on the Argentina market and gain an unwarranted market share. Even total imports (which include imports from Mercosur countries) decreased every single year from 1993 (21.78 millions of pairs) until 1996 (13.47 millions of pairs).<sup>132</sup> The European Communities refers to EC-Graph 1 as representing this patent absence of any increase in imports.

5.147 The European Communities asserts that Argentina does not deny these important facts, but chose to ignore them. Instead, Argentina claimed that there was a general increase in imports of footwear between 1991 and 1995. It stated<sup>133</sup>: "[a]s may be gathered from Table I, during the period 1991-1995 there was a 70 per cent increase in imports in physical units and if the analysis for 1996 is included, the increase was 52 per cent for the whole period." Of course, these figures include MERCOSUR countries and so are irrelevant. But even if the overall import figures were accepted, the increase over the 1991-1995 (or 1996) period in no way complies with the requirements of Article 2.1 of the Agreement on Safeguards. Argentina's failure to take note of the most recent trends demonstrates that it failed to evaluate all the relevant evidence and pertinent information available.

5.148 According to the European Communities, imports into Argentina (whether they be non-MERCOSUR imports or total imports) have continuously and consistently decreased since 1993. Thus, the European Communities submits that the imposition of a safeguard measure should not be allowed: if Argentina, or any other WTO Member in the future, were able to construct its analysis on the basis of figures going back six years (in this case on the basis of 1991-figures, for safeguard measures taken in 1997), while disregarding the intervening trends, the security and predictability of

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<sup>131</sup> G/SG/N/8/ARG/1, Exhibit EC-16, in particular Table I on page 21.

<sup>132</sup> EC Graph-1.

<sup>133</sup> Exhibit EC-16, document G/SG/N/8/ARG/1, at page 21. See also Exhibit EC-17, document G/SG/N/10/ARG/1, G/SG/N/11/ARG/1, at page 2. Argentina concluded on the same page that "an absolute growth of imports between 1991 and 1995 has been found to exist. Furthermore, this increase has also taken place relative to domestic production and the domestic market."

the multilateral system would be seriously jeopardised. The European Communities strongly objects to using statistics that go back for such a long period, for the following reasons:

5.149 First, Article XIX GATT is clear on the objective of safeguard measures: they are intended to protect against emergencies and unforeseen circumstances. The European Communities considers that an increase in footwear imports between 1991 and 1993 cannot justify the imposition of provisional safeguard measures in February 1997 and definitive safeguard measures in September 1997, in particular when there was a decrease in imports from non-MERCOSUR countries (as well as of total imports, including MERCOSUR countries) during the most recent period for which data were available<sup>134</sup> (1994, 1995 and 1996). The nature of safeguards as "emergency" measures makes clear that their use is not appropriate in the case of a long-term increase in imports. The ordinary meaning of the wording of Article 2.1 of the Agreement on Safeguards necessarily makes clear (the text reads: "*is being imported*") that this provision deals with current imports, i.e. an on-going situation, not with a situation in the past. The other official language versions of the text confirm the increase of the imports has to be still relevant at the time of making the final findings for the imposition of safeguard measures.

5.150 In response to questioning by the Panel regarding whether any decreasing trend in imports at the end of an investigation period would make a resulting safeguard measure inconsistent with the WTO, the European Communities states that one of the key conditions which must be fulfilled is that a product is being imported in increased quantities absolute or relative to domestic production. The *increasing* trend in imports must be in evidence at the time when the determination is made. Therefore, if there is a clear and confirmed *decreasing* trend over the last years of the investigated period, the condition of increasing imports of Article 2.1 of the Agreement on Safeguards is not fulfilled, and therefore no safeguard measure can be imposed. According to the European Communities, it cannot be accepted, as suggested in the question by the Panel, that a safeguard measure could be taken only on the basis that the level of imports at the end of an investigation period was higher than at the beginning of the period. If this calculation method were to be accepted as valid, then it would become very simple for WTO Members to demonstrate that the increased imports requirement had been fulfilled: it would suffice to set the beginning of the investigation period at a year during which the level of imports was lower than the level at the end of the investigation period, while ignoring intervening trends, in particular at the end of the period. The European Communities submits that this method is not in accordance with the correct interpretation of the import condition set out in Article 2.1 of the Agreement on Safeguards.

5.151 The European Communities asserts that in the present case, during the last three years before the safeguard measure was taken, Argentina's imports showed a clear and confirmed *decreasing* trend, both with regard to total imports and with regard to non-MERCOSUR imports. Therefore, the European Communities believes that the key condition set out in Article 2.1 of the Agreement on Safeguards, that a product is being imported in increased quantities absolute or relative to domestic production, is not fulfilled. A different situation would be that in which, at a point in time, there might have been a decrease in imports, but without altering an increasing trend which is still relevant at the time of making the determinations required by the Agreement on Safeguards. In other words, if

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<sup>134</sup> Whilst the investigation by Argentina disregarded 1996 footwear imports data (although they were already available: see Exhibit EC-16, document G/SG/N/8/ARG/1, at page 21, where data for 1996 imports are mentioned) Argentine Resolution 987/97, which imposed definitive safeguard measures, refers in its fourth recital to imports which "increased during the period 1991-1996" (see Exhibit EC-20, document G/SG/N/10/ARG/1/Suppl.1, G/SG/N/11/ARG/1/Suppl.1, p.2). Accordingly, Argentina carried out an investigation on the basis of 1991-1995 data but took a decision based on the 1991-1996 period. See also Exhibit EC-17, document G/SG/N/10/ARG/1, G/SG/N/11/ARG/1, at page 2, which states that the domestic market share of imports reached a peak of 25 per cent in 1997. However, this year was not analysed in Exhibit EC-16, document G/SG/N/8/ARG/1, at page 21.

no determination of increased imports can be made, no safeguard measure may be imposed, even if it were a "reduced" safeguard measure. On the other hand, the European Communities asserts, it is only after it has been determined that, *inter alia*, there are increased imports that a safeguard measure should be applied only to the extent necessary to prevent or remedy serious injury, pursuant to Article 5.1 of the Agreement on Safeguards. The level of the increased imports will be one of the factors to take into account in the decision concerning the nature and scope of the measure.

5.152 Second, the European Communities submits, if a WTO Member decides to take a safeguard measure (which is a measure which in fact contradicts the general aim of trade liberalisation and should therefore only be allowed under exceptional circumstances), that Member must demonstrate convincingly that imports had gone up sharply over the most recent period and that -- as a direct result of this sharp rise in imported goods -- the domestic industry suffers, or will imminently suffer, serious injury. In such an analysis, it is of no direct use to look back at the economic situation which existed many years ago. What should have been analysed by Argentina are data of the relevant economic factors prevailing at the time before a safeguard measure would be taken. It must have established that these factors constituted serious injury and were caused by a large increase in imports, which must therefore have been recent. Thus, even if it may be justified to provide (as in Article 8 and Annex I of Decree 1059/96<sup>135</sup>), that information on import data "must be supplied for the last five (5) full years", this is only to provide a background against which trends could be established, not in order to measure the injury.

5.153 Finally, regarding the inclusion of imports from MERCOSUR countries in the analysis and the subsequent exclusion of MERCOSUR countries from the application of the safeguard measure, the European Communities argues that Argentina has attempted to justify this inconsistency as follows: according to Argentina<sup>136</sup>, it was "reasonable" to consider MERCOSUR imports in the analysis, because "in the absence of minimum specific duties or protective measures there would be at least an equal flow of imports from the rest of the world into the Argentine Republic." The European Communities disagrees. This statement clearly indicates that Argentina based its measure, not on the actual and present existence of an increase in imports, but on a hypothetical increase in imports. This is contrary to Article 2.1 of the Agreement on Safeguards<sup>137</sup>. In any event, there is absolutely no basis to assume that present MERCOSUR imports represent even a crude estimate of the increase in imports which would occur if the minimum specific duties were removed.

5.154 Regarding the imports/production ratio, the European Communities submits that a decreasing trend during the last years of the investigated period is apparent in the statistics given by Argentina.<sup>138</sup> Argentina stated<sup>139</sup> that "[t]he import/production ratio was 11 per cent in 1991, 24 per cent in 1992, 34 per cent in 1993, 36 per cent in 1994, 34 per cent in 1995 and 28 per cent in 1996." Imports have therefore also not increased "relative to domestic production", as set out in Article 2.1 of the Agreement on Safeguards. In fact, these statistics demonstrate clearly that the domestic industry was capturing an ever increasing share of the domestic market during the most recent years.<sup>140</sup> In 1996, the domestic industry occupied 72 per cent of the Argentine domestic market.

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<sup>135</sup> See Exhibit EC-10, document G/SG/N/1/ARG/3, at page 5, 15.

<sup>136</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 23.

<sup>137</sup> A similar hypothetical reasoning may also be seen in Resolution 226/97 (which imposed provisional duties). It is stated therein that "the mere absence of Minimum Specific Duties would recreate the critical circumstances, required for the adoption of provisional safeguard measures". (emphasis added). See Exhibit EC-12, document G/SG/N/6/ARG/1/Suppl. 1, G/SG/N/7/ARG/1/Suppl. 1, at page 2.

<sup>138</sup> EC Graph-2.

<sup>139</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 25.

<sup>140</sup> The percentages provided by Argentina actually overstate the situation, because the denominator (production) includes only *production for the domestic market*. If total production (i.e. including production for exports and for contractors or joint venture production) had been used as the denominator, the percentages would have been lower.

5.155 The European Communities argues that in its first submission, Argentina -- as it did in its investigation -- relies exclusively on the mere comparison of the absolute figures at the beginning of the investigated period with those at the end, and has chosen not to comment on the *relevance* of the intervening trends<sup>141</sup>, thereby violating Article 4.2(c) of the Agreement on Safeguards. Argentina even incorrectly states that imports had increased more rapidly at the beginning of the period and "remained at very high levels both in relative and absolute terms"<sup>142</sup> (emphasis added), even though it is obvious that import levels declined sharply during the last years of the investigated period.<sup>143</sup>

5.156 The European Communities agrees in this respect with the United States, which states<sup>144</sup> that, regarding the import condition set out in Article 2.1 of the Agreement on Safeguards, "a Member must examine imports during the full period under review to ensure that imports are *currently* increasing, and that such increase is *currently* causing or threatening serious injury." Indeed, in the EC view, the text of Article 2.1 of the Agreement on Safeguards supports such interpretation which focuses on the period immediately preceding the taking of the safeguard measure. With the United States<sup>145</sup>, the European Communities does not view the English and Spanish texts of Article 2.1 to be inconsistent with each other, since both texts convey the understanding that imports must have increased and that such increased imports cause (or threaten to cause) serious injury to the domestic industry. This means that *current* imports must be at a higher level than *previous* imports: the *increasing* trend in imports must be in evidence at the time when the determination is made.

5.157 The European Communities objects to statements made by Argentina to the effect that the "increased imports" condition can already be considered fulfilled simply by comparing the data from 1991 with the data from 1995. Argentina stated that such a comparison of data "does not mean that in the investigation *the evolution of this variable during the years in between* was not analysed." However, the European Communities notes that Argentina does not indicate *where* in its reports such an analysis of the evolution of imports over the five-year period can be found. According to the European Communities, unless Argentina is able to do so, it has not demonstrated that it examined the "relevance of the factors", in violation of Article 4:2(c) Agreement on Safeguards.

5.158 Thus, the European Communities submits that by not demonstrating an increase in imports, Argentina violated Article 2.1 of the Agreement on Safeguards, by not evaluating the relevance of the intervening trends, Argentina violated Article 4.2(c) of the Agreement on Safeguards and by not evaluating "all relevant factors of an objective and quantifiable nature" regarding the rate and amount of increase in imports, Argentina violated the requirements set out in Article 4.2(a) of the Agreement on Safeguards.

(ii) *Argument of Argentina*

5.159 Argentina submits that over the period investigated (1991-1995), there was an increase in the average number of pairs imported of 70 per cent in absolute terms, and an increase of 157 per cent in

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<sup>141</sup> The US notes that there may be reasons why imports may show a decreasing trend, including: the timing of shipments, seasonality of the product, or importer concern about the investigation (*infra*, para. 6.39). The European Communities agrees with the US that in deciding whether the requirements of Article 2:1 are satisfied, the relevance of such trends, as well as possible others, should be carefully considered. In the present case, it is clear that the decreasing trend of imports is not a temporary feature.

<sup>142</sup> *Infra*, para. 5.160.

<sup>143</sup> The European Communities refers to EC-Graphs 1 and 2.

<sup>144</sup> US argument in *infra*, para. 6.27.

<sup>145</sup> *Infra*, note 395.

value.<sup>146</sup> In relative terms, i.e. the share of imports in comparison with domestic production, the increase was 235 per cent over the period investigated.<sup>147</sup>

5.160 According to Argentina, the CNCE noted in particular that imports over the period investigated had increased much more rapidly at the beginning of the period and had remained at very high levels both in relative and absolute terms. For information purposes and prior to concluding the investigation, as the official import statistics for 1996 were available, the absolute increase in imports over the period 1992-1996 was examined. This examination revealed an increase of 52 per cent in volume and 162.58 per cent in value.<sup>148</sup>

5.161 Argentina maintains that the decline in imports in absolute terms in 1995 was deemed to be a temporary reaction of the general economy to the "tequila effect", because all imports fell significantly due to the dramatic drop in consumption in general and in footwear in particular. The value of imports also fell in 1995 as a result of the recession caused by the economic crisis in Mexico. The volume of imports of footwear, however, remained at such high levels that, despite the dramatic decrease in consumption, imports maintained their share of a deteriorating market. Their volume in a depressed market was particularly damaging.

5.162 According to Argentina, Article 2.1 of the Agreement on Safeguards lays down the requirement that such product "imported ... in such increased quantities (in Spanish "han aumentado en tal cantidad" - past tense) ... and under such conditions as to cause (in Spanish "y se realizan en condiciones tales que causan" - present tense) or threaten to cause serious injury ...". Argentina argues that there is a linguistic difference here between the Spanish and English versions which, in spite of the fact that the European Communities and the United States do not perceive it, probably because Spanish is not a dominant language in either the European Communities or the United States, Argentina considers to be important to this case.

5.163 Argentina contends that if the two versions were equal or the English version were accepted as the correct one, imports would have to be increasing at the moment at which the measure is taken and would have to be causing injury or threatening to cause injury at that moment. This would preclude the possibility of imports having increased and as a result of such increase (which may temporarily have stopped), causing or threatening to cause injury to the domestic industry.

5.164 According to Argentina, if the European Communities' assertion were interpreted strictly, a temporary decline within the context of a growth trend verified throughout the period of the investigation would automatically make it impossible to apply the measure. Argentina does not think that this is what the text of the Agreement means, nor does Argentina believe that the linguistic difference is without importance. Argentina argues that its opinion is shared by the United States which, in its oral statement to the Panel, expressed its disagreement with the European Communities' assertion that the CNCE had failed to demonstrate convincingly that imports "have gone up *sharply* over the most recent period".<sup>149</sup>

5.165 According to Argentina, in other words, neither do imports have to have increased in accordance with the European Communities' interpretation of the English version of the Agreement on Safeguards, nor is it in the period "immediately" prior to the application of the measure that they

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<sup>146</sup> Preliminary Report by the Department, page 4 (Exhibit ARG-1), consistent with Act No. 338, pages 25 and 32 (Exhibit ARG-2). See also the CNCE Technical Report and Table 21 A, sheet 5505 and 20 A, sheet 5501 (Exhibit ARG-3).

<sup>147</sup> Document G/SG/N/8/ARG/1, page 56 (corresponds to EC-16).

<sup>148</sup> Exhibit ARG-3, Technical Report, Table 15 in Annex 5; Table 1 Exhibit ARG-2, Act 338.

<sup>149</sup> *Infra*, para. 6.30.



have to go up sharply. Moreover, it is over a period such as the five years used for the investigation that the authority can analyse all of the factors including those other than imports.<sup>150</sup>

5.166 In Argentina's view, it is difficult to understand how the European Communities can draw the conclusion that there was no increase in imports during the investigation period, i.e. from 1991 to 1995, when EC-16 itself recognises a total increase of 70.04 per cent in millions of pairs from 1991 to 1995 considering the totality of imports (including from MERCOSUR), or 44.75 per cent excluding MERCOSUR. If for the same period we consider imports in c.i.f. value, the total increase for 1991-1995 amounts to 157.2 per cent, and even if we exclude MERCOSUR (although there are no legal grounds for doing so under Article 2.1), the figure for the growth of imports from outside MERCOSUR for the period investigated is 124.87 per cent.<sup>151</sup> Argentina points out that the analysis of imports conducted by the CNCE is only partially reflected in Exhibit EC-16. The performance of imports is analysed in detail in the file, and we would ask the Panel to verify and confirm the existence of the objective evidence that served as a basis for the CNCE. Argentina also submitted charts which, in its view, are sufficiently self-explanatory to refute the assertion in paragraph 37 of the EC Rebuttal that there was no increase in imports.<sup>152</sup>

(b) "Under such conditions"

(i) *Argument of the European Communities*

5.167 The European Communities observes that Argentina has limited its analysis to demonstrating an increase in quantity of imports (during the 1991-1995 period). However, Argentina failed to examine *under which conditions* these imports occurred, in spite of the clear wording of the text of Article 2.1 of the Agreement on Safeguards, which requires WTO Members to do so. The relevant part of this provision reads as follows:

"... that such product is being *imported* into its territory *in such increased quantities*, absolute or relative to domestic production, *and under such conditions* as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products." (emphasis added)

5.168 The European Communities submits that the conditions under which imports take place (i.e. the term "*and under such conditions*") mean, notably, the price of imports as a fundamental and additional element to the increased imports. It is normally only through low prices that increased imports exert pressure on the domestic industry and cause serious injury. Given the inclusion of this requirement in Article 2.1, a safeguard investigation should therefore identify the conditions which, in addition to the increase in imports, gave rise to the injury and explain in what way they occurred. Clearly, the drafters of the Agreement on Safeguards intended to exclude that an increase of imports -- as such -- could already be sufficient to justify a safeguard action.

5.169 The European Communities argues that, in this regard, Resolution 987/97<sup>153</sup> stated, in the sixth recital, that "[o]wing to their *lower price, imports exerted strong pressure* on the domestic footwear industry, significantly affecting its activity and results." (emphasis added). Furthermore,

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<sup>150</sup> Argentina asserts that this is also corroborated by the argument of the United States, *infra*, para. 6.29.

<sup>151</sup> Exhibit EC-16, page 21.

<sup>152</sup> Exhibit ARG-22, Charts G1 and G2.

<sup>153</sup> See Exhibit EC-20, document G/SG/N/10/ARG/1/Suppl.1, G/SG/N/11/ARG/1/Suppl.1, at page 2. See also Exhibit EC-17, document G/SG/N/10/ARG/1, G/SG/N/11/ARG/1, at page 2.

Argentina, in its "Final Opinions" in its injury analysis<sup>154</sup>, referred to "a gradual increase in the average price of imports" and to the "lower price of imports, exerting heavy pressure on the industry, significantly affecting its results". However, import prices were not analysed. The Argentine investigation and analysis is limited to the evolution of "domestic prices", regardless of import prices.<sup>155</sup> The European Communities objects to the fact that Argentina has failed to investigate, analyse and notify the conditions under which foreign footwear was being imported into its territory. In this respect, in spite of the requirement set out in Article 2:1 Agreement on Safeguards and its statements regarding the effect of lower price of imports, the European Communities asserts that Argentina made no price analysis of imports (in order to determine the possible existence of price undercutting), nor did it make any other possibly relevant analysis. Moreover, according to the European Communities, Argentina gave no explanation for the absence of such analysis.

5.170 In its reply to a question by the Panel as to what kind of elements, in the view of the European Communities should be taken into account in the interpretation of the phrase "under such conditions" in Article 2:1, in addition to the volume of imports, the European Communities submits that the effect of prices of imports on prices of domestic products is a "condition of imports" which should always be analysed. In all cases, according to the European Communities, imports are characterised not only by their volume, but also by their prices<sup>156</sup>. These import prices may have an effect on the prices -- and therefore market position -- of the like or directly competitive domestic products (e.g. price undercutting or price depression).

5.171 Therefore, the European Communities submits that prices of imports should always be analysed as an essential "condition of imports", in order to determine the existence of a possible causality link between imports and any alleged injury. The European Communities does not exclude the possible existence of other "conditions of imports" (not conditions of "injury") which could be analysed subsequently and taken into account in specific cases.

5.172 The European Communities submits that Argentina claims, without providing a valid legal argumentation, that the terms "under such conditions" do not constitute a legal requirement. According to the European Communities, the interpretation of this provision by Argentina makes the meaning of the term "and under such conditions" redundant, which cannot be permitted: according to principle of effective of treaty interpretation recalled and enunciated by the Appellate Body in *Gasoline*<sup>157</sup>, "[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."

5.173 According to the European Communities, the words "and under such conditions" are present in the text of Article 2:1 Agreement on Safeguards and cannot be ignored. As is the case for "quantities", the "conditions" relate to imports: a product is being imported in such quantities and under such conditions. Therefore, Article 2:1 Agreement on Safeguards requires that certain conditions accompany the increased imports. As stated before by the European Communities, in most cases such "conditions" are likely to relate to significantly lower import prices, which may force domestic prices down, and consequently trigger the injury to the domestic industry. In its notification, the European Communities argues, Argentina did not address which "conditions", if any, would satisfy the requirement of Article 2:1. According to the European Communities, the suggestion made by Argentina that the "conditions" should relate to market share is just as unfounded as stating that the conditions should relate to sales, production or employment.

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<sup>154</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 37-38.

<sup>155</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 19.

<sup>156</sup> This is clearly shown by taking the simple example of import/export statistics. The two variables of such statistics always are expressed in both "quantity" and "value".

<sup>157</sup> Report by the Appellate Body on '*United States – Standards for Reformulated and Conventional Gasoline*', WTO/DS2/9, 20 May 1996, at page 23.

5.174 The European Communities submits that the analysis and determination of the existence of "such conditions" is an element of particular importance for any subsequent causality determination. This is shown by Argentina itself, which notes<sup>158</sup> that "[o]wing to their lower price, imports exerted strong pressure on the domestic footwear industry." The European Communities has the following comments to make regarding this statement.

5.175 First, according to the European Communities, Argentina claims that it never received the prices from importers and therefore did not analyse them. In other words, the statement that import prices were low, and therefore exerted strong pressure on the domestic footwear industry is no more than a convenient assumption by Argentina, on the basis of which it considers the causality requirement fulfilled. Second, according to the European Communities, Argentina requests the European Communities to present the exact prices of imported footwear to the Panel. This the European Communities fails to understand: did not the Appellate Body in *'US –Wool Shirts'*<sup>159</sup> confirm "the rule that the party who asserts a fact is responsible for providing proof thereof"? Argentina, not the EC, has claimed that low import prices have caused harm to the domestic industry and it is therefore up to Argentina, not the EC, to prove that fact. Thirdly, the European Communities submits that it should be noted that Argentina disposes of official data concerning the value of imports, per customs subheading, per origin, etc. According to the European Communities, Argentina simply did not analyse such data.

5.176 The European Communities observes that in its reply to a question by the Panel<sup>160</sup>, Argentina sets out a list of examples of "conditions" which in its view could possibly be envisaged, either individually or jointly, in this respect. However, Argentina does not indicate which of those conditions, if any, it considers relevant for the present case. The European Communities notes that this new list is radically different from the one presented in Argentina's first submission<sup>161</sup>, where Argentina mainly focused on the "share of the domestic market". According to the European Communities, such reference was just as unfounded as stating that "conditions" should relate to sales, production or employment. The European Communities welcomes Argentina's change of view on this issue, including the fact that Argentina now recognises that "price" is a relevant factor. The European Communities asserts that the effect of prices of imports on prices of domestic products is a "condition" of imports which is always present and, thus, should always be analysed. In all cases, imports are characterised not only by their volume, but also by their price<sup>162</sup>. These import prices may have an effect on the prices -- and therefore market position -- of the like or directly competitive domestic products<sup>163</sup>. With Argentina, the European Communities does not exclude the possible existence, in specific cases, of other "conditions" of imports (not conditions of "injury") to be subsequently taken into account.

5.177 The European Communities welcomes the statement by Argentina later in the proceeding that the term "under such conditions" "constitutes a legal requirement".<sup>164</sup> The European Communities is therefore puzzled when Argentina seems to claim that this requirement should be read together with, and not independently from, the "increased imports" requirement. If "under such conditions" is a

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<sup>158</sup> Exhibit EC-17, page 2.

<sup>159</sup> Report by the Appellate Body on *'United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India'*, WT/DS33/AB/R, 25 April 1997, at page 14.

<sup>160</sup> *Infra*, para. 5.186.

<sup>161</sup> *Infra*, para. 5.185.

<sup>162</sup> This is clearly shown by taking the simple example of import/export statistics. The two variables of such statistics always are expressed in both "quantity" and "value".

<sup>163</sup> In its reply to questioning by the Panel (*infra*, para. 5.191-5.194), Argentina acknowledges the fact that the price of imports can have a bearing on the health of a domestic industry producing the like or directly competitive product. Argentina puts forward in its reply to this question new statistics, which do not relate to the investigation.

<sup>164</sup> *Infra*, para. 5.187.

separate legal requirement, why then, the European Communities queries, should its compliance not be separately demonstrated? Argentina finds a good reason: the GATT Analytical Index and Professor Jackson in his book "The World Trading System" did not make special headings entitled "under such conditions". The European Communities asks whether Argentina is seriously arguing that because the WTO Secretariat decided that it was not useful in its publication to make a separate heading for the "under such conditions" requirement in Article XIX (not even Article 2:1 Agreement on Safeguards) that a -- black letter -- requirement contained in an international agreement can be ignored? The European Communities queries whether Argentina really believes that Professor Jackson's writings have more weight than the text of the Agreement on Safeguards. The European Communities observes that while Professor Jackson undoubtedly would take great pride in being given so much importance. However, he would be the first to disregard Argentina's reliance on his words as opposed to relying on the actual text of the Agreement on Safeguards. The requirement is there and Argentina should have demonstrated in its notifications that it complied with the requirement.

5.178 In this respect, the European Communities contends, it cannot be accepted that Argentina gives *ad-hoc* proof of compliance with the "under such conditions" requirement in reply to a question by the Panel. Argentina does not indicate where such data and their assessment can be found in the relevant documents of the investigation. Compliance was not demonstrated at the time and can not, afterwards, be repaired.

5.179 Regarding Argentina's reply to a question from the Panel on Argentina's price analysis, the European Communities notes first that Argentina had previously stated<sup>165</sup> that "importers *refused* to provide the data it requested [i.e. prices]." However, although the CNCE (in Act 338) first stated that "the enterprises that provided information on imports represented not less than 49 per cent of total imports in each year"<sup>166</sup>, it is subsequently noted that "the Commission, bearing in mind the failure of a majority of importers to collaborate with the investigation, in as much as they failed to submit the import data in the form requested, found itself obliged to adopt the criterion of best information available."<sup>167</sup> The reason on which the CNCE based itself to disregard importers' data was the importers' questioning of the necessity to supply data in accordance with the "five-segment" approach, instead of in relation to the official customs nomenclature. Nowhere in Act 338 is it stated that importers refused to provide information on prices. Thus, according to the European Communities, it is clear that the importers did not in fact refuse to hand over prices to the CNCE, but instead were simply unable to provide data which corresponded exactly to the "five segments" approach which the CNCE had adopted for its investigation. Argentina now explains that importers had data on prices available, but that they were broken down by "tariff categories", or "market headings". Therefore, prices on imports were available, but were disregarded because the importers' categorisation was not compatible with the CNCE's categorisation. In the EC view, it appears that Argentina later abandoned the "five segments" approach and considered there to be a "single product". The European Communities does not understand why Argentina did not use the data held by importers and subsequently include an analysis of them in its investigation report.

5.180 Second, Argentina mentions in its reply to the Panel<sup>168</sup> that the CNCE's reference to "low-value imports" was not necessarily based on the unit value of the imports, but instead on the "notorious under-invoicing in Argentina which was to a great extent the factor which led to the modification of tariff protection from *ad valorem* duties to similar levels in the form of specific duties." The European Communities is concerned by this observation, since the low prices of imports in particular have been mentioned by Argentina as the main reason why safeguard measures were

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<sup>165</sup> *Infra*, para. 5.188

<sup>166</sup> Document G/SG/N/8/ARG/1, Exhibit EC-16, at page 8.

<sup>167</sup> Document G/SG/N/8/ARG/1, Exhibit EC-16, at page 12.

<sup>168</sup> *Infra*, para. 5.194.

adopted<sup>169</sup>. The European Communities notes that the safeguard instrument is not the appropriate means of dealing with problems related to under-invoicing. Such problems should, in the European Communities' view, be dealt with by the means provided for in the Customs Valuation Agreement<sup>170</sup>.

5.181 In addition, the European Communities adds, Argentina provides in its reply to a Panel question a table<sup>171</sup> containing data allegedly concerning prices of imports and domestic products. However, there is no reference to where such data and their assessment can be found in the relevant documents of the investigation.

5.182 The European Communities objects to the fact that Argentina has failed to investigate, analyse and notify the conditions under which foreign footwear was being imported into its territory. In this respect, in spite of the requirement set out in Article 2.1 of the Agreement on Safeguards and its statements regarding the effect of lower price of imports, Argentina made no price analysis of imports (in order to determine the possible existence of price undercutting), nor did it make any other possibly relevant analysis. Moreover, Argentina gave no explanation for the absence of such analysis.

5.183 The European Communities therefore submits that Argentina, by not identifying or examining the conditions under which imports occurred, violated Article 2.1 of the Agreement on Safeguards.

(ii) *Argument of Argentina*

5.184 Argentina notes that the European Communities maintains that the term "under such conditions" in Article 2 means analysis of the price of imports as a fundamental and additional requirement to the performance of imports<sup>172</sup>, and that the European Communities argues that a demonstration of "the price of imports as a fundamental and additional element to the increased imports" is required and that there must normally be "low prices".<sup>173</sup> Argentina states that nowhere does the Agreement on Safeguards explicitly impose this requirement. A clear and correct reading of Article 4.2 reveals that the term "under such conditions" refers to all of the conditions under which the increase in imports takes place.

5.185 In Argentina's view, Article 4.2(a) points out certain factors that must be examined in order to determine whether imports have caused serious injury to the domestic industry, including the "rate and amount of the increase" and "the share of the domestic market". This third element, the share of the domestic market, is clearly one of the "such conditions" under which the increase in imports is taking place and could cause serious injury. The data on the market share of imports clearly confirm that products of imported origin took (increase in share) and maintained (consolidation of the level of imports) a significant share of the Argentine footwear market.<sup>174</sup>

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<sup>169</sup> Argentina has mentioned (see paragraph 2 of Argentina's notification of 1 September 1997, Exhibit EC-17) that "owing to their lower price, imports exerted strong pressure on the industry, significantly affecting results." In addition, Argentina has mentioned (Id.) that the "decline in output was replaced by imports, essentially cheap imports."

<sup>170</sup> Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994.

<sup>171</sup> *Infra*, paras. 5.192-5.193.

<sup>172</sup> Argentina maintains that the expression "under such conditions" was not universally recognized as a basis for making an independent determination arising from the "increase in imports". GATT, Analytical Index: Guide to GATT Law and Practice, updated 6<sup>th</sup> Edition (1995), pages 517-518, and John Jackson, The World Trading System, pages 181-182. United States Law does not require independent determinations concerning "under such conditions" 19 USC 2252.

<sup>173</sup> *Supra*, para. 5.168.

<sup>174</sup> Act No. 338 (Exhibit ARG-2) pages 31-32; see also CNCE Technical Report (Exhibit ARG-3), sheet 5500, and Table 20(a) (sheet 5501) and Table 21(a), (sheet 5505).

5.186 In response to a **Panel** question about the kinds of elements, in addition to the volume of exports, that should be taken into account to satisfy the requirement of "under such conditions" in Article 2.1, **Argentina** states that the so-called "such conditions" refer to the characteristics of the imports of goods under consideration and their impact upon entry into the market of the country carrying out the analysis. The characteristics of the imported goods could comprise, in addition to their quantity, their quality, composition, specific nature, end use, the degree of substitutability between them and with respect to domestic production, technology, consumer tastes, influence of the brand name in marketing, and price. The other element which, in Argentina's view, is included in the notion of "conditions" and which is present in the expression "*en condiciones tales*" in Spanish and "under such conditions" in English derives from the "totality of the circumstances" under which the increase in "imports" has occurred. Article 4.2(a) specifies a few injury factors that should be analysed in assessing the impact of the "totality of imports". In this respect, the "rate and amount" of the increase in imports and the "share of the domestic market" taken by increased imports are particularly relevant. In the case at hand, the imports maintained a significant market share throughout the period.<sup>175</sup>

5.187 Argentina disagrees with the European Communities' statement that, according to Argentina, the term "under such conditions" does not constitute a legal requirement.<sup>176</sup> Argentina does indeed consider the expression "under such conditions" to constitute a legal requirement under the Agreement on Safeguards, but its content differs from what the European Communities claims to be an Argentine interpretation. For Argentina, a clear and correct reading of Article 4.2 suggests that the expression "under such conditions" refers to the totality of the conditions in which the increase in imports takes place. In considering the totality of circumstances, both the CNCE and, subsequently, the Department of Foreign Trade, considered the evolution of prices before adopting the decision to apply the safeguard measure, in spite of the fact that this is not a legal requirement under the Agreement on Safeguards. This evaluation and the comparison of import prices in dollars c.i.f. with the prices of domestic production can be found in Argentina's reply to questioning by the Panel.<sup>177</sup>

5.188 Argentina argues that the European Communities' attempt to cast doubt on the CNCE's analysis on the grounds that it lacked price data is ironic. Argentina underlines that the CNCE did not have the information on prices because the importers refused to supply the data it requested, including a breakdown of prices according to the categories defined by the CNCE for that purpose. The CNCE's price analysis was seriously limited by this refusal of the importers to participate properly, and the CNCE could rightly assume as an undisputed fact that the prices of imports for the categories of products analysed were lower than the prices of the domestic product. Indeed, the importers did not submit any information to the contrary. Faced with this refusal by the importers to provide data as required by the CNCE, Argentina, as any other Member would have had to do, had no choice but to make certain assumptions concerning prices.

5.189 Finally, Argentina contends, if the prices of EC exports to Argentina are indeed low, the European Communities could have presented them in this dispute so that the Panel could form an idea of the "conditions" in which such imports were entering the Argentine market. But the presentation of this statistical data would have shown that, as Argentina has argued, the prices of imports are so low that they displace domestic production. In other words, one has the impression that the European Communities prefers to invoke Argentina's non-compliance with a non-existent requirement under the Agreement on Safeguards rather than to contribute to the verification of prices which would confirm that Argentina's determination of injury is irrefutable.

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<sup>175</sup> Act No. 338, (Exhibit ARG-2) pp. 31-32. See also Technical Report, (Exhibit ARG-3), sheet 5500, Table 20.a (sheet 5501) and Table 21.a (sheet 5505). (See *supra* para. 5.159.)

<sup>176</sup> *Supra*, para. 5.172.

<sup>177</sup> *Infra*, paras. 5.191-5.193.

5.190 Noting that Argentina discussed the difficulties its authorities had in collecting information on the prices of imported footwear, and concluded that these prices were lower than those for domestic production, the **Panel** asked Argentina whether it agreed that the price of imports can have a bearing on the health of a domestic industry producing the like or directly competitive product.

5.191 **Argentina** responds that, in its view, prices must be taken into consideration in an analysis of injury, which is why it requested information on prices. At the same time, the fact that prices do not decline does not mean that they are not "suppressed". Argentina states that in its investigation, the CNCE verified that the growing share of imports in the market had an impact on sales prices of local products with the result that these products did not produce any income in excess of the "break-even point". Starting in 1993, profits declined sharply, narrowing the gap between sales revenue and the break-even point. The sharpest decreases took place in 1995 and 1996, when sales revenue dropped below the "break-even point" and companies were unable to cover their fixed and variable costs and earn normal sales profits.<sup>178</sup> The complainants described this effect as a price-cost "contraction".<sup>179</sup> The CNCE viewed the situation as a "strong pressure on the industry" which "significantly affected its results".<sup>180 181</sup>

5.192 Also in response to the Panel's question, Argentina presented a table comparing the average unit values of imports and domestic products. On the basis of this table, Argentina stated that the average c.i.f. import prices throughout the period were half or less than half those of domestic production. Although this is an average, the magnitude of the difference implies, by virtue of the very meaning of the word "average", that a significant share of imports took place at prices considerably lower than those of the domestic product.

5.193 In discussing the table in its answer, Argentina states that for the types of products identified as "permanent" throughout the period, the CNCE observed a decline in the price/cost ratio, indicating that the prices of outside competitors were exerting pressure on domestic prices, which in its turn, fit in with the increase in the market share of imports. The fact the comparison cannot be made product-by-product has led to an overall analysis in which consumers, making a rational choice, showed that imports as a whole were less expensive than the domestic products. This "rational" choice is not made exclusively on the basis of the nominal price, but preferences can also be affected by worldwide advertising campaigns, the leading brands being among those which spend the most in comparison to any other non-durable consumer good. For example, the brand Reebok paid \$80 million to sponsor the clothing of the national football team, and Nike paid \$200 million to sponsor the Brazilian team. Pricing policy and advertising are so clearly related to each other that they cannot be analysed independently from each other.

5.194 The **Panel** asked Argentina where in the record of its investigation this analysis based on average unit values could be found. In response, Argentina stated that the CNCE resorted to this

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<sup>178</sup> Exhibit ARG-3, CNCE Technical Report, sheet 5471, Table No. 12 and Chart No. 23.

<sup>179</sup> Exhibit ARG-3, CNCE Technical Report, Annex 6, sheet 5760.

<sup>180</sup> Exhibit ARG-2, Act No. 338, p. 47.

<sup>181</sup> The **Panel** asked Argentina to reconcile its argument that imports moved into the low-priced end of the market with upward trend in average unit values in imports as shown in G/SG/N/8/ARG/1 (Exhibit EC-16) and the statement in that document that there was a shift in the composition of some imports, in response to the DIEM, away from cheap footwear and toward higher-valued footwear. Argentina responded that the impossibility of competing with imported goods owing to their low prices constitutes a negative factor for domestic producers, and that the corresponding analysis is set forth in the Technical Report (Exhibit ARG-3) and the Preliminary Report of the Department of Foreign Trade (Exhibit ARG-1). According to Argentina, the change in the behaviour of imports is the result of the application of the DIEMs. Indeed, the DIEMs cause the value of imports to grow faster than the volume and at the same time change the composition of those imports towards footwear with a higher unit value that are not affected by the DIEMs. Added to which, Argentina states, there was no longer any possibility of under-invoicing.

analysis in the absence of information on import prices and because the aggregate import data was too general to provide an indication of price trends.<sup>182</sup> Argentina submitted that the tariff categories do not correspond to specific types of shoes.<sup>183</sup> Moreover, some of the tariff classifications are "market headings" which contain a wide range of footwear types, so that the unit values vary according to the product mix. Finally, the CNCE also determined that the rapid changes in style made it impossible to examine historical series for the period, in particular with respect to sports footwear<sup>184</sup> which was predominantly of Asiatic origin.<sup>185</sup> Argentina considered the average prices which emerged from the information on imports subject to the above-mentioned limitations. This analysis pointed to the existence of low-value imports even if it was not possible to know the specific prices of the different kinds of footwear. When the CNCE mentioned the low-value imports, it was referring to Act 338, XIII.2, page 46. This reference to low value was not necessarily based on the low unit value of the product, but on the notorious under-invoicing in Argentina which was to a great extent the factor which led to the modification of tariff protection from *ad valorem* duties to similar levels in the form of specific duties.

**3. Article 2.1 and Article 4 of the Agreement on Safeguards – Alleged failure to demonstrate that "serious injury" or "threat of serious injury" occurred to the domestic industry that produces like or directly competitive products**

(a) Period of investigation

(i) *Argument of the European Communities*

5.195 The European Communities argues that the Argentine analysis of "serious injury" or "threat of serious injury" suffers from the same deficiency as the "increased imports" analysis. Argentina took 1991 as the base year of its analysis. In other words, Argentina relied on figures which were five to six years old, as a basis for imposing the safeguard measure in 1997. Given the fact that the WTO safeguard mechanism is meant to deal with "emergency" measures the European Communities submits that it is not appropriate to rely on statistics which go so far back. An investigation over an extremely long period (from 1991 – 1995) does not demonstrate the existence of present serious injury or the threat thereof. In the European Communities' view, a comparison with the figures for 1991 is more likely to indicate a past structural change which has taken place in Argentina, rather than an unforeseen emergency development, which is the kind of situation safeguard measures are designed to deal with. Therefore, according to the European Communities, the arguments put forward by the European Communities regarding "increased imports" are *mutatis mutandis* relevant to condemn the Argentine analysis regarding "serious injury". Safeguard measures are meant to deal with emergency situations and unforeseen developments. A safeguard analysis should concentrate on the factors prevailing at the time before a safeguard measure would be taken. Furthermore, an investigation which compares figures for a five-year period is more likely to indicate a past structural change which has taken place in Argentina, rather than an unforeseen emergency development. Five-year-old figures can only provide a general background of economic trends.

5.196 According to the European Communities, it is not appropriate to simply compare figures that go back five years with the most recent figures, without looking at the intervening trends. An investigation over a longer period can be useful to demonstrate, for example, when imports went up, when they went down, and when they reached their highest or lowest levels. If Argentina would have studied the intervening trends, as opposed to simply compare the imports in 1991 and the imports in 1995, it would have noted that there was a sharp decrease in footwear imports over the last three

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<sup>182</sup> The **Panel** notes that Argentina provided no citation to the record where this analysis could be found.

<sup>183</sup> See tariff structure in Table No. 4 of the Technical Report (Exhibit ARG-3), sheet 5386.

<sup>184</sup> Exhibit ARG-3, CNCE Technical Report, sheet 5464.

<sup>185</sup> Exhibit ARG-3, CNCE Technical Report, sheet 5484, and Table 16, sheet 5486.



years. The European Communities underlines that Argentina often compares 1995 data with only 1991 data, ignoring 1996 as well as the intervening trends. Argentina provides no explanation for the disregard of 1996 data, nor for the simple comparison of figures for the beginning of the investigation period with those for the end. The European Communities submits that such a comparison cannot provide a complete picture.

5.197 The European Communities does not contest the fact that an investigation is carried out over a five-year period. In fact, Argentina could even have chosen an even longer period. The European Communities does however object to the way in which the statistics have been used by Argentina in the present case, since figures relating to a period of five years ago are of only limited relevance.

5.198 Regarding the list of examples of practice of other Members given by Argentina<sup>186</sup>, the European Communities submits that this is not a relevant overview, since it does not shed any light on the time frame on which the determinations were based, but simply on the years analysed during the investigation. In fact, numerous examples can be given which demonstrate that determinations are based on conditions which have arisen in the recent past and continue to exist at the time of making the determinations.

5.199 The European Communities notes that Argentina<sup>187</sup> also argues that a long investigation period is appropriate in the case of safeguard measures which can remain in force for eight years. The European Communities takes issue with this statement. The investigation needs to determine whether an emergency measure is necessary or not. If it is decided that such a measure is justified, then the domestic industry obtains a sufficient number of years to adjust. The time to adjust can be much longer than the time during which the serious injury was done, in the same way that someone who has been in a serious car accident needs more time to recover than the time during which the actual injury occurred. In addition, Article 7.1 of the Agreement on Safeguards clearly states that the adjustment time is "such period of time as may be necessary". This period "shall not exceed four years", indicating that a shorter time period is in fact preferred. When the total period is extended to eight years, as Argentina has mentioned, the Member imposing the measure is obliged to re-investigate the situation, in accordance with Articles 2, 3, 4 and 5 of the Agreement on Safeguards. In other words, an 8-year extension is exceptional and can only be applied if the new investigation determines that a safeguard measure continues to be necessary.

5.200 The European Communities considers that a WTO Member is free to analyse a five-year period or longer in order to discern trends, but that its determination that serious injury exists must still be relevant at the time the determination is made, i.e., relate to the end of the period.

(ii) *Argument of Argentina*

5.201 Argentina notes that in Resolution MEYOSP 226/97, issued on 24 February 1997, the Ministry of the Economy and Public Works and Services declared the initiation of the investigation, and that based on this, the CNCE proceeded with the investigation into injury caused to the domestic industry, taking into account the parameters and requirements laid down in the Agreement on Safeguards, Law 24425, and Regulatory Decree 1059/96. On the basis of the aforementioned provisions and Decree 766/94, the CNCE drew up questionnaires in order to gather additional specific and relevant information both from the sector requesting the measure and other parties interested in the investigation - importers and exporters, whether individually or through the Chambers to which they belonged - so as to assess the situation in the Argentine footwear market. These questionnaires were given to a representative number of domestic producers and importers. At the same time, other official bodies were requested to provide information concerning trade in this sector.

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<sup>186</sup> *Infra*, para. 5.203.

<sup>187</sup> *Infra*, para. 5.204.

5.202 Argentina points out that the request for a safeguard measure was submitted by the domestic industry on 26 October 1996 in accordance with the provisions of Decree 1059/96. This Decree requires that a request for application of a safeguard measure contain information covering the last five full years. Accordingly, the corresponding period in this particular case is 1991-1995.<sup>188</sup> Argentina asserts that the fact that there was an increase in imports is clearly demonstrated by comparing the data for 1991 and 1995. However, this does not mean that in the course of the investigation the evolution of this variable during the years in between was not analysed. This period of five years complies with the requirements of Decree 1059/96, duly notified to and reviewed by the Committee on Safeguards.<sup>189</sup> In the light of this requirement, the only complete series that could be produced from the statistics subsequently produced in support of the application were for the period 1991-1995, and, Argentina states, this is what determined the choice of that period. In the case at issue, the five-year period is particularly relevant because the Argentine economy had embarked upon a process of structural economic reforms which, starting in April 1991 with the Law on Convertibility, led to increased trade flows and a reinforcement of economic liberalisation.

5.203 Argentina argues that the Agreement on Safeguards does not specify a particular period for gathering information nor does it define the specific period to be covered by the investigation. Nowhere does previous GATT practice or current WTO practice establish any standard for the period to be analysed. Nevertheless, any safeguard investigation must cover a given period so as to ensure that the analyses carried out are reliable and transparent. The choice of a five-year period is validated by the experience of the GATT Contracting Parties and by the practice taken over by the WTO. Argentina states that simply as an example, the following is a list of safeguard investigations notified to the Committee and the period analysed in each case:

Country	Product	Initiation of the Investigation	Period investigated	Comments	WTO document
Brazil	Toys	18 June 1996	January 1991 - December 1995	Period for determining injury	G/SG/N/6/BRA/1 G/SG/N/7/BRA/1
Korea	Dairy products	28 May 1996	January 1993 – June 1996	<i>Idem</i>	G/SG/N/6/KOR/2
Korea	Bicycles	27 August 1996	January 1993 – July 1996	<i>Idem</i>	G/SG/N/6/KOR/3 G/SG/N/8/KOR/2
United States	Wheat gluten	1 October 1997	July 1992 – June 1997	<i>Idem</i>	G/SG/N/6/USA/4 G/SG/N/8/USA/2/Rev.1
United States	Broom corn	4 March 1996	1991 - 1995	A safeguard measure was adopted (effective 28 November 1996) but <i>it does not apply to <u>Canada nor Israel</u></i> nor to developing countries	G/SG/N/6/USA/2 G/SG/N/8/USA/1 G/SG/N/10/USA/1 G/SG/N/11/USA/1

5.204 Argentina states that in order to obtain additional information to substantiate its conclusions derived from the analysis of the period 1991-1995, the CNCE collected information on the year 1996, which confirmed that the levels of imports<sup>190</sup>, the share of apparent consumption and the available indicators of injury had not changed. Moreover, Argentina questions how, if the Agreement on Safeguards itself fixes three years for a quota, it can reasonably be thought that a "representative"

<sup>188</sup> The Agreement on Safeguards only refers once to specific periods for the analysis. Article 5.1 states that the level of quantitative restrictions shall be the average in the last three representative years. Even here, the three years are not mandatory, because if there is "clear justification" another period may be chosen. In any case, the three most recent years are not required. The period must be "representative".

<sup>189</sup> Article 8 – Annex I of Decree 1059, G/SG/N/1/ARG/3 of 13 January 1997.

<sup>190</sup> Exhibit ARG-2, Act 338, page 47; and Exhibit ARG-3, Technical Report, Tables 20.a and 21.a, Sheets 5501 and 5505 respectively.

period could be two years. To Argentina, this appears to be an extrapolation from Article 6.8 of the ATC. In the case of the Agreement on Safeguards, where a measure can last for up to eight years, it is difficult to sustain that it is enough to investigate only the previous two years. A longer period is necessary in order to verify the increase and confirm the continued trend.

5.205 Argentina states that the request by the Argentine footwear-producing industry was made in October 1996 and, as the questionnaires were sent out in March 1997, there were no complete data for 1996. In addition, it was not possible to delay sending out the questionnaires because of the time-limits fixed in the Agreement on Safeguards and the relevant domestic legislation.<sup>191</sup> Consequently, Argentina asserts, in deciding that the investigation period should be 1991-1995, the CNCE acted in strict compliance with domestic regulations and with the obligation to obtain comprehensive information in order to analyse each and every one of the variables and indicators stipulated in the Agreement on Safeguards and give the parties an opportunity to take full part in the proceedings.<sup>192</sup>

5.206 Argentina submits that it is quite clear that there was compliance with the Agreement on Safeguards and that the period of the investigation was reasonable. It is also obvious that the EC attempt to impose its own standards ("there must be a sharp rise in imports") and/or requirements ("the first five years can be analysed only as background"), in spite of the fact that the Agreement on Safeguards nowhere specifically mentions this methodology and/or these requirements, is without foundation.

(b) Segmentation of products/market

(i) *Argument of the European Communities*

5.207 The European Communities asserts that a Member is free in its choice of the product for which it intends to apply the safeguard measure, as long as all requirements (relating *inter alia* to imports, injury and causality) of the Agreement on Safeguards and Article XIX GATT have been met with regard to that product and, consequently, with regard to the domestic industry that produces like or directly competitive products. In the present case, the European Communities argues, Argentina was free to choose "footwear" as the product for which it intended to apply a safeguard measure. Consequently, Argentina was required to demonstrate that all requirements of the Agreement on Safeguards and Article XIX GATT were met with regard to "footwear" and consequently with regard to the Argentine industry that produces products which are like or directly competitive "footwear" products. In that case, all *determinations* would have to be made in relation to "footwear" as a whole. However, in the EC view, the Agreement on Safeguards does not contain an obligation to conduct an

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<sup>191</sup> In response to Norway's claim that the USITC had not collected data on the actual injury until the time at which it determined the injury, the Panel on *United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway* found that the requirements on analysis in this Agreement (the Anti-Dumping Agreement) must strike a balance with the other requirements of the Agreement, for example, the rights of interested parties to take part in the proceedings. A period of review that was constantly being updated might not guarantee all the parties a satisfactory opportunity to review and comment on the data. Report by the GATT Panel "*United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*" adopted by the Committee on Anti-Dumping Practices on 27 April 1994, ADP/87, paragraphs 580 et seq.

<sup>192</sup> As indicated in the Report of the *United States - Salmon Panel*, it was found that "An interpretation of this sentence under which investigating authorities would somehow be obliged to continue to collect data up to the time of the final determination would undermine other provisions of the Agreement, in particular those relating to rights of interested parties concerning access to information used by the investigating authorities ... An adequate protection of procedural rights of interested parties therefore required that determinations of (present) material injury be based on a defined record of facts before the investigating authorities." ADP/87, page 213, paragraph 580.

*analysis* of the requirements on the basis of the "footwear" market as a whole. There is no *obligation* in the Agreement on Safeguards to conduct a disaggregated injury analysis. Argentina was free to disaggregate the "footwear" market into separate parts, "for the purposes of the investigation".

5.208 The European Communities asserts that Argentina adopted in its analysis an approach of segmenting the market in five sectors<sup>193</sup>, taking into account the different competitive situations with regard to those types of footwear. Having adopted such an approach, Argentina was obliged to follow it consistently throughout the injury analysis and to prove serious injury in all segments in which measures were to be imposed. Only if in all five segments those requirements were met could Argentina have made the determination that for the "footwear" market as a whole, safeguard measures should be applied. No such conclusion would be justified if only in a limited number of segments the requirements would be met. In fact, Argentina has not proved "serious injury" in any of the selected five segments. It established an alleged injury only for the whole footwear sector and provided no explanation for ignoring the sectors in its conclusions. It has merely used data of one or other sector as it considered appropriate for its purposes. Furthermore, factors relating to import trends, market share, profits and losses and employment have not been investigated for each market segment.

5.209 The European Communities asserts that Argentina tried to justify this deficiency by stating<sup>194</sup> that it had to resort to "best information available", given the "failure of a majority of importers to collaborate with the investigation, inasmuch as they failed to submit the import data in the form requested". However, objective information is available from official statistical sources. Accordingly, the threshold of objective evidence<sup>195</sup> must be reached before safeguard measures can be imposed. The European Communities submits that if Argentina is not able to provide such objective evidence in its demonstration of "serious injury", it should not be allowed to impose a safeguard measure.

5.210 The European Communities submits that, contrary to Argentina's assertion<sup>196</sup>, there is no confusion in the EC argument. It is clear that each WTO Member is free to determine, if it intends to apply a safeguard measure, the scope of the "domestic industry that produces like or directly competitive products". It is equally clear that each WTO Member can apply such measure if it can demonstrate convincingly that all the requirements set out in the Agreement on Safeguards are fulfilled. In the present case, the Argentine authorities chose to initiate procedures regarding the product footwear for the footwear industry as a whole<sup>197</sup>. The Argentine authorities should therefore have demonstrated that the footwear industry as a whole suffered "serious injury" (or the threat thereof) before imposing safeguard measures. In this respect, the CNCE concluded that it was "reasonable to preserve the unity of the footwear market for the purposes of the injury analysis"<sup>198</sup>.

5.211 The European Communities asserts that the CNCE recognised that it was necessary to break down the market for the purposes of the investigation"<sup>199</sup> (although Argentina now claims<sup>200</sup> that this breakdown was necessary "merely for the purpose of gathering information"). In spite of this decision, this breakdown was not followed in its analysis<sup>201</sup>, even though this "five segments"

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<sup>193</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 12. See also Exhibit EC-17, document G/SG/N/10/ARG/1, G/SG/N/11/ARG/1, at page 3.

<sup>194</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 12.

<sup>195</sup> Article 4:2(a) Agreement on Safeguards uses the wording "factors of an objective and quantifiable nature having a bearing on the situation of industry."

<sup>196</sup> *Infra*, para. 5.214.

<sup>197</sup> Document G/SG/N/8/ARG/1, Exhibit EC-16, at page 9 - 13.

<sup>198</sup> *Id.*, at page 11.

<sup>199</sup> *Id.*, at page 11 - 12.

<sup>200</sup> Argentina's reply to questioning by the Panel (*infra* note 205).

<sup>201</sup> This breakdown may have been useful for practical reasons, but it necessarily complicated the drawing of conclusions at the end of the investigation. For example, what should Argentina have concluded if in only two of the five segments "serious injury" was found? Would this be enough to conclude that the entire

approach was the main reason why Argentina rejected importers' data<sup>202</sup>. It is not clear to the European Communities when during the investigation, if at all, Argentina decided that it should analyse the industry in its totality<sup>203</sup>, instead of analysing the industry in five separate segments, as stated by the CNCE.

5.212 This procedure, whereby Argentina bases itself "for the purposes of the investigation"<sup>204</sup> on five segments, but in fact does not do so in a consistent way which can be verified by other parties or a Panel, should, according to the European Communities, not be considered as a valid evaluation of "all the relevant factors of an objective and quantifiable nature". Therefore, the European Communities recalls its statement that, unless Argentina demonstrated this for the footwear industry in its totality, "serious injury" should have been demonstrated in each of the five segments before safeguard measure could be applied

5.213 The European Communities maintains that, having chosen to divide the sector into five segments and to reject price information that did not correspond, Argentina should either have maintained its "five segments" approach and establish injury for each segment, or if it changed its mind, have reversed its rejection of the importers' data.

(ii) *Argument of Argentina*

5.214 Argentina maintains that with respect to like products, the European Communities confuses the analysis by the CNCE, which covered the whole of the Argentine footwear-producing industry and the like product defined when initiating the investigation, with the categories used by the CNCE in the questionnaires sent out for the purpose of obtaining information. The CNCE determined that there was only one like product and therefore one domestic industry.<sup>205</sup> Consequently, the analysis of injury was made in relation to the industry as a whole and each factor analysed within that context.<sup>206</sup> Since Argentina determined that there was only one like product, Argentina submits that the European Communities' statement that Argentina should have analysed the different factors, import trends and situation of the industry for each of the five elements for which it collected information is not correct.

5.215 According to Argentina, the EC assertion that the reason why Argentina defined a single like product was that the importers had not provided information broken down into the five elements, as requested in the questionnaires, is not acceptable. In a safeguard investigation the parties should at least provide the information requested by the competent authority. In the case of the importers, this information was not furnished. The CNCE endeavoured to collect information on the broadest

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footwear industry suffered "serious injury"? What if these two segments covered 40 per cent of the footwear market? What if these two segments covered 80 per cent of the footwear market? Argentina made no such analysis nor did it weigh the importance of the different sectors for which it claimed that "serious injury" existed, so as to come to the conclusion that such injury was present for the industry in its totality.

<sup>202</sup> For example, no information on the situation in the five sectors was given for the factor "employment". See Document G/SG/N/8/ARG/1, Exhibit EC-16, at page 18.

<sup>203</sup> In its reply to a Panel question, Argentina claims that the industry is analysed "as a whole". (para. 5.214).

<sup>204</sup> Document G/SG/N/8/ARG/1, Exhibit EC-16, at page 11.

<sup>205</sup> In reply to a **Panel** question, Argentina states: "The CNCE determined that there was only one like product. The categories originally identified were not like products, but were established merely for the purpose of gathering information, as indicated at the beginning of the investigation (see pages 12-13 of Act No. 338; see also sheets 5390-5406 of the Technical Report)".

<sup>206</sup> In its response to **Panel** questioning, Argentina explained that this point is covered in Parts VI.1 to VI.9 of Act No. 338. The information taken into account in evaluating the relevant factors in each part refers to the industry as a whole (Production, pages 15-17; Sales, pages 18-19; Inventories, page 19; Costs, pages 19-20; Installed Capacity and Investment, pages 20-21; Employment, page 22; Domestic Prices, pages 22-23; Ownership and Financial Situation of Enterprises, pages 23-24). In certain specifically identified cases, the CNCE also considered whether certain particular segments were affected in an atypical or extreme way.

possible bases in order to ensure that the data would permit a comprehensive evaluation of the question of "like product" and also to obtain the data needed to evaluate injury. The CNCE decided to divide the footwear market into various groups that were more or less homogeneous from the standpoint of competitive conditions. As a principle, each group was defined on the basis of substitutability of the products as concerns both supply and demand. The analysis of the various segments or groups in the course of the investigation led to the conclusion that the degree of substitutability as regards both supply and demand was not exclusive to each of the segments. On the contrary, the elasticity of substitution underlined the need to include all these segments in a single market and to define one single like product: "footwear".

5.216 Argentina asserts that the tariff categories for the types of footwear defined by the CNCE for the purpose of collecting information are not specific, but are based on the materials used in the product (see tariff structure in Table 4 of the Technical Report, sheet 5386). In addition, some tariff categories are "market headings" which cover a wide range of products so the values vary according to the "mix" of products. Consequently, this information is not useful when analysing injury.<sup>207</sup>

(c) Investigation; Evaluation of "all relevant factors"

(i) *Factors set out in Article 4.2(a)*

Argument of the European Communities

5.217 The European Communities notes that Article 4.2(a) of the Agreement on Safeguards requires that the investigation of serious injury, or the threat thereof, evaluate "all relevant factors of an objective and quantifiable nature having a bearing on the situation of the domestic industry, in particular the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilisation, profits and losses, and employment." According to the European Communities, this provision lays down the principle that an injury investigation must be complete ("all relevant factors") and reliable ("factors of an objective and quantifiable nature having a bearing on the situation of that industry"). Furthermore, an investigation must be consistent, adequate, complete, clear and precise for its conclusions to be sufficiently motivated and transparent. The European Communities notes that this position finds support in two recent Panel reports<sup>208</sup> which dealt with the standard of "serious damage" set forth in Article 6.3 of the Agreement on Textiles and Clothing (ATC)<sup>209</sup>. Both Panel Reports stressed the obligation to examine each of the enumerated injury factors in detail. In *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*<sup>210</sup>, the Panel criticised the US for providing inconsistent and inadequate information. The Panel in *United States – Measure Affecting Woven Wool Shirts and Blouses from India* stated<sup>211</sup> that, "[a]t a minimum, the importing Member must be able to demonstrate that it has considered the relevance or otherwise of each of the factors listed [...]". Since the United States examined only eight

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<sup>207</sup> Exhibit ARG-2, Act No. 338, page 13.

<sup>208</sup> See Panel Report on *'United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India'*, 6 January 1997, WT/DS33/R; and Panel Report on *'United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear'*, WT/DS24/R, 8 November 1996. Both Panel Reports were subject to review by the Appellate Body which did not, however, rule on the standard of serious damage.

<sup>209</sup> Article 6:3 ATC reads: "In making a determination of serious damage, [...] the Member *shall examine* the effect of those imports on the state of the particular industry, as reflected in *changes in such relevant economic variables* as output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investments; none of which, either alone or combined with other factors, can necessarily give decisive guidance." (emphasis added).

<sup>210</sup> Panel Report on *'United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear'*, WT/DS24/R, 8 November 1996, at paragraph 7.45.

<sup>211</sup> See Panel Report on *'United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India'*, 6 January 1997, WT/DS33/R, at paragraph 7.26.

out of eleven listed factors, while some of the information provided by the United States was either incomplete, vague or imprecise, the Panel ruled that the requirements of Article 6.3 of the Agreement on Textiles and Clothing had not been respected.<sup>212</sup>

5.218 The European Communities argues that even though the wording of Article 6.3 of the Agreement on Textiles and Clothing is slightly different from Article 4.2(a) of the Agreement on Safeguards, both provisions nevertheless contain a list of injury factors which must be evaluated properly by the investigating authority. Therefore, in accordance with the rationale stated in the above-mentioned Panel Reports, the European Communities submits that, at a minimum, a "serious injury" determination under the Agreement on Safeguards must demonstrate that the relevance or otherwise of each of the factors listed in Article 4.2(a) of the Agreement on Safeguards was considered. The European Communities further submits that that provision requires each injury factor to be properly analysed. All listed factors have to be investigated completely and in full. The result of the analysis cannot be inconsistent, inadequate, incomplete, vague or imprecise. Therefore, in the EC view, if Argentina investigates five separate sectors of the footwear industry, but fails – as mentioned earlier – to investigate import trends, market share, profits and losses and employment for *each* market segment, it violates its obligations under the Agreement on Safeguards.

5.219 The European Communities contends, in addition, that Article 4.2(c) of the Agreement on Safeguards requires Argentina to provide a "detailed analysis of the case under investigation" as well as a "demonstration of the relevance of the factors examined." According to the European Communities, judging from the little explanation Argentina has offered, it failed to comply with these conditions. Argentina also failed to consider the full range of evidence available. For example, it wrongly excluded 1996 data from its period of investigation and failed to consider in detail the trends within the investigation period. Mere recitation of the changes which occurred in the listed factors of Article 4.2(a) is not sufficient to meet the obligations of the Agreement on Safeguards, given the requirements set out in Article 4.2(c). If Argentina would have considered all of the relevant factors, based on all the evidence available, it would have found that the Argentine footwear industry was not suffering serious injury, or the threat thereof.

5.220 The European Communities notes that in Section VI (State of the Domestic Industry) Argentina provides<sup>213</sup> a lengthy, yet incomplete summary of some of the data gathered in its investigation, including with regard to production, exports, sales, stocks, costs, installed capacity and investment, employment, domestic prices and assets & financial position of the enterprises. At no point in this recitation of the data does Argentina tie any of the data to the condition of the domestic industry. Not until the final section (Section XIII) does Argentina discuss the relevance of the factors examined. Therein, in a sub-section entitled "Effects of imports on domestic production", Argentina concluded<sup>214</sup> that "the increased imports have caused serious injury to the domestic industry and that there is an additional threat of injury in the absence of measures additional to the existing Common External Tariff." According to the European Communities, the facts cited by Argentina<sup>215</sup> as indicative of such injury include that the decline in output was "replaced by imports, essentially cheap imports". On the same page, Argentina also noted a decline in employment and the financial situation of domestic companies, as well as a rise in inventories. These observations, however, are not supported by the facts available in the analysis and do not prove serious injury.

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<sup>212</sup> *Idem*, at paragraph 7.51.

<sup>213</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 13.

<sup>214</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 38. See also Exhibit EC-17, document G/SG/N/10/ARG/1, G/SG/N/11/ARG/1, at page 2. See also Exhibit EC-20, document G/SG/N/10/ARG/1/Suppl. 1, G/SG/N/11/ARG/1/Suppl. 1, at page 2.

<sup>215</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 38.

5.221 The European Communities stresses the lack of consistency and of representativity of many of the figures used by Argentina as a basis for the imposition of safeguard measures. In this sense, the Argentine authorities admitted, for example, in their Acta 266, concerning the initiation of the safeguard investigation, that "data on production could not be verified" and that the information gathered in this respect is "imperfect". Thus, in Acta 338, concerning the serious injury determination, they note that the Commission used its own "estimates". No indication is given of the overall representativity of such "estimates". Similarly, the findings contained in Acta 338 concerning sales refer to a percentage decline in "the sample group of large and medium enterprises". No official statistics concerning overall sales are given. In addition, as regards profitability, assets and financial situation, the Argentine authorities acknowledge in Acta 338 that their data subset "does not constitute a representative sample of the sector, since it consists only of four "medium" enterprises".

5.222 The European Communities submits that the evidence presented in the Argentine analysis does not support a finding of "serious injury" for the whole of the footwear sector. Regarding market share, the European Communities asserts that Argentina stated<sup>216</sup> that the domestic market share of imports increased substantially. However, the European Communities notes that Argentina has also mentioned<sup>217</sup> that the market share of all footwear imports (i.e. including imports from MERCOSUR countries) decreased in 1996, the year before the safeguard measure was taken. Argentina stated<sup>218</sup> that "[t]he market share of imports increased from 10 per cent in 1991 to 20 per cent in 1992, 26 per cent in 1993, 27 per cent in 1994 and 1995, and 22 per cent in 1996." According to the European Communities, it is clear that in the first two years of the investigated period the share of total imports increased, while in the more recent period domestic production has become more and more important.<sup>219</sup> The European Communities notes that the domestic industry in 1996 occupied 78 per cent of the market. Argentina, in its first submission, chose to simply compare the number for 1991 with the number of 1996 and concluded that the share had increased. By doing so, the European Communities states that it missed the intervening decreasing trend.

5.223 Regarding changes in the level of domestic sales, the European Communities contends that the analysis cites not a decrease, but a strong increase with regard to women's and casual footwear. The European Communities notes that Argentina stated<sup>220</sup>: "[...] while both exclusively women's footwear and town and/or casual footwear recorded increases in sales over the interval in question, by 71 per cent in volume and 76 per cent in value in the first case and by 111 per cent and 124 per cent, respectively, in the second." In spite of these strong increases in sales, safeguard measures were imposed also on exclusively women's footwear and town and/or casual footwear. The European Communities states that although such estimates do not reflect the state of the whole industry, they show the sales on the domestic market remained relatively stable during most of the investigation period, although the figure for 1996 ended just below the figure of 1991.<sup>221</sup> However, the European Communities cannot agree with the sweeping conclusion that these figures demonstrate an industry suffering from a "significant overall impairment".

5.224 Regarding production, the European Communities observes first that Argentina stated<sup>222</sup> that production of footwear (measured at current prices) did not decrease, but instead *increased* by 7.7 per cent during the 1991-1995 period. This important figure was immediately discarded by Argentina,

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<sup>216</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 37. See also Exhibit EC-17, document G/SG/N/10/ARG/1, G/SG/N/11/ARG/1, at page 2. See also Exhibit EC-20, document G/SG/N/10/ARG/1/Suppl. 1, G/SG/N/11/ARG/1/Suppl. 1, at page 2.

<sup>217</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 25. The statistics presented by Argentina make clear that the figure in 1996 is lower than the three preceding years (1993, 1994 and 1995).

<sup>218</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 25.

<sup>219</sup> The European Communities refers to EC Graph-3.

<sup>220</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 16.

<sup>221</sup> The European Communities refers to EC Graph-4.

<sup>222</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 38. See also Exhibit EC-17, document G/SG/N/10/ARG/1, G/SG/N/11/ARG/1, at page 3.



stating<sup>223</sup> that "the industry shifted production to higher-unit-value products in response to demand factors and the need to compete in the international footwear trade within the constraints of the Argentine rules of the game." Whatever may exactly have been meant with the latter, it is clear that production did not decline and that Argentina's industry has shown that it was capable of shifting production to more valuable products. According to the European Communities, it should be clear that the production level during the investigation period has largely remained within the band of 800 million pesos and 1000 million pesos, ending slightly above the band in 1996.<sup>224</sup> In spite of these positive figures, Argentina found it necessary to impose safeguard measures.

5.225 The European Communities notes that, according to Argentina<sup>225</sup>, net increase in production should be disregarded, because "the industry shifted production to higher-unit-value products in response to demand factors and the need to compete in the international footwear trade within the constraints of the Argentine rules of the game". The European Communities fails to see how a shift to products with a higher value, so as to become more competitive, can be a reason to ignore the positive production figures. Furthermore, according to the European Communities, Argentina cannot claim, on the one hand, that the investigation concerns a single like product, i.e. footwear, and, on the other hand, argue that there have been changes in the type of footwear produced which result in higher value products. In this respect, the European Communities argues that it is also relevant to note that, according to Argentina's reasoning, any possible increase in the value of imports would not be relevant since it could simply be due to a shift in the type of imports. However, Argentina has not analysed the conditions under which imports took place.

5.226 Second, the European Communities would like to point at the following quotes from a document produced by Argentina<sup>226</sup>: "[t]he data on domestic footwear production have been questioned in the investigation. The CIC and CAPCICA took divergent positions from the very moment of formulation of the safeguard request." "The Commission used its own estimates based on the macro-economic statistics and the results of the questionnaires, since it did not consider those submitted by the parties to be suitable." In this respect, the European Communities notes that Argentina, having discarded the production data submitted by the parties, did not provide any precise data on domestic production and excluded from its consideration production intended for exports as well as contractor or joint venture production. The European Communities submits that the Agreement on Safeguards requires transparency. Argentina's reliance on data which are not reported anywhere, nor replicable because the recalculations were not explained, patently violates that requirement. Furthermore, Argentina only analyses production trends in percentage terms, without providing absolute figures on Argentina's footwear production. Also, the data on production<sup>227</sup> only refer to the total for "medium-sized and large enterprises" and appears as a sample whose representativity is not established.

5.227 Third, the European Communities asserts, the reliance by Argentina<sup>228</sup> on a decline in total production (in physical terms) between 1991 and 1995 is flawed for another reason. Argentina, in comparing just these two years data, ignored data from 1996<sup>229</sup>, and all the intervening trends. The injury test of the Agreement on Safeguards is not satisfied by a simplistic comparison of one year's data against those of a prior, arbitrarily chosen, year. Rather, the requirement that the "competent

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<sup>223</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 14, 38. See also Exhibit EC-20, document G/SG/N/10/ARG/1/Suppl. 1, G/SG/N/11/ARG/1/Suppl. 1, at page 3.

<sup>224</sup> The European Communities refers to EC Graph-5.

<sup>225</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 38.

<sup>226</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 13, 14.

<sup>227</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 41 and following.

<sup>228</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 38. See also Exhibit EC-17 at page 3.

<sup>229</sup> Data for 1996 were analysed by Argentina: see Exhibit EC-16, document G/SG/N/8/ARG/1, at page 14.

authorities" evaluate "all relevant factors" mandates that Argentina puts the present year's condition into the context of the preceding years. In fact, a 1998 study<sup>230</sup> by the '*Centro de Estudios para la Producción*' analysed the relative advantages of the different sectors of Argentine industries. Surprisingly, coming from this department, it shows that the footwear industry is the third best situated of the 27 sectors considered. But not only that: the report shows that it was one of the sectors that had improved most since 1980.

5.228 The European Communities states that one could readily imagine a situation in which an industry had an extraordinary year, with record production, shipments, prices, financial returns, etc., only to have those indicators fall the following year for any number of reasons. However, even if the industry started to recuperate, and the next three years showed increasing production, shipments, prices, financial return, etc., under Argentina's methodology, that industry would be experiencing injury if those indicators did not reach the record levels of five years ago. The comparison of the "present" situation only to that of a single prior year, ignoring the intervening trends, opens the door for manipulation any time an industry fails to repeat an extraordinary year. Thus, even if Argentina had explained its recalculation of the production data, its reliance on the decrease in 1995, as compared to only 1991, cannot, in the EC view, meet the requirement that Argentina consider all relevant factors.

5.229 Finally, the European Communities states, Argentina failed to properly explain the inherent contradiction that production figures increased, when measured at current prices, and decreased, when measured in physical terms. As the Panel explained<sup>231</sup> in '*Brazil – Imposition of Provisional and Definitive CVD's on Milk Powder and Certain Types of Milk from the EEC*', it is not enough for the competent authority to recite facts. Rather, it is incumbent upon the investigating authorities to "provide a reasoned opinion explaining how such facts and arguments had led to their finding." Argentina's explanation<sup>232</sup> that the simultaneous increase in value and decrease in volume was due to a shift to higher unit-value products does not explain how the decline in volume "trumps" the increase in value, and can be considered to demonstrate serious injury. In short, Argentina gives no reasoned conclusions concerning the relative weight of these two contradictory trends.

5.230 The European Communities observes that Argentina notes that similar positive statistics for production which were produced by the *Centro de Estudios para la Producción*, which is part of the Argentina government, should not be considered because its production statistics excluded "vulcanised rubber or moulded plastic footwear".<sup>233</sup> The European Communities has the following two comments to make regarding this statement.

First, it would seem that, if production for this sector were included in the figures as well, then the total figure for production would rise, possibly even bringing the footwear sector higher in the competitiveness ranking (in 1997 it was third out of 27).

Second, the European Communities believes it is useful to consider the figures set out by the *Centro*, since, even though Argentina may claim that the exact definition of the footwear industry is not fully comparable these are official statistics which are not challenged by Argentina and which are more reliable than the estimates used for the safeguard investigation.

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<sup>230</sup> Exhibit EC-30, at page 21. The '*Centro de Estudios para la Producción*' forms part of the '*Secretaría de Industria, Comercio y Minas*', falling under the Argentina Ministry of Economy.

<sup>231</sup> Panel Report on '*Brazil – Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community*', adopted by the Committee on Subsidies and Countervailing Measures on 28 April 1994, SCM/179, and Corr. 1 (hereinafter referred to as '*Brazil – Milk Powder*'), at paragraph 286.

<sup>232</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 38. See also Exhibit EC-20, document G/SG/N/10/ARG/1/Suppl.1, G/SG/N/11/ARG/1/Suppl.1, at page 3.

<sup>233</sup> *Infra*, para. 5.261.

Furthermore, what it does demonstrate clearly is that, if a different definition of "the footwear industry" is used than the one in the present investigation, then the situation would indicate the complete opposite of the alleged "significant overall impairment in the position of the domestic industry." The European Communities questions how the results of two separate investigations can be so totally different, even if the exact scope of the investigation is not fully overlapping.

5.231 The European Communities also draws the Panel's attention to another factor, exports, which, according to the European Communities, indicates clearly that the Argentine industry is not suffering from an alleged serious injury.<sup>234</sup>

5.232 Regarding productivity, the European Communities notes that, in spite of the fact that this factor is clearly mentioned in the list of Article 4.2(b) of the Agreement on Safeguards, Argentina did not examine this requirement in a separate heading in its investigation, under Chapter VI (State of the Domestic Industry). However, the above-mentioned '*Centro de Estudios para la Producción*' noted<sup>235</sup> that, if productivity in base-year 1991 was 100, it was 129.2 in the year 1996 if calculated 'per employee' and 124.3 if calculated 'per worked hour'. In other words, this organisation noted a significant increase in productivity at the end of the investigated period, if compared to the start of this period. Again, these figures would not seem to justify the implementation of a safeguard measure by Argentina.

5.233 The European Communities maintains that, on an *ad hoc* basis, Argentina has decided to address the issue of productivity in its first submission. However, the European Communities submits the Panel should find that Argentina did not evaluate "all" relevant factors having a bearing on the domestic industry, as required by Article 4.2(a) of the Agreement on Safeguards. Furthermore, Argentina does not provide any "quantifiable" data, as required by Article 4.2(a) nor bases its determinations on a "detailed analysis" as required by Article 4.2(c) of the Agreement on Safeguards. The European Communities contends that data provided by the *Centro de Estudios para la Producción* indicated that the productivity (per employee) had increased during the investigated period only in 1993 did productivity fall slightly below the 1991 level.<sup>236</sup> For all other years, productivity was higher, in particular in 1996, the year before the safeguard measure was taken, when productivity was almost 30 per cent higher than the base year. These statistics are hardly evidence of the alleged "significant overall impairment in the position of the domestic footwear industry".

5.234 Regarding installed capacity: the European Communities notes that Argentina stated<sup>237</sup> that "for the total of large and medium enterprises the installed capacity for performance sports footwear *increased* between 1991 and 1995, reaching almost 19 million pairs in the latter year and increasing again in 1996" (emphasis added). In the same paragraph, Argentina noted that installed capacity for the production of exclusively women's footwear and town and/or casual footwear *increased*, while that for non-performance footwear *held steady*. Thus, the only category that did not increase was the "other" category. Therefore, Argentina failed to point to any evidence to support a finding of serious injury to the entire footwear market during the investigated period. The European Communities notes that for most sectors which Argentina had investigated, installed capacity had increased. This fact, which, in the EC view, is confirmed by Argentina contradicts the statement made by Argentina that installed capacity decreased. This increase took place in spite of the allegation that 997 factories closed during the investigation period. The European Communities surmises that this may have had to do something with the fact that, as Argentina stated<sup>238</sup>, "the sector had been fitted out with the latest generation of new installations with a view to improving its competitive profile by closing down

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<sup>234</sup> The European Communities refers to EC Graph-6.

<sup>235</sup> See Exhibit EC-29.

<sup>236</sup> The European Communities refers to EC Graph-7.

<sup>237</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 17.

<sup>238</sup> Exhibit EC-16, document G/SG/N/8/ARG/1, page 18.

inefficient plants and developing new product lines". However, in spite of the extremely brief reference<sup>239</sup> that "utilisation declined from 65 percent [in 1991] to 53 percent [in 1995]" no information was given by Argentina in its notification. According to the European Communities, these two figures however do not say anything about intervening trends and can hardly be called a "detailed analysis" as required by Article 4.2(c) of the Agreement on Safeguards.

5.235 Furthermore, the European Communities asserts, Argentina asked a number of enterprises to indicate the year in which they had produced most since 1986. At least two enterprises claimed to have the highest production in 1996, the year before the safeguard measure was taken, while five others had their best year during the investigation period<sup>240</sup>. Still, Argentina decided to impose safeguard measures.

5.236 Regarding profits and losses: the European Communities submits that the evidence presented by Argentina on this factor<sup>241</sup> was insufficient to demonstrate serious injury or the threat thereof. Furthermore, the methodology used to analyse profitability is questionable. For example, Argentina did not separate profitability data regarding footwear production from other business lines but considered only global financial data, with the exception of a subset of only four medium-sized companies<sup>242</sup> producing exclusively footwear and with regard to ten other firms, for which specific accounts of the footwear sector were consolidated.

5.237 Hence, according to the European Communities, it is unclear for which proportion of the domestic industry reliable data on profitability was gathered and even for the proportion of the domestic industry investigated, the evidence is not conclusive as to whether it was in fact profitable. Even though Argentina included<sup>243</sup> a statement that in 1995 and 1996 results were "below the break-even point", there was no evidence submitted to support this and indeed tables presented in its notification do not show that the industry made losses<sup>244</sup>. This is particularly relevant, because Resolution 987/97<sup>245</sup> bases the imposition of definitive measures on *inter alia*, "a worsening of the economic and financial situation of companies in the domestic industry".

5.238 The European Communities argues that Argentina expressly states, in Section VI.9 of Acta 338, which deals with "Assets and financial position of the enterprises, that "out of the total number of cases for which the corresponding accounting information could be obtained (six "large" and six "medium" enterprises) a subset consisting of firms devoted exclusively to footwear production was split off" and continues but noting that "this subset does not constitute a representative sample of the sector, since it consists of only four "medium" enterprises". . Subsequently, ten "specific accounts for the footwear sector" were investigated and further calculations were made. The European Communities questions how then Argentina can, on the basis of such unrepresentative samples, claim in Resolution 987/97 that there was "a worsening of the economic and financial situation of companies in the domestic industry". Consequently, the European Communities alleges, Argentina did not base its investigation on factors of a "quantifiable nature", as required by Article 4.2(a) of the Agreement on Safeguards, nor did it make its determinations on the basis of a "detailed analysis" as required by Article 4.2(c) of the Agreement on Safeguards.

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<sup>239</sup> Exhibit EC-16, document G/SG/N/8/ARG/1, page 17.

<sup>240</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 18.

<sup>241</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 20.

<sup>242</sup> Argentina admits that this cannot constitute an appropriate sample. On page 20 of document G/SG/N/8/ARG/1, Exhibit EC-16, Argentina stated: "*Although this subset does not constitute a representative sample of the sector [...]*".

<sup>243</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 20.

<sup>244</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, Table 8, Accounting Ratios Profitability Indices, at page 46.

<sup>245</sup> See Exhibit EC-20, document G/SG/N/10/ARG/1/Suppl.1, G/SG/N/11/ARG/1/Suppl.1, at page 2. See also Exhibit EC-17, document G/SG/N/10/ARG/1, G/SG/N/11/ARG/1, at page 3.

5.239 Regarding employment, the European Communities submits that in its findings, Argentina did not analyse any official statistics concerning employment in this sector. Argentina simply arrived at the conclusion that employment had declined<sup>246</sup> on the basis of the information submitted by the petitioner and a sample of enterprises the representativity and reliability of which is not established. However, nowhere in its investigation did Argentina demonstrate that the footwear sector had suffered an exceptional growth in unemployment. Indeed, the statistics<sup>247</sup> put forward by Argentina show relative stability in employment. Argentina stated<sup>248</sup> that "the employment data provided by the large and medium enterprises in the sample indicate the loss of 560 jobs exclusively in footwear production between 1991 and 1995 [...]." This loss represents, "in relative terms, 5.2 per cent [...] of employment in 1991". According to the European Communities, data provided by Argentina shows the number of employees for medium-sized and large enterprises has remained relatively stable during the investigation period, after an initial increase in 1992.<sup>249</sup> The total number of employees in 1995 is slightly lower than the initial number in 1991, indicating a loss of 635 jobs out of a total of around 14,000. In addition, Argentina noted<sup>250</sup> that, for 30 per cent of small firms, employment figures increased while for 19 per cent they remained steady. Furthermore, data on employment in the footwear sector, provided by the above-mentioned '*Centro de Estudios para la Producción*' confirm the stability in employment in the sector from 1991 up to 1996.<sup>251</sup> Therefore, given these employment statistics, the European Communities fails to understand how Argentina could have concluded that they demonstrated in some way a "serious injury" for the domestic industry, i.e. a "significant overall impairment". The European Communities points out that there is some discrepancy in the data proffered by Argentina: the European Communities notes that Argentina claims that "the information for medium and large enterprises indicated a 13 per cent fall in employment" during the 1991-1995 period, while Argentina had previously given<sup>252</sup> a lower figure of 4.6 per cent. However, according to the European Communities, a closer look at the table set out in the CNCE Technical Report (sheet 5640) confirms that, according to this table, the previous lower figure given by Argentina was correct.

## Argument of Argentina

### Investigation

5.240 Argentina states that the competent authorities in the National Foreign Trade Commission (CNCE) and the Department of Foreign Trade (Department) of the Ministry of the Economy made a preliminary determination, finding that there was clear and sufficient evidence of an absolute increase in imports of footwear and a damaging effect on the domestic industry. Based on this finding, they decided to initiate an investigation and, in view of the existence of critical circumstances within the meaning of Article 6 of the Agreement on Safeguards and Article 35 of Decree 1059/96 and the fact that any delay in taking action would cause damage which it would be difficult to repair, they applied a provisional measure.

5.241 According to Argentina, the measures taken by the Argentine Government to open up the economy led to increased imports of consumer goods in general and imports of footwear in particular. For example, during the period 1991-1993, imports of footwear increased by 190 per cent in terms of

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<sup>246</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 38. See also Exhibit EC-17, document G/SG/N/10/ARG/1, G/SG/N/11/ARG/1, at page 3. See also Exhibit EC-20, document G/SG/N/10/ARG/1/Suppl. 1, G/SG/N/11/ARG/1/Suppl. 1, at page 2.

<sup>247</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 18.

<sup>248</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 18.

<sup>249</sup> The European Communities refers to EC Graph-8.

<sup>250</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 19.

<sup>251</sup> See Exhibit EC-29.

<sup>252</sup> Document G/SG/N/8/ARG/1, Exhibit EC-16, at page 19.

value, compared with an increase of 134 per cent for imports of consumer goods in general.<sup>253</sup> For imports of footwear, the data analysed at that time showed an absolute increase in imports from 1991-1995<sup>254</sup>, and justified the initiation of an investigation since the claims by the applicants concerning serious injury caused by the imports were borne out by the evidence they submitted.

5.242 Argentina states that, in its preliminary determination, the Department underlined "the high rate of unemployment, the precarious financial situation of the companies, the fall in production and the decrease in the utilisation of installed capacity during the period under review, reflected in the industry's declining share of Argentina's GDP", and that these developments were caused by the increase in imports.<sup>255</sup> When evaluating imports of footwear over the period (1991-1995), the Department found an increase of footwear imports of over 70 per cent in terms of volume and more than 150 per cent in terms of value.<sup>256</sup> It confirmed that, despite the specific duties which led to a fall in imports, their level largely exceeded the figure for 1991.<sup>257</sup>

5.243 Argentina asserts that the Department decided that the circumstances and merits of the case justified the initiation of an investigation and, in view of the critical circumstances<sup>258</sup>, the application of a provisional measure. The Department recommended the application of a provisional safeguard measure in the form of specific duties and, when calculating the measure, decided that an acceptable level of imports would be 11 million pairs.<sup>259</sup> This level of 11 million pairs was lower than the average level of imports for the period 1993-1995<sup>260</sup>, which had caused the injury to the industry confirmed in the preliminary determination.

5.244 Argentina maintains that, in accordance with Decree 1059/96 and the Agreement On Safeguards, the measures were imposed for a period of 200 days. The Department calculated duties for each tariff heading taking into account factors such as price elasticity, the volume imported under each tariff heading and also the existence of distortions due to seasonal shipments from the northern hemisphere and the undervaluation of imports. The decision to initiate an investigation and impose provisional safeguard measures based on critical circumstances was duly notified to the WTO on 21 February 1997<sup>261</sup> and subsequently published in Argentina's *Boletín Oficial* on 24 February 1997.

#### Methodology for gathering data from firms

5.245 Based on the analysis of the application and on subsequent consultations with other interested parties, the CNCE considered that the different sizes of the producers made it necessary to divide them into three categories according to the numbers employed: (a) large (over 100 employees); (b) medium (between 41 and 100 employees); and (c) small (less than 41 employees). Importing

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<sup>253</sup> Exhibit ARG-1, Report by the Department on the feasibility of initiating an investigation and applying provisional safeguard measures, hereinafter referred to as the "Preliminary Report by the Department", page 32.

<sup>254</sup> Exhibit ARG-1, Preliminary Report by the Department, page 31.

<sup>255</sup> Exhibit ARG-1, Preliminary Report by the Department, page 32.

<sup>256</sup> Exhibit ARG-1, Preliminary Report by the Department, page 4.

<sup>257</sup> Exhibit ARG-1, Preliminary Report by the Department, page 32.

<sup>258</sup> Exhibit ARG-1, Preliminary Report by the Department, page 32.

<sup>259</sup> In response to a question put to it by the **European Communities** about why this level of imports was considered "acceptable", **Argentina** responded that Annex ARG-1 – Preliminary Report of the Department of Foreign Trade of 6 January 1997 - page 32, Annex IX, contains the basis on which the figure of 11 million pairs was chosen as "an acceptable level of imports". This report considers imports for the period 1990-1992. Average annual imports for that period amounting to 8.98 million pairs, the average level was increased to 11 million for the calculation of the specific duty levels that would be needed to maintain total imports at that level. Eleven million was considered acceptable because it permitted the maintenance of a percentage share of imports in apparent consumption that would enable domestic production to compete with imported goods.

<sup>260</sup> Exhibit ARG-1, Preliminary Report by the Department, pages 32-33.

<sup>261</sup> G/SG/N/6/ARG/1.

enterprises were classified according to the value of imports: large (over US\$1 million) and (b) medium and small (between US\$100,000 and US\$1,000,000). Following this classification, 60 questionnaires were sent to domestic producers and 69 to importers.<sup>262</sup>

5.246 The questionnaires sent to large and medium enterprises requested quantifiable data and small enterprises were asked to reply to multiple choice questions indicating trends. Of the 60 questionnaires sent out, 24 went to large and medium firms and 36 to small firms, taking into consideration their geographical location so as to cover the whole of Argentina.<sup>263</sup> The information supplied by the producers and importers was checked by the CNCE.

#### Hearings

5.247 Argentina states that both the Department and the CNCE held public hearings to give all interested parties an opportunity to state their position, as required by Article 3.1 of the Agreement on Safeguards. Prior to its hearing, the CNCE met with various interested parties in order to give them a pre-hearing report which classified the information collected to date. Argentina maintains that the European Communities took part in this hearing, putting forward arguments similar to those used before this Panel.

#### Factors considered when determining injury

5.248 Argentina submits that on the basis of the information in the replies to the questionnaires, as well as the information provided by the parties and the data contained in official sources, the CNCE analysed all the factors corresponding to the requirements under the Agreement on Safeguards and determined the existence of serious injury as a result of the increase in imports.

5.249 Argentina notes that Article 4.2(a) of the Agreement on Safeguards provides that, in determining injury, the competent authorities shall evaluate "... in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilisation, profits and losses, and employment". According to Argentina, the European Communities argues that Argentina did not take into account all the factors in Article 4.2 that should be examined and therefore did not prove the relevance of the factors examined.<sup>264</sup> The European Communities also claims that discussion of the factors by Argentina is not related to the situation of the industry.

5.250 According to Argentina, the final decision of the CNCE, contained in Parts I-XII of Act No. 338, is a review of the evidence and the factual conclusions taken into account. The factual basis comes from the evidence collected during the investigation (positive evidence) and included in the Technical Report. Part XIII of Act No. 338 contains a summarised version of the CNCE's conclusions based on the evidence collected during the investigation, as recorded in the preceding Parts I-XII of the Act. For example, the "conditions of the domestic industry" in Part VI are findings that result from an examination of the evidence on the domestic footwear-producing industry in Argentina. The CNCE's final conclusions are based on these findings. To take an example, the

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<sup>262</sup> Exhibit ARG-2, Act No. 338, page 5.

<sup>263</sup> Annex ARG-4, a model of the questionnaires sent to large and small enterprises.

<sup>264</sup> Regarding the decisions of the Panels in the cases *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, in document WT/DS24/R of 8 November 1996, and *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, in document WT/DS33/R of 6 January 1997, Argentina does not agree with the argument that these decisions can provide guidance when analysing serious injury in an investigation under the Agreement on Safeguards. See argument *supra*, para. 5.143.

examination of the financial situation in Part VI leads to the determination that it had deteriorated.<sup>265</sup> At the same time, it was determined that the financial situation was caused by the increase in costs and the downward trend in sales by the industry (break-even point).<sup>266</sup> Imports replaced the reduction in sales.<sup>267</sup>

5.251 The **Panel** notes that in response to its question regarding which of the documents submitted to the Panel constituted the published "report setting forth [the] findings and reasoned conclusions reached on all pertinent issues of fact and law" referred to in Article 3.1 of the Agreement on Safeguards, Argentina responded that Act No. 338 is the published report of the findings of the CNCE with respect to serious injury. It establishes the grounds for the determination of injury and includes as a reference document the Technical Report. The Technical Report, prepared by CNCE staff, summarises all of the factual data gathered during the investigation. Resolution 987/97 of the Ministry of the Economy includes as a reference document Act 338 as well as the report published by the Department of Trade and Industry. Argentina submits that it fulfilled the obligation contained in Article 3 by publishing Resolution 987/97 containing a summary description of the results of the injury investigation and the reasons which led to the decision to apply a safeguard measure and to the consultations carried out with the Member countries of the WTO in conformity with Article 12.3. Argentine Law No. 19.549 on Administrative Procedure which, together with Regulatory Decree 1059 regulates the processing of requests for the application of safeguard measures, states that the interested parties shall have access to all information contained in the file except information deemed to be "confidential", and moreover, all parties were supplied with information by the implementing authority during the hearings provided for under that legislation. Thus, Argentina explains, the file contains one part representing a compilation of facts and background material and another part containing the conclusions of the CNCE together with the Final Report of the Department of Foreign Trade. These various elements develop and explain the causal link stipulated in Article 4.2(b) of the Agreement on Safeguards which the European Communities claims that the Argentine Government failed to establish. The file, which contains more than 10,000 pages, cannot be published with the administrative act ordering the measure.

5.252 With respect to the share of the domestic market, Argentina asserts that the share of imports in apparent consumption increased during the investigation period from 12 per cent in 1991 to 21 per cent in 1995 in terms of pairs, and from 10 per cent in 1991 to 27 per cent in 1995 in terms of value in millions of current pesos.<sup>268</sup> Even if this factor is analysed on the basis of the evidence provided by the European Communities<sup>269</sup> there is still confirmation of growth in the market share taken by imports (period 1991-1996). There is nothing in the Agreement on Safeguards to suggest that the increase in imports, as a relevant factor in the determination of injury, should not be determined by comparing imports at the beginning and at the end of the period. This yields a higher level of imports than in 1991, a result which is moderated in the EC graph by the so-called DIEM effect. Argentina recalls the EC statement that domestic production grew at the expense of imports into the domestic market<sup>270</sup> and remarks that: first, the European Communities arrived at this figure for increased share of production in the domestic market by shortening the period of investigation; and second, that different conclusions can be reached depending on how the figure is analysed. Argentina submitted a graph<sup>271</sup> which set out the import figures and market share taken by imports in what Argentina considered to be the proper perspective for a safeguard investigation which, Argentina contends, reflects a reading exactly opposite to the EC reading in EC Graph-2.

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<sup>265</sup> Exhibit ARG-2, Act No. 338, page 48.

<sup>266</sup> Exhibit ARG-2, Act No. 338, page 24, Exhibit ARG-3, Technical Report of the CNCE, sheet 5471.

<sup>267</sup> Exhibit ARG-2, Act No. 338, pages 47-48.

<sup>268</sup> Exhibit ARG-3, Technical Report, Table 20, sheet 5501; and Exhibit ARG-2, Act 338, sheet 5334.

<sup>269</sup> EC-Graph 3.

<sup>270</sup> *Infra*, para. 5.340.

<sup>271</sup> Exhibit ARG-22, Graph 4.



5.253 Concerning the volume of sales, Argentina states that the CNCE determined that sales of footwear produced in Argentina fell by 15 per cent in value and 27 per cent in volume over the period 1991-1995 and the volume continued to fall in 1996.<sup>272</sup> From the replies to the questionnaires sent out by the CNCE, it appeared that the majority of small enterprises had seen their sales drop<sup>273</sup>, and that sales of performance sports footwear showed an even greater decrease: 33 per cent in volume and 35 per cent in value.

5.254 Argentina submits that EC Graph 4 is described by the European Communities as showing that the figures for 1996 were barely lower than the 1991 figures. In Argentina's view, first, this confirms that in comparison to 1991, the level of sales had declined at the end of the investigation period. At the same time, and following the European Communities' logic that the period from beginning to end only serves to confirm trends, EC-Graph 4 clearly reveals a sharp decrease in sales for the period 1994-1995. Finally, the particular comment on the situation with respect to women's footwear and casual footwear is irrelevant in view of the definition of "like product" contained in the file.

5.255 Regarding production, Argentina submits that the CNCE noted an average decrease of 15 per cent in volume over the period investigated, 1991-1995.<sup>274</sup> Argentina notes that, although there was a 7.7 per cent increase in the value of production in current pesos, this was due to a change in the product mix following a decision to concentrate on products with a higher unit value.<sup>275</sup>

5.256 According to Argentina, the replies to the questionnaires also showed that output over the period investigated had fallen by 24 per cent in large and medium firms. Contrary to the EC assertion, information on total production in 1996 showed an even greater decrease.<sup>276</sup>

5.257 Argentina observes that the European Communities criticises the methodology used to determine the production in physical units and consequently the values calculated on this basis. This criticism is the result of failing to read the Technical Report of the CNCE. Section III.2 of Act No. 338 and pages 5443 and 5491 of the Technical Report explain in detail how official information was used to arrive at an estimate that completes the information in the questionnaires, which do not cover the whole sector.

5.258 In this connection, Argentina explains, the CNCE used official macroeconomic statistics and made its own estimates of domestic production based on official data. Based on these macroeconomic statistics, the gross value of production at 1986 prices for the footwear manufacturing sector according to the INDEC was estimated. This indicator provides an estimate of the trend in the physical volume of production in the sector. In addition, the trend in the gross value of production in

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<sup>272</sup> Exhibit ARG-2, Act No. 338, page 18.

<sup>273</sup> Exhibit ARG-2, Act No. 338, page 18.

<sup>274</sup> Exhibit ARG-2, Act No. 338, page 15.

<sup>275</sup> Exhibit ARG-2, Act No. 338, Section XIII.2, page 46. In reply to a question put to it by the **European Communities**, about how such a change could be seen as a factor which contributes to "significant overall impairment" of its domestic industry, Argentina stated that the question distorted the meaning of the determinations made. On the one hand, there is the explanation of why, while there is a decrease in the production of pairs, there was an increase of some 7.7 per cent in value. On the other hand, there is an attempt to extend this notion and conclude there is no significant impairment of the domestic industry. Argentina states that it should be made clear that in analysing injury, an entire set of factors (not just one factor) were considered. The higher production value in current pesos must, according to Argentina, be analysed in the context of that set of factors. In fact, Argentina asserts, production was focusing on higher-priced products in response to the requirements of a changing market, and the point is that at these higher values, the industry suffered in terms of the cost-price ratio as a result of the imports.

<sup>276</sup> Exhibit ARG-2, Act No. 338, page 16; and Exhibit ARG-3, CNCE Technical Report, Table 14, sheet 5599.

the footwear sector at current prices was also estimated as follows: firstly, in order to estimate the trend in production at current values, the variation in the index of physical volume was adjusted by the variation in the wholesale price index for the footwear sector, drawn up by the National Institute of Statistics and Censuses; secondly, in order to calculate the gross value of production for each of the years considered, the above estimated variations were applied to the value for the year 1993 according to the final figures in the 1994 National Economic Census.

5.259 According to Argentina, the CNCE also made its own estimate of the volume of domestic production of footwear on the basis of data from the CIC, replies to the questionnaires, the verification undertaken and official data, as follows:

- (a) Firstly, it calculated a base value for 1995, partly using the figures provided by the CIC in its request for that year, which were broken down according to the size of the enterprise. The figures for total production of large enterprises provided by the CIC were adjusted in accordance with those obtained by the CNCE in the replies to the questionnaires for the same group of enterprises (the CIC figures showed total footwear production by large enterprises to be around 25 million pairs in 1995 whereas the figure for the CNCE was 21.5 million). According to the CIC figures, production by large enterprises accounted for 39 per cent of the domestic production in 1995. It should be noted that the CNCE obtained information from all the large enterprises, almost all of which was verified.
- (2) The above trend in the index of volume in physical terms in the sector was then applied to this base value in order to obtain a series for the whole period analysed. The production data included exports and production for third parties (contracts and joint ventures).

5.260 Argentina submits that Tables 12 to 17<sup>277</sup> of the Technical Report show production in terms of absolute value, not only in percentages of variation. Production is also expressed in absolute terms in the tables on apparent consumption, except that in this case exports have been deducted, leaving only the share of production actually intended for the domestic market.

5.261 Argentina contends that in order to substantiate the alleged inconsistency in the information used by the CNCE, the European Communities presented a study carried out by the CEP, *Centro de Estudios de la Producción* (Centre for Production Studies), which forms part of the Department of Industry, Trade and Mines, whose purpose is to carry out studies, analyses and investigations on economic and trade matters. In this study, the CEP provided information on footwear concerning the "manufacture of footwear with the exception of vulcanised rubber or moulded plastic footwear (INDEC, Rev.2, Code 324) and the manufacture of footwear and its parts (INDEC, Rev. 3, Code 192)" although this information does not correspond to the product investigated. Argentina argues that the CEP report does not cover the same area as the investigation conducted by the CNCE, so that its conclusions cannot be compared with the CNCE's Technical Report and it cannot be claimed that there are contradictions. Argentina also argues that if the CEP information is accepted as valid, the European Communities also should accept other information in the same CEP report that contradicts other EC arguments.

5.262 Argentina notes that the CNCE determined that production in the footwear sector decreased and that its contribution to the GDP also fell, thereby indicating a deterioration in conditions in the sector compared with production in the economy as a whole.<sup>278</sup> In 1995 as well, the footwear sector's contribution to the GDP fell<sup>279</sup>, showing a relative deterioration in this industry in comparison with

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<sup>277</sup> Exhibit ARG-3, Technical Report, Tables 12 to 16.

<sup>278</sup> Exhibit ARG-3, Technical Report, Table 6, sheet 5431.

<sup>279</sup> Exhibit ARG-3, Technical Report, Table 7, sheet 5432.

industry in general.<sup>280</sup> The Department also noted the same wide disparity in the impact of footwear imports. It confirmed the CNCE's determination in its final report regarding the decrease in domestic production and compared the trend in GDP in the footwear sector with that of the manufacturing sector in general, noting a significant difference. Whereas GDP in the manufacturing sector rose by 11 per cent between 1991 and 1995, GDP in the footwear sector fell by almost 16 per cent.<sup>281</sup> The European Communities was wrong in stating that production did not decrease (Table 14, sheet 5599) in 1996. In fact, it declined by a further 2 per cent in 1996 in large and medium enterprises.<sup>282</sup> According to Argentina, the Panel cannot fail to recognise the significance, in the context of the strong GDP growth that was taking place in Argentina during the investigation period, of the particularly sharp decline in one sector.<sup>283</sup>

5.263 Argentina submits that an industry, analysed in its own context<sup>284</sup> and in relation to the manufacturing industries as a whole<sup>285</sup>, that shows significant negative trends, is an industry which is suffering "serious injury" within the meaning of the Agreement on Safeguards.

5.264 Argentina submits that according to the information provided in the replies to the questionnaires, which was checked and classified in the Technical Report, there was no increase in productivity in physical terms (pairs per employee) for the large and medium enterprises taken as a whole during the period 1991 to 1995. On the contrary, information on total production and employment shows a drop in productivity over this period. However, change in product mix towards more complex products means that it takes more time and work to make each pair, and this fits in with the investment made by the sector during the period analysed. Argentina observes that this could lead to confusion when reading the figures, which may give the impression that there had been increases in productivity because of the higher value of the product.

5.265 Argentina asserts that to examine the utilisation of installed capacity, installed capacity must be considered on the one hand, and production on the other. As regards installed capacity, it appears from the replies to the questionnaires that there was an increase for all of the enterprises concerned. During the period, the companies had made investments with a view to increasing their production capacity. However, there was also a drop due to the declared closure of enterprises, and the level that had been reached at the beginning of the period under investigation was never recovered. The information provided by the Chamber of the Footwear Industry (CIC) showed that 997 companies had closed between 1991 and 1995, and the average total utilisation of capacity had declined to 53 per cent of installed capacity. On the basis of the analysis of the installed capacity and production figures, the CNCE reached the conclusion that the utilisation of installed capacity had decreased by approximately 15 per cent in the period 1991-1995.<sup>286</sup> In any case, Argentina states, the European Communities confuses the evolution of installed production capacity with the utilisation of that capacity.<sup>287</sup>

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<sup>280</sup> Exhibit ARG-3, Technical Report, Table 6, sheet 5431 and chart 7, sheet 5434, and chart 8, sheet 5435.

<sup>281</sup> Exhibit ARG-5, Report on the final conclusions of the investigation in question, 28 August 1997, pages 4 and 13, hereinafter referred to as the Final Report of the Department.

<sup>282</sup> Exhibit ARG-3, Technical Report, Table 14, sheet 5599; see also Exhibit ARG-2, Act No. 338, page 16.

<sup>283</sup> Exhibit ARG-22, Graph 5.

<sup>284</sup> See, in general, Exhibit ARG-2, Act No. 338, and Exhibit ARG-5, Final Report of the Under-Secretary.

<sup>285</sup> See comparative data, Exhibit ARG-2, Act No. 338, page 15; and Exhibit ARG-3, CNCE Technical Report, Table 6, sheet 5431 and Chart No. 8, sheet 5435, and Exhibit ARG-5, page 13 (sheet 1788).

<sup>286</sup> Exhibit ARG-6.

<sup>287</sup> In response to a **Panel** question regarding as to where in the record the analysis of capacity could be found, Argentina stated that the table that it had presented on capacity utilization in answer to an earlier Panel

5.266 According to Argentina, the fact that the industry made investments is not necessarily an indication of its health. The investments in question were necessary in order to ensure the capacity to compete and survive in the new market conditions that the industry now faced. The companies that made the investments assumed the costs and risks of having to contract debts in order to attain that objective.

5.267 With respect to profits and losses, Argentina submits that as regards the assets and financial position of the enterprises, the profit indexes for the industry as a whole showed a significant decline during that period. Among the enterprises producing footwear exclusively, the net margin in relation to sales fell by 18 per cent to about 6 per cent at the end of the period. The trend was the same in the multi-product enterprises where there was a confirmed decline, down to a level of 1 per cent at the end of the period under analysis. In other words, the profits and losses situation reflects the impossibility of covering a minimum level of operating costs representing the "break-even point". According to Argentina, this factor played a particularly important role in determining injury caused by a steady increase in imports over time, or in other words, the injury suffered when a certain level of imports was reached.<sup>288</sup> Argentina notes that from 1993, the level of indebtedness increased, causing the capacity of enterprises to generate their own funds to cover interest payments to decrease, with a negative impact on the resulting net profits (in a context in which it was increasingly impossible to pass on cost increases). Starting in 1993, the level of the industry's indebtedness increased and the capacity to meet financial costs declined, resulting in a decrease in net profits.

5.268 Argentina contends that the CNCE examined the data on profitability<sup>289</sup> and confirmed significant decreases in liquidity and profitability as well as substantial increases in the level of indebtedness. One of the factors that accounted for this level of indebtedness was the imperative need for enterprises to invest in response to the changes that were taking place in the Argentine footwear market. Since there were multi-product enterprises, the CNCE examined the state and the profitability trends of all of the enterprises in the footwear sector, the "multi-product" enterprises on the one hand, and the enterprises producing footwear exclusively on the other. In the enterprises in general and in the multi-product enterprises in particular, the CNCE examined the so-called "specific accounts" reflecting the status of footwear production and sales.

5.269 According to Argentina, the table below clearly shows the downward profitability trend during the period 1991-1995, both in terms of the profitability indicators themselves and in relation to their assets and sales.<sup>290</sup>

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question was based on information gathered through the questionnaires and set forth in Exhibit ARG-3, the Technical Report, and more specifically that it is the quotient between total production of medium and large enterprises (Table 17 of Annex III to the Technical Report), and installed capacity (Table 43 of Annex III of the Technical Report). Argentina further indicates that the information concerning installed production capacity and its utilization as well as the analysis and conclusions relating thereto can be found in folios 5459 to 5463 of the Technical Report and page 20 of Act 338 (Exhibit ARG-2).

<sup>288</sup> Exhibit ARG-3, Technical Report, Table XII, Chart 23, sheets 5467 and 5472.

<sup>289</sup> Exhibit ARG-3, Technical Report Sheet 5467.

<sup>290</sup> *Idem*.

Profitability indexes

	All enterprises	Enterprises producing footwear only
	% change 1991/1995	% change 1991/1995
Gross profitability	-15.6	-44

A complete listing of the indices examined is found at Technical Report (Exhibit ARG-3) folio 5467.

5.270 Argentina states that the data on the so-called "specific accounts" comes from the replies to the questionnaires sent to the enterprises requesting specific information on the financial activities connected with the production of footwear.<sup>291</sup> The analysis of this information can be found in Section VI.9 of the final ruling of the CNCE and in the Technical Report.<sup>292</sup>

5.271 According to Argentina, the CNCE proceeded on the basis of a definition of a break-even point consisting of the value corresponding to the point at which average income on sales covers the variable costs of the pairs sold and the fixed costs of the pairs produced. The fact that the ratio between sales and the break-even point falls abruptly from positive figures in 1991 (19.8 per cent) to strongly negative figures in 1995 and 1996 (-34.16 per cent and -24.51 per cent respectively) implies a clear negative impact on prices, with the consequent injury clearly evidenced by the industry.

5.272 With respect to profitability indexes, Argentina asserts that the financial indexes of Table 8 of the Notification are taken from the financial statements and balance sheets presented by large and medium-sized enterprises and represent on average 85 per cent of the total production of those enterprises, and in the small enterprises, as well, 89 per cent showed decreases in profits during the period under investigation. The methodology used is the methodology accepted under the rules of financial analysis corresponding to international standard systems.

5.273 Argentina further notes the European Communities' persistent tendency to consider any figure that confirms the existence of the factors required to verify injury to be unrepresentative. Thus, the European Communities describes as unrepresentative the sample of large and medium enterprises that served as a basis for the CNCE's analysis of this factor.<sup>293</sup> In Argentina's view, the European Communities proceeds on the basis of the erroneous idea that the number of enterprises *per se* is a determining element in defining representativity. For the investigating authority, representativity must be determined on the basis of the relative weight of the enterprises in the productive sector under analysis. The sample of six large and six medium enterprises, in the view of the CNCE, was a representative sample of the sector.

5.274 Concerning employment, according to Argentina, all of the available figures clearly point to an increase in unemployment in the footwear production sector in Argentina. Argentina asserts that the CIC submission, which was subsequently backed by the submission of the union representing workers in the footwear sector during the public hearing, points to a loss of approximately 14,000 jobs, with total employment in the sector dropping from 42,000 to 28,000. In its submission following the public hearing, the chamber grouping together the importers includes a table concerning "workers employed" between 1991 and 1995 (source: INDEC) for the sector "footwear manufacture excluding rubber footwear", showing a decrease of 20.96 per cent.<sup>294</sup> Argentina argues that, in view of this figure (21 per cent) provided by the importers themselves (against whom the safeguard

<sup>291</sup> Ten multi-product enterprises, small and medium, supplied specific information on footwear, so that more than 80 per cent of the overall production of these enterprises was covered.

<sup>292</sup> Exhibit ARG-3, Technical Report, Table 12 and Chart 23, sheets 5472/73.

<sup>293</sup> *Infra*, para. 5.345.

<sup>294</sup> Sheet 5074 of the file.

measure was taken), it is difficult to understand the EC claim<sup>295</sup> that the employment figure remained stable during the investigation period. The debate concerning the official or unofficial nature of the figures provided does not alter the unemployment figure provided by the importers in the investigation file. Argentina states that according to the replies to the questionnaires, from 1991 to 1995 the number of employees decreased by 5.2 per cent in the large enterprises and 4.6 per cent in the medium-sized enterprises<sup>296</sup>, while 52 per cent of the small enterprises claimed that their level of employment had declined. Argentina emphasises that there was clearly a loss of jobs which, in the Argentine context, was sufficiently significant to be considered an indicator of injury within the context of the factors analysed.<sup>297</sup>

5.275 Argentina wishes to clear up the confusion emerging from the EC argument<sup>298</sup> that Argentina first notified a minor drop in employment (4.6 per cent) to the WTO and subsequently argued in reply to a Panel question that the drop in employment verified by the CNCE was 13 per cent. Firstly, the figures of 4.6 per cent and 13 per cent refer to two different things. The former represents the decline in employment for all of the enterprises that supplied information for both years, while the latter refers to unemployment or loss of jobs in production corresponding, as stated in the explanatory note to table 47 of the Technical Report,<sup>299</sup> to the same group of enterprises for both years.<sup>300</sup> At the same time, Argentina maintains, it is important to stress that in the Commission's evaluation of this parameter used for the determination of injury, the figure of 13 per cent mentioned in the reply to a Panel question represents the threshold at which the CNCE considered that this requirement of the Agreement had been met. Thus, the evaluation of unemployment in the footwear industry made by the importers themselves, i.e. CAPCICA,<sup>301</sup> pointing to a figure of 21 per cent, serves as evidence of the difference between the threshold conservatively verified by the Commission and the unemployment estimate submitted by the importers.

(ii) *Additional factors analysed by Argentina*

Argument of the European Communities

5.276 Regarding domestic prices: the European Communities submits that this is often one of the more significant indicators to establish whether a given sector has suffered damage as a consequence of imports. Indeed, if confronted with sharply increased imports (for example as a result of significantly lower prices of imports) an expected reaction of the domestic industry would be to significantly lower domestic prices, with the likely result of harm for the domestic industry. Official statistics however clearly show<sup>302</sup> that industrial footwear prices registered no reduction whatsoever during the 1991-1995 period.

5.277 The European Communities states that, according to the Argentine analysis, domestic prices as a whole *increased* during the 1991-1996 period. Indeed, there is no indication of price depression. Argentina explained<sup>303</sup> that "the increases in wholesale price indices were due, not to an attempt by the industry to increase its profit margins, but to increased costs and the difficulty which the indices have in reflecting the trend in the face of significant changes in supply and demand (quality, new

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<sup>295</sup> *Infra*, para. 5.286.

<sup>296</sup> Act 338, Exhibit ARG-2, page 21.

<sup>297</sup> Argentina's response to questioning by the Panel. Argentina states that the information derived from the questionnaires in absolute values reflects the values of the representative sample of enterprises, and the downward trends were determined on that basis. The information from the questionnaires confirmed the downward trend for employment during that period.

<sup>298</sup> *Supra*, para. 5.239

<sup>299</sup> Exhibit ARG-3.

<sup>300</sup> Argentina refers to G3 of Annex ARG-22.

<sup>301</sup> Exhibit ARG-21, Sheets 5073 to 5075.

<sup>302</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 19.

<sup>303</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 19.

products, etc), such as occurred during the period 1991-1995." Despite these figures, Argentina found it necessary to impose safeguard measures.

5.278 Regarding investment, the European Communities observes that Argentina noted<sup>304</sup> that the domestic industry had made substantive efforts to improving productivity. The industry had invested 251.75 million pesos between 1990 and 1995, mainly to improve the equipment, the infrastructure and the training of human resources: "[t]he sector had been fitted out with the latest generation of new installations with a view to improving its competitive profile by closing inefficient plants and developing new product lines. Thus, these investments had made possible the transformation of the sector with improvements in productivity and product quality to enable it to compete on the domestic and foreign markets."

5.279 Regarding total investments by large enterprises, the European Communities states that Argentina noted<sup>305</sup> that 168 million pesos had been invested during the 1991-1995 period. In addition, during 1996 the large enterprises invested another 17 million pesos. The European Communities submits that these positive statements hardly support an impression of an industry which suffers a "significant overall impairment". On the contrary, an increase in investment evidences an optimistic industry, planning for a better future. In particular, large enterprises would not have invested an additional 17 million pesos in 1996 if they had been suffering serious injury.

#### Argument of Argentina

5.280 Regarding the European Communities' comments on the price analysis conducted during the investigation, Argentina states that it relied on detailed information on price indexes (wholesale and retail) compiled by INDEC and on information obtained from replies to the specific questionnaires circulated during the investigation. According to Argentina, the CNCE concluded that this indicator was not significant to the analysis in that the "footwear" sector covered a product range which did not remain invariable over time. On the contrary, the very nature of the sector implied constant changes of models, qualities, specific applications etc., which not only qualified the application of this parameter to the use of price indexes but also made it impossible to construct a series on the basis of the replies to the questionnaires.

5.281 Regarding investment, Argentina points out that the Agreement on Safeguards does not in fact require an analysis of investments. In Argentina's view, the European Communities is mistaken in saying that the investments made in the sector were an indicator of "good health". The change in consumer patterns made it necessary to change the domestic product mix in order to adapt to the new conditions. This called for investments, particularly in machinery, equipment and tooling, both domestic and imported, that were independent from the economic results and represented the only way of remaining in the market

(d) Finding of serious injury

(i) *Argument of the European Communities*

5.282 The European Communities submits that Argentina's analysis with regard to the condition of the domestic industry cannot support a finding of serious injury or threat thereof. According to the European Communities, a review of the investigation demonstrates that the Argentine industry was not suffering serious injury caused by imports. The errors and omissions present in Argentina's injury analysis are such as to render meaningless any conclusion on the existence of injury as whether or not it was serious.

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<sup>304</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 18.

<sup>305</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 18.

5.283 The European Communities maintains that according to the wording of Article 2.1 of the Agreement on Safeguards, Argentina, before imposing a safeguard measure, is required to demonstrate "serious injury", which is explained by Article 4.1(a) and Article 4.1(c) of the Agreement on Safeguards as meaning "a significant overall impairment in the position of the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products."

5.284 The European Communities stresses that the standard of "serious injury" is -- by definition -- higher than the standard of "material injury", which is used in anti-dumping investigations. The factors mentioned in Article 4.2(a) of the Agreement on Safeguards must clearly point at a significant overall impairment in the position of the domestic industry. The European Communities submits that even material injury was not established and that serious injury could not be shown given the limitations of the investigation undertaken.

5.285 The European Communities submits that Argentina, on the basis of its investigation, could not have established that its industry had suffered "serious injury". Equally, the European Communities submits that Argentina did not establish a "threat of serious injury". Instead, Argentina has shown nothing more than a long-term trend of a consolidation of the industry. The European Communities submits therefore that Argentina violated Article 2.1, Article 4.2(a) and Article 4.2(c) of the Agreement on Safeguards.

5.286 The European Communities submits that Argentina's analysis of the injury factors set out in Article 4.2 (a) of the Agreement on Safeguards does not warrant a determination that "serious injury" was present in 1996 because:

- (a) imports (whether including or excluding MERCOSUR) did not increase, neither in absolute nor in relative terms;
- (b) sales have remained stable;
- (c) production figures show a net increase (7.7 per cent in value over the 1991-1995 period), even excluding exports;
- (d) productivity increased by almost 30 per cent over the 1991-1996 period;
- (e) installed capacity increased significantly over the period and insufficient information was given regarding capacity utilisation;
- (f) evidence regarding profits and losses was not representative; and
- (g) official employment figures were not provided. Estimates showed that employment remained stable.

5.287 With respect to Argentina's replies to questions concerning the injury analysis, the European Communities submits that, first, production figures (measured at current prices) had not declined, but instead had increased by 7.7 per cent during the investigated period. Argentina had discarded this positive figure by stating that "the industry shifted production to higher-unit-value products".<sup>306</sup> The European Communities notes that Argentina in its reply to a Panel question on this issue is unable to explain how this move toward the higher-valued products could be seen as indicative of injury to the

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<sup>306</sup> Document G/SG/N/8/ARG/1, Exhibit EC-16, at page 14, 38.



domestic footwear industry. In addition, Argentina is unable to indicate, when asked to do so by the Panel, where in the record of the investigation this development is addressed.<sup>307</sup>

5.288 In addition, the European Communities notes an inherent contradiction in the second part of the reply to a certain Panel question. While Argentina had previously stated<sup>308</sup> that Argentine producers moved toward higher-valued products while imports moved to the lower end, Argentina now seems to argue the opposite, when it states that DIEMs in fact "caused the value of imports to grow" and "change the composition of those imports towards footwear with a higher unit value".

5.289 Second, in reply to a Panel question, Argentina submits a new definition of what in its view should be considered an industry suffering "serious injury", thereby side-stepping the definition set out in Article 4.1(a) of the Agreement on Safeguards. According to Argentina:

"an industry, analysed in its own context and in relation to the manufacturing industries as a whole, that shows significant negative trends, is an industry which is suffering 'serious injury' within the meaning of the Agreement on Safeguards."

The European Communities cannot accept this interpretation of the term "serious injury". WTO Members are not in a position unilaterally to change the agreed text of an international agreement. The Agreement on Safeguards does not contain a requirement to compare the situation of the relevant industry with the "manufacturing industries as a whole"<sup>309</sup>, nor does the Agreement on Safeguards contain the criterion "significant negative trends." The European Communities therefore requests the Panel to disregard these new criteria put forward by Argentina.

5.290 Third, the European Communities notes that Argentina seems not to have provided the statistics for a number of categories, as required by specific questioning by the Panel, including certain figures for production, productivity, capacity utilisation, profits and losses and employment.

(ii) *Argument of Argentina*

5.291 Argentina considers that all of the requirements of Article 4 of the Agreement on Safeguards for the determination of serious injury have been fulfilled. Argentina maintains that the analysis conducted by the CNCE reached the following conclusions:

- (a) Imports in terms of c.i.f. values increased 157 per cent between 1991 and 1995.
- (b) Imports in terms of number of pairs increased 70 per cent during the period under investigation.
- (c) The increase was faster between 1991 and 1993, and the subsequent decline was the result of the application of the DIEMs.

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<sup>307</sup> Instead, Argentina refers to "ARG-3" and "ARG-1" in general. Its answer to a question (*supra*, note 275) by the **European Communities** is not convincing either. Argentina states that "it should be made clear that in analysing the injury, an entire set of factors were considered and not only one single factor. This higher production value in current pesos must be analysed in the context of that set of factors." In other words, Argentina admits that, as far as the production factor is concerned, no "serious injury" contribution could be determined. This is exactly what the **European Communities** had claimed.

<sup>308</sup> Document G/SG/N/8/ARG/1, Exhibit EC-16, at page 14, 38.

<sup>309</sup> Such comparison could lead to the absurd result of having to allow a safeguard measure, even though the situation of the relevant industry had remained unchanged. For example, if the "whole of the manufacturing industries" would have an exceptionally good year, the "trend" for the industry in question could be "significantly negative" in comparison.

- (d) The domestic market share of imports rose from 10 per cent in 1991 to 21 per cent in 1995, with greater penetration in the sports shoe segment.
- (e) The volume of output declined, both overall and specifically for the domestic market.
- (f) The difference in the performance of production at current prices was accounted for by the changes in product mix in the industry.
- (g) The lost output was replaced by imports, especially cheap imports.
- (h) Employment decreased, inventories rose and the economic and financial situation of the enterprises deteriorated as a result of the displacement of domestic production<sup>310</sup>.

5.292 Similarly, Argentina maintains that it analysed the situation in the footwear industry individually and relative to the situation in the manufacturing industry as a whole, and demonstrated that there was *serious injury* as reflected in a significant increase in idle capacity, a high and committed level of financial indebtedness and a significant drop in the levels of production and employment. According to Argentina, this demonstration of *serious injury* clearly complies with the requirements laid down in the Agreement on Safeguards and presents an industry which is far from being "vigorous" as the European Communities claims.

5.293 Argentina submits that the letter of the Agreement does not require that all of the factors considered should be negative - it only requires that the factors should be considered and analysed ("the competent authorities shall evaluate")<sup>311</sup>, as the CNCE did in this case. The CNCE considered, in its determination of injury, the interaction between rapid growth of imports and a decline in economic and financial performance of an industry leading directly to the replacement of the domestic industry with imports.<sup>312</sup>

5.294 Argentina submits that in its determination of serious injury, the CNCE took account of all relevant factors of an objective and quantifiable nature having a bearing on the situation of the Argentine footwear industry. Not only did it consider the factors mentioned in Article 4.2(a) but also a series of industrial indicators, the analysis of which is set forth in the Commission document in Sections VI (State of the Domestic Industry), VII (Performance of Imports), VIII (Apparent Consumption and Market Shares), X (Conditions of Competition between the Domestic Product and Imports) and XIII (Final Opinions of the Commission), and in Sections VII, VIII and IX of the Technical Report. The CNCE analysed the evolution of these factors during the period under investigation, from 1991 to 1995, and its conclusions were backed by the information for 1996.

5.295 Argentina contends that the CNCE determined that the absolute and relative increases in imports during the period under investigation caused serious injury and justified the safeguard measures. This determination was based on the statement, hardly surprising, that imports would have continued their objectively observed growth trend if the specific duties had not been applied.

5.296 In Argentina's view, the European Communities is totally mistaken in its view that it is impossible to determine serious injury when a restrictive measure is in force. For one thing, the European Communities has used this practice.<sup>313</sup> But also, Argentina was not applying any restrictive

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<sup>310</sup> Exhibit ARG-21, sheets 5350-5352.

<sup>311</sup> Article 4.2(a).

<sup>312</sup> Exhibit ARG-2, Act No. 338, pages 47 and 48.

<sup>313</sup> The **European Communities** reached a similar conclusion concerning the effects of a quota applied during the review period for certain types of footwear that were under a safeguards investigation in 1988. "The growth of imports from Taiwan has, however, been restrained by the national quota applied during this period to some of the types of footwear which were the subject of the inquiry." (Commission Regulation (EEC) No. 1857/88, Section C)

measure, but a simple tariff expressed in the form of specific duties, whose legitimacy cannot be questioned, being outside the terms of reference of this Panel. It is important to point out that the WTO Panel that examined the specific duties on textiles stated that a distinction should be drawn between the specific duty regime in force during a previous stage and the preliminary safeguard measure imposed in February 1997. The Panel rejected the request by the United States to review the WTO compatibility of the specific duties on footwear, claiming that the measures had been revoked (WT/DS56/R, 25 November 1997, paragraph 6.15).

(e) Threat of "serious injury"

(i) *Argument of the European Communities*

5.297 According to the European Communities, Argentina based its conclusions<sup>314</sup> on a prognosis of what would happen if the specific duties imposed, in excess of bound rates, were removed. However, the European Communities argues, such an approach is not supported by WTO rules: Article 4.2(a) of the Agreement on Safeguards clearly requires that an investigation be based on "all relevant factors of an objective and quantifiable nature", not on a hypothetical analysis.

5.298 The European Communities observes that Argentina noted<sup>315</sup> that it had found the existence of a "threat of injury". However, the European Communities asserts that Article 4.1(b) of the Agreement on Safeguards clearly states that such a threat can only be found if the serious injury is "clearly imminent". Also, it states that such determination "shall be based on facts and not merely allegation, conjecture or remote possibility." In the EC view, no such analysis was carried out. Furthermore, a "threat of serious injury" cannot be based on the effect of the removal of WTO-illegal minimum specific duties. In effect, Argentina has invoked a threat of serious injury based on a *threat* of increased imports. According to the European Communities, Argentina, in its reply to a Panel question, confirms that its determination of the threat of serious injury was based on the anticipated rise in imports. It states<sup>316</sup> that "if these duties were removed, imports could be expected to resume the same upward trend" and "[f]urther increases could only aggravate the serious injury". (emphasis added). This is not allowed by the Agreement on Safeguards. Thus, the European Communities alleges, the existence of a threat of serious injury was neither existent nor established.

(ii) *Argument of Argentina*

5.299 According to Argentina, thorough examination of the Technical Report in Act No. 338 reveals a complete and integrated analysis of each relevant factor. Part XIII, Section 2 sets forth the grounds for the Commission's determination that the increase in imports caused serious injury and that there was an additional threat of injury. The Commission found that national output had decreased, that domestic sales had decreased even more and that the production had been replaced by imports during the increases and decreases experienced by the market in general (1995).

5.300 Argentina submits that in spite of the effects of the DIEMs, which managed to keep imports below 1993 levels, the effects of imports continued to cause serious injury.<sup>317</sup> These harmful effects were shown by the reduction in employment, the increase in inventories throughout the industry and the deterioration in the economic and financial situation of the enterprises concerned.<sup>318</sup>

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<sup>314</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 38.

<sup>315</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 38.

<sup>316</sup> Argentina's reply to Panel questioning, *infra*, note 338.

<sup>317</sup> Exhibit ARG-2, Act No. 338, pages 47 and 48.

<sup>318</sup> Exhibit ARG-2, Act 338, sheets 5322, 5325 and 5326 and 5851.

5.301 Argentina argues that the European Communities is mistaken in concluding that import levels no longer caused injury following the application of the DIEMs. Argentina contends that the Commission simply found that imports had decreased to a certain extent, but its complete analysis confirms (paragraph 98) that the injury continued and that there was an additional threat of injury in the absence of the DIEMs which were to be withdrawn.

5.302 Finally, Argentina continues, the GDP data confirms a clear interrelationship between the increase in imports and the decrease in the industry's GDP. Thus, in analysing the causal link, the CNCE points out that: "the Commission ... concluded that increased imports are causing serious injury to the domestic industry and that there is a further threat of injury in the absence of safeguard measures."<sup>319</sup>

5.303 In response to questioning by the Panel concerning the legal basis in the Agreement on Safeguards for its apparent view that it is possible to find actual injury and threat simultaneously, Argentina asserted that the notifications to the WTO indicate the circumstances in which the threat of serious injury was determined, a threat which grew during the investigation and led to the decision to apply the definitive measure. Argentina states that once these first requirements contained in Article 4.1(b) were verified Argentina was in a position to apply a provisional measure under Article 6. At the same time, there were other elements, including the DIEMs applied to footwear which were revoked by Resolution 225/97 and which were never found to be inconsistent with the WTO Agreement. The elimination of the DIEMs led to a change of circumstances which affected the situation of the domestic market and of the domestic industry. Consequently, it had influence in the determination of injury. In fact, the injury was exacerbated during the period from February to September 1997 which led to the establishment of a definitive measure different from the provisional measure initially applied. In any case, Argentina does not consider that the threat of injury, which was used in connection with the application of the provisional measure, is relevant when by definition, what the Panel is called upon to decide is the conformity of the definitive measure. According to Argentina, WTO precedent is restrictive as regards panel rulings on measures that are not definitive. Finally, Argentina stated, the concepts of threat of injury in Article 4.1(b) of the Agreement and serious injury in Article 4.1(a) of the Agreement are not mutually exclusive, nor does the Agreement lay down any time-sequence as regards the verification by the investigating authority of the existence of either one separately or both together, simultaneously or separately.

**4. Article 2.1 and Article 4.2(b) of the Agreement on Safeguards -- Alleged failure to demonstrate a "causal link" between increased imports and serious injury or threat of serious injury**

(a) Causal link – First sentence of Article 4.2(b)

(i) *Argument of the European Communities*

5.304 The European Communities asserts that even if serious injury or a threat thereof did exist and imports were increasing, Argentina still has the obligation, when taking a safeguard measure, to demonstrate that there is a causal link between any proven increased imports (and the conditions under which they are imported) and the serious injury or the threat thereof. Other factors causing injury to the domestic industry at the same time should not be attributed to imports. Furthermore, the European Communities submits, just as for injury, Article 4.2(c) requires that a "detailed analysis" and a "demonstration of the relevance of the factors examined" be given and published for the establishment of a causal link under the first sentence of Article 4.2(b). The European Communities submits that Argentina has failed to establish a causal link between increased imports of footwear and serious injury or the threat thereof. By taking the safeguard measure at issue, Argentina violated Article 2.1, Article 4.2(b) and Article 4.2(c) of the Agreement on Safeguards.

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<sup>319</sup> Exhibit ARG-2, Act No. 338, page 47.

5.305 The European Communities contends that in the present case, Argentina was obliged to demonstrate *on the basis of objective evidence*<sup>320</sup> that a causal link between the two conditions existed. Such a causal link can not be demonstrated, as Argentina has done, by making simple references to the investigated factors. Argentina has merely listed the results of the analysis of increased imports and serious injury without giving any *reasoned opinion* on how the two factors were linked<sup>321</sup>. This is not sufficient to satisfy the requirement that, on the basis of objective evidence, the existence of a link is demonstrated.

5.306 The European Communities maintains that there is no *specific proof* mentioned in the Agreement on Safeguards which constitutes *objective evidence* that a link exists. In the present case, Argentina has provided two reasons why it believed this link was present. First, it has stated that "owing to their lower price, imports exerted strong pressure on industry, significantly affecting results" and second, it has said that "the decline in output was replaced by imports, essentially cheap imports." Neither statement in the European Communities' view is based on "objective evidence" of the existence of a causal link, as required by the first sentence of Article 4:2(c) Agreement on Safeguards.

5.307 The European Communities asserts that the reasons given by Argentina for finding a causal link are set out in paragraph 2 of its notification of 1 September 1997 (Exhibit EC-17). According to the European Communities, it is worth quoting this paragraph in full as it demonstrates the utter inadequacy of Argentina's reasoning on the causal link between the alleged increased imports and the alleged injury. It reads as follows:

"By Act No. 338 of 12 June 1997, the National Foreign Trade Commission (CNCE), the body responsible for making the determination in question, concluded that "increased imports are causing serious injury to the domestic industry and that there is a further threat of injury in the absence of safeguard measures".

This determination is based on a number of preceding conclusions which are summarised below, with an indication in each case of the corresponding section of the National Foreign Trade Council's Act:

(a) Imports: the increase in imports, both in absolute terms and relative to domestic production, is of the kind covered by the Agreement on Safeguards. There is an increase such as to cause significant impairment to the domestic industry. This conclusion is based on the following facts:

- The c.i.f. value of imports increased by 157 per cent between 1991 and 1995, and by 163 per cent between 1991 and 1996 (Section VII.1).

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<sup>320</sup> The **European Communities** asserts that Argentina, *infra*, para. 5.353, seeks to restate its view that the requirement to establish a causal link can be met by the investigating authority surveying the evidence and concluding that there is a causal link. In response, the **European Communities** argues that it never said that the term "objective evidence" was unclear and does not agree that it requires a "precise definition". For the **European Communities** it is quite clear what is meant by "objective evidence". However, the **European Communities** argues that the point is that the failure to establish a causal link is not so much a question of there not being "objective evidence" in the CNCE report (that is a matter which according to the **European Communities** was discussed in examining the injury factors) but that there is no real statement of the *reasons* for concluding the existence of a causal link. The CNCE report (the relevant part of which, the **European Communities** repeats, was quoted and analysed by it in its First Written Submission) simply juxtaposes alleged increased imports and injury factors and contains no explanation or reasons. The **European Communities** mentions elsewhere the kind of reasoning that in its view could have satisfied the requirements of the Safeguard Agreement.

<sup>321</sup> See Panel Report, *Brazil - Milk Powder*, at paragraph 286.

- The quantity of pairs imported increased by 70 per cent between 1991 and 1995, and by 52 per cent between 1991 and 1996 (Section VII.1).
- The domestic market share of imports also increased substantially. For all types of footwear, the share of imports in apparent consumption, measured at current prices (pesos), increased from 10 per cent in 1991 to 27 per cent in 1995, while measured in numbers of pairs it rose from 12 per cent in 1991 to 21 per cent in 1995, reaching a peak of 25 per cent in 1997 (Section VIII.1 and VIII.2).
- The growth of imports was greater in the performance sports shoe segment than for other types of footwear (Section VIII.2).
- Owing to their lower price, imports exerted strong pressure on the industry, significantly affecting results (Section XIII.1).
- The international picture shows a strong growth of imports of footwear and major restructuring processes, together with many cases of government action to restrict such imports (Section IX).

Thus, an absolute growth of imports between 1991 and 1995 has been found to exist. Furthermore, this increase has also taken place relative to domestic production and the domestic market.

(b) Effects of imports on domestic production: increased imports are causing serious injury to the domestic industry and there is a further threat of injury in the absence of safeguard measures, according to the factual findings of the investigation:

- During the period under investigation, the volume of output declined both overall and for the domestic market. The decline was greater for the sample of enterprises surveyed than for estimated total output based on macroeconomic statistics (Section VI.1).
- The performance of production measured at current prices was different from that of production in physical terms, showing a growth of 7.7 per cent between 1991 and 1995. This is accounted for by the fact that the industry shifted production to higher unit-value products in response to demand factors and the need to compete in the international footwear trade within the constraints of the Argentine rules of the game (Section VI.1).
- This decline in output was replaced by imports, essentially cheap imports, as the investigation shows a growth in apparent consumption, both in current pesos and in pairs, with the sole exception of the latter estimate for the year 1995, which showed a significant drop due to the economic recession (Section XIII.1).
- Production for the domestic market declined proportionally more than total output, as exports increased significantly over the period 1991-1995 (Section VI.2 and VI.3).
- Although the effect of the special minimum import duties (DIEMs) began in 1994 and increased between 1995 and 1996, the industry's condition has deteriorated, with a demonstrated reduction in employment, rising inventories

and worsening of the economic and financial situation of companies (Section VI).<sup>322</sup>

5.308 The European Communities argues that examination of this statement reveals that most of these claimed explanations of causal link are in reality simple references to the existence of "increased imports" and "injury". The European Communities submits that the simple juxtaposition of statements about increased imports and injury are clearly not sufficient to satisfy the requirements of Article 4.2 of the Agreement on Safeguards. As a previous panel once had the opportunity to note, it is not sufficient for an authority to refer to the evidence it considered and state its conclusion. "It was incumbent upon the investigating authorities to provide a reasoned opinion explaining how such facts and arguments had led to their finding."<sup>323</sup>

5.309 The European Communities maintains that in the above purported explanation of causal link, there are only two instances where the situation of the domestic industry is referred to in any relationship with imports at all. The first is in paragraph (a), fifth indent: "Owing to their lower price, imports exerted strong pressure on the industry, significantly affecting results". The second is in paragraph (b), third indent: "This decline in output was replaced by imports, essentially cheap imports." The European Communities states that it will demonstrate that these statements are inaccurate and can in no way be considered as justifying a finding of causal link. Both statements in the EC view are not based on "objective evidence" of the existence of a causal link, as required by the first sentence of Article 4.2(c) of the Agreement on Safeguards.

5.310 First, the European Communities argues, the statement that "owing to their lower price, imports exerted strong pressure on the industry" is wholly unsupported by any evidence. One of the errors committed by Argentina in this case was that there was no analysis of the prices of imports (although there was some consideration of the prices of *domestic* production). There is therefore no basis to even start to examine whether import prices might have "exerted pressure" on the domestic industry.

5.311 Secondly, the European Communities considers the claim that imports were displacing domestic production ("this decline in output was replaced by imports, essentially cheap imports"). The European Communities will show that there are two complementary errors here. First, output is not shown to have declined and, second, imports did not increase. There can therefore be no question of replacement of domestic production by imports. (A further error is the reference to "essentially cheap imports"; that has already been discussed above -- there is no analysis of the price of imports).

5.312 The European Communities submits that output did not decline between 1991 and 1996 on any basis. Argentina could only pretend to find a decline by ignoring 1996. Also, the figures it used related only to production for the domestic market. Exports and subcontracting are ignored although they keep the production lines running, employ workers, and generate revenue. Also, even according to Argentina's own way of calculating production (disregarding exports and subcontracting), there was an increase in exports in *value* terms even from 1991 to 1995.

5.313 The European Communities states that the complementary error was that imports (whether from non-MERCOSUR countries only or from all countries) had not increased (see section V.C.2(a)(i)), a manifest error. The European Communities states that it submitted material to the

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<sup>322</sup> See Exhibit EC-17, document G/SG/N/10/ARG/1, G/SG/N/11/ARG/1 of 15 September 1997, at page 2-3. The same reasons are also given in the injury notification of 25 July 1997, Exhibit EC-16, document G/SG/N/8/ARG/1, at pages 37 and 38. See also Exhibit EC-20, document G/SG/N/10/ARG/1/Suppl. 1, G/SG/N/11/ARG/1, Suppl. 1, at page 2.

<sup>323</sup> See Panel Report, *Brazil – Milk Powder*, at paragraph 286.

Panel which show how imports decreased both absolutely and as a proportion of domestic production at the end of the investigation period.<sup>324</sup>

5.314 The European Communities argues that in addition to not providing proper arguments for a causal link, Argentina's analysis is also inadequate in a number of other respects by failing to consider relevant factors which would have demonstrated an absence of causal link or demonstrated that other causes were to blame for the developments observed. According to the European Communities, these include:

- The failure to carry out a price analysis of imports which could have shed light on the market relationship between imports and domestic production and thus on causal link;
- The structural changes in production patterns occurring in Argentina which were being brought about deliberately through the operation of the Industrial Specialisation Law<sup>325</sup>. The operation of this law, which allows producers to import at much reduced duty rates (including exemption from minimum specific duties) on condition that they export equivalent quantities) must have had a number of effects on the various injury factors examined by Argentina but no allowance is made for this;
- There is another reason why imports could not have been causing any injury which might have existed. Argentina found serious injury despite the presence of the 1993 minimum specific duties, which were in many cases identical to the 1997 safeguard measures. Thus, even if -- despite the imposition of such duties on imports -- the alleged serious injury had occurred, it can be concluded that the injury could not have been caused by imports. This would indicate that any "serious injury" would necessarily have been caused by other factors (e.g. macro-economic difficulties). No explanation is given by Argentina of how imports could have caused injury in spite of the existence of the minimum specific duties

5.315 Accordingly, the European Communities asserts, it is impossible to argue that imports replaced domestic production.

5.316 In response to Argentina's query about what test the European Communities would suggest concerning a causal link,<sup>326</sup> the European Communities underlines its position that it is not possible to establish a causal link by comparing the beginning of a 5 year period with the end and noting an increase of overall imports and some change in the condition of the domestic industry – causation is a process and to reveal a causal link it is necessary to examine and explain what has happened during this period. This is especially so when a lot else is happening in that period. A major move towards liberalisation of imports in the Argentine economy, an economic crisis (the tequila effect) and the introduction of a system of minimum specific duties on imports of footwear.

5.317 According to the European Communities, it is in particular not possible to claim, after surveying the evidence, to have established a causal link between imports and injury when no detailed examination has been made of the relationship between *the prices* of imported goods and those of the domestic goods. Price is the means by which products compete with each other and thus the way in which imports could be found in a safeguard investigation to be taking market share from domestic production. Argentina was asked to give more detail on the examination that it did carry out an investigation of prices. The European Communities asserts that Argentina's answer to Panel questioning<sup>327</sup> merely confirms the inadequacy of its data since Argentina only presents average

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<sup>324</sup> EC Graphs 1 and 2.

<sup>325</sup> The operation of this scheme is explained in notification G/SCM/N/3ARG/Suppl. 1, of 28 July 1997. Exhibit EC-31.

<sup>326</sup> *Infra*, para. 5.357.

<sup>327</sup> *Supra*, paras. 5.191-5.194.



figures for the whole industry and thus ignores the fact that imported shoes were of different types and that the kinds of shoes produced by the domestic industry and imports varied over the period. Thus, according to the European Communities, the additional elements which would have been needed are *inter alia* an examination of: the *trend* in imports over the period; the *changes* that took place over that period (i.e. the *other factors* that might have been involved); a *price analysis* showing how the prices of imported products affected the prices of domestic products; and a *reasoned explanation* of how the trend in imports caused the injury and the *other factors* did not. This is precisely what Argentina has failed to do, for the simple reason, the European Communities submits, that there was no causal link between imports and the alleged serious injury.

5.318 The European Communities also takes issue with Argentina's invocation of threat of injury. Perhaps because it realised the weakness of the arguments on serious injury, Argentina adds to the preface to its list of alleged causality indicators in paragraph (b) of the text quoted above: "there is a further threat of injury in the absence of safeguard measures". However, nothing in the reasoning contained in the above quotation points to a causal link between increased imports and a threat of serious injury. Article 4.1(b) provides that "a determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility". The European Communities submits that the same applies *a fortiori* to the establishment of a causal link.

(ii) *Argument of Argentina*

5.319 Argentina points out that the Argentine authorities, the CNCE, the Under-Secretary of Trade and the Secretary of Trade, in their respective reports to the Ministry of the Economy, clearly established on the basis of substantiated facts and sufficient evidence that the increase in footwear imports has been the cause of the serious injury to the industry. For reference purposes, the complete file of the investigation and its findings were included in the notification to the Committee on Safeguards.

5.320 Argentina argues that the CNCE based its findings on the interaction between a rapid growth in imports and a decline in the performance of the industry which led directly to the replacement of domestic production with imports. Argentina refers to Chart 7<sup>328</sup> which, it asserts, clearly shows that until 1992, there was no marked change in overall production, but that the increase in imports from 1991 to 1993 caused a decline in production and a corresponding decline in GDP, while the GDP for overall production actually increased.<sup>329</sup> Argentina refers to Chart 8 which, it submits, shows that the GDP of the economy in general was growing in real terms while the GDP for footwear was decreasing sharply, even more sharply for footwear than for production or for the economy as a whole in 1995.<sup>330</sup>

5.321 According to Argentina, thorough examination of the Technical Report in Act No. 338 reveals a complete and integrated analysis of each relevant factor. Part XIII, Section 2 sets forth the grounds for the Commission's determination that the increase in imports caused serious injury and that there was an additional threat of injury. The Commission found that domestic production had decreased, that domestic sales had decreased even more and that the production had been replaced by imports during the increases and decreases experienced by the market in general (1995).

5.322 Argentina submits that in spite of the effects of the DIEMs, which managed to keep imports below 1993 levels, the effects of imports continued to cause serious injury.<sup>331</sup> These harmful effects

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<sup>328</sup> Exhibit ARG-3, Technical Report, Chart 7, sheet 5434.

<sup>329</sup> Exhibit ARG-3, Technical Report, Table 6, sheet 5431 and Final Report of the Under-Secretary of Foreign Trade, Exhibit ARG-5, page 13.

<sup>330</sup> Exhibit ARG-3, Technical Report, Chart 8, sheet 5435.

<sup>331</sup> Exhibit ARG-3, Act No. 338, pages 47 and 48.

were shown by the reduction in employment, the increase in inventories throughout the industry and the deterioration in the economic and financial situation of the enterprises concerned.<sup>332</sup>

5.323 Argentina argues that the European Communities is mistaken in concluding that import levels no longer caused injury following the application of the DIEMs. Argentina contends that the Commission simply found that imports had decreased to a certain extent, but its complete analysis confirms (paragraph 98) that the injury continued and that there was an additional threat of injury in the absence of the DIEMs which were to be withdrawn.

5.324 Finally, Argentina continues, the GDP data confirms a clear interrelationship between the increase in imports and the decrease in the industry's GDP. Thus, in analysing the causal link, the CNCE points out that: "the Commission ... concluded that increased imports are causing serious injury to the domestic industry and that there is a further threat of injury in the absence of safeguard measures."<sup>333</sup>

5.325 Thus, in Argentina's view, it is unacceptable for the European Communities to argue that Argentina did not relate its determination of injury to the state of the industry. Once it had finished compiling and analysing the information on, for example, the financial position in the industry, the CNCE determined that there has been a considerable decline. Moreover, Argentina concluded that this financial position was brought about by an increase in inventories and a decline in the industry's sales (break-even point), which were replaced by imports.

5.326 According to Argentina, the European Communities cannot expect to find the conclusions of an investigation covering 10,000 sheets compressed into one sheet. The investigation contains all of the elements required to prove that there has been an increase in imports and to demonstrate the effects of that increase on the footwear-producing industry. Thus, it fulfils the requirement of Article 4.2(b) concerning the causal link between the increase in imports and the serious injury or threat thereof.

5.327 In short, Argentina contends, the CNCE simply proceeded according to Article 4.2(a) and analysed the factors. Subsequently, when those factors made it possible to prove the existence of serious injury, the CNCE and the other authorities drew up their reports emphasising the rational link between each one of them and the state of the footwear industry (as required by Article 4.2(b)). For example, increased imports = increased unemployment; increased imports = increased share in the domestic market; decline in domestic production = increased share of imports in apparent consumption while total apparent consumption remains stable, and so on.

5.328 Argentina notes that the European Communities attacks these links established by the Argentine authorities on the grounds that they are not sufficiently substantiated. However, the European Communities itself, in arguing that Argentina failed to consider "other factors", is simply making assertions without any empirical backing. It states, for example, that Argentina failed to carry out a price analysis (when in fact, it did) and concludes that such an analysis would have shown that other causes were responsible for the mentioned facts. In other words, Argentina analyses the factors, concludes that there is injury and demonstrates the causal link, while the European Communities asserts that there are "other causes" besides the increase in imports that cast doubt on the causal link – but it does not say what they are so that Argentina can refute its claims. For example, Argentina queries how the EC statement that it is "the macroeconomic difficulties" that are causing injury to the domestic industry can be refuted.<sup>334</sup>

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<sup>332</sup> Exhibit ARG-21, Act No. 338, sheets 5322, 5325 and 5326 and 5851.

<sup>333</sup> Exhibit ARG-3, Act No. 338, page 47.

<sup>334</sup> *Infra*, para. 5.359.

(iii) *Response by the European Communities*

The arguments in Argentina's first written submission

5.329 The European Communities states that the response in Argentina's first written submission is brief and unconvincing. It does not address most of the European Communities' arguments and seeks to obfuscate the issues with references to the Technical Report and in particular to its conclusions and by complaining that the European Communities "cannot expect to find the conclusions of an investigation covering 10 000 pages compressed into one page." The European Communities emphasises that it is not in conformity with the Agreement on Safeguards for an investigating authority to survey a mass of documents and *simply conclude* that there is a causal link. It needs to state its reasons and these reasons need to make sense. The European Communities considers that Argentina has confirmed the European Communities' conclusion that no causal link was established by not replying to the EC criticisms of the statement.

5.330 Regarding the issue of causality, the European Communities notes that Argentina first chooses to refer to Chart 7 to the CNCE Report at page 5434 which is supposed to clearly show that "until 1992, there was no marked change in overall production, but that the increase in imports from 1991 to 1993 caused a decline in production and a corresponding decline in GDP, while the GDP for overall production actually increased". Chart 8 to the same Report at page 5435 is called in aid to show GDP for footwear was "declining sharply" in 1995. According to the European Communities, this "clear evidence" consists of:

- Chart 7 comparing footwear production with total manufacturing production, a procedure rendered necessary by the fact that footwear production is constantly increasing. There is a relative decline in footwear production between 1992 and 1993, which according to the European Communities disappears when the scale is shifted. The European Communities questions whether this shows an industry in distress, and whether a one-off not-repeated relative decline in 1992-3 justifies safeguard measures in 1997;
- Chart 8, which in fact is the same as Chart 7 but with the upper line inflated by including total domestic product at "market prices". For the European Communities, it is difficult to see how this can provide any more information than Chart 7.

5.331 The European Communities questions in any event how this demonstrates a causal link with increased imports particularly since the mechanism by which any increased imports could adversely affect domestic industry, that is the interaction between the prices of imported and domestic goods has not been analysed.

5.332 The European Communities notes that Argentina then refers the Panel to Part XIII Section 2 of the Technical Report in Act N° 338 as setting out the grounds of causality. For the European Communities, this adds nothing new. The Technical Report in Act N° 338 is reproduced in Argentina's injury notification and the European Communities attached it as Exhibit EC-16. The causality grounds are at page 38 and referred to footnote 67 to the European Communities' first written submission. It is included in the more complete list of "grounds of causality" which the European Communities quoted *in extenso* and analysed above<sup>335</sup>. The European Communities asserts that Argentina fails to mention that the European Communities considered this list or of course to reply to the European Communities' criticisms of it.

5.333 The European Communities argues that, as if accepting that there is nothing to demonstrate causality, Argentina next resorts to explaining that :

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<sup>335</sup> *Supra*, para. 5.307.

“In spite of the effects of the DIEMs, which managed to keep imports below 1993 levels, the effects of imports continued to cause serious injury” (paragraph 152) and

“The European Community is mistaken in concluding that import levels no longer caused injury following the application of the DIEMs. The Commission simply found that imports had decreased to a certain extent, but its complete analysis confirms (paragraph 98) that the injury continued and that there was an additional threat of injury in the absence of the DIEMs which were to be withdrawn” (paragraph 153).

The European Communities contends that this does not make sense. The Agreement on Safeguards requires that increased imports cause serious injury. It is impossible to conclude, while respecting the Agreement on Safeguards, that there was nevertheless serious injury caused by increased imports despite the fact that import decreased. For the European Communities, if it is true that there is injury, this simply proves that there must be some cause other than increased imports.

5.334 In the EC view, Argentina’s real argument seems to be that there would have been increased imports if it had not been for the DIEMs and this would then have been the cause of injury or a threat of injury. The European Communities underlines that this is not allowed by the Agreement on Safeguards. A threat of injury must be due to an *actual increase in imports*. Safeguard measures cannot be justified by a *threat of increased imports*. The European Communities argues that there is nothing much else in this section on causality except that Argentina repeats that the investigation was long and complicated, that the CNCE concluded that there was a causal link, and that the European Communities has merely mentioned other possible factors and not demonstrated that they caused injury. The European Communities contends that there *was no* serious injury. The European Communities did not seek to show that other factors caused the alleged serious injury, which in any case this is not its role. It pointed to the *absence* of analysis of certain factors, which Argentina has not refuted. The European Communities points as an example to the issue of the Industrial Specialisation Law, which promotes imports and exports by Argentine producers.

#### Argentina's answers to the Panel’s questions

5.335 The European Communities states that the Panel first asked Argentina<sup>336</sup> to specify where in its investigation report it considered the relevance of each injury factor, in particular for its determination of causation. Argentina responded by explaining the structure of Act 338 and the CNCE Report, and confirming that the "causality decision" could be found in the subsection entitled "final conclusions" at the end of Act 338 (pages 47 - 48) which "determines the causal relationship". The European Communities points out that the subsection of Act 338 to which Argentina is referring corresponds to pages 37 and 38 of the injury notification of 25 July 1997 in Exhibit EC-16 and is reproduced in paragraph 2 of the notification of 1 September 1997 (Exhibit EC-17) which was quoted *in extenso* by the European Communities<sup>337</sup>. It is this reasoning (or rather list of considerations) which the European Communities analysed and demonstrated that it did not contain a justification of a causal link.

5.336 The European Communities argues that the Panel also invited Argentina to provide the missing causality analysis by asking the following questions at the first meeting:

“20. Argentina makes the argument that the repeal of the DIEMs would have caused a threat of serious injury to the domestic industry unless provisional safeguards were taken. Is it Argentina's argument that removal of the DIEMs necessarily would have led to an increase in imports, and that such increase necessarily would have caused serious injury? If

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<sup>336</sup>Question 19 by the Panel to Argentina, at page 9.

<sup>337</sup>*Supra*, para. 5.307.

so, how can Argentina reconcile this argument with the language in Article 4.1(b) regarding the determination of a threat of serious injury (i.e., to be “based on facts and not merely on allegation, conjecture or remote possibility”). If not, how did Argentina establish and substantiate the link between the two? Where in the record of the investigation can this analysis be found?

21. Assuming that an investigating authority finds (i) absolute or relative increases in imports and (ii) serious injury to the domestic industry, what else in specific terms must it establish in order to demonstrate a causal link between the two? Please indicate how Argentina addressed this point in its investigation on footwear, and indicate where in the record this analysis can be found.”

5.337 According to the European Communities, the first of these questions (n° 20), is asking Argentina to justify its “threat of injury” argument. The European Communities notes that Argentina responds by saying that the removal of the DIEMs would cause imports to increase and that “the level of imports at the moment at which the preliminary measure was imposed was causing actual serious injury. Further increases could only aggravate the serious injury.”<sup>338</sup> The European Communities asserts that it therefore confirms that the threat of injury was based on an *anticipated* rise in imports due to the removal of the DIEMs. The European Communities maintains its position that the clear text of the Agreement on Safeguards requires that a threat of injury must be due to an *actual increase in imports* and cannot be justified by a *threat of increased imports*, however probable such an increase might appear.

5.338 The European Communities asserts that it therefore only remains to examine Argentina’s allegation that at the time the provisional measure was imposed the level of imports was causing actual serious injury. According to the European Communities, this is what the Panel’s second question on causality (n° 21) invited Argentina to justify.

5.339 The European Communities contends that Argentina bases its reply to Question 21 on a series of findings and pointing to the places in the investigation record where they are allegedly to be found. The European Communities quotes the passage in its entirety and then states that it will demonstrate that they in no way contribute to establishing a relevant causal link:

“Argentina specifically determined that imports had increased<sup>15</sup> at the expense of national production<sup>16</sup> causing sales to fall<sup>17</sup> and inventories and associated costs to increase. The decline in local production as well as the costs associated with increased inventories had been directly responsible for a decrease in the profitability of the industry<sup>18</sup> and resulted in an inability to service debts<sup>19</sup> or to remain above the “break-even point”.<sup>20</sup> This examination is described in detail in the determinations concerning the factors in Parts VI.1 to VI.9 of Act No. 338.”

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<sup>15</sup> Page 47 of Act No. 338 indicates absolute increases in volume and value terms for the periods 1991-1995 and 1991-1996. In terms of value, the penetration of imports increased for all types of footwear during the investigation period.

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<sup>338</sup> **Argentina’s** full response to by the Panel was as follows: “Argentina analysed import trends before and after the DIEMs. The CNCE reached the conclusion, hardly surprising, that the application of import duties in the form of specific duties had caused a decrease in imports, and that if these duties were removed, imports could be expected to resume the same upwards trend. The level of imports at the moment at which the preliminary measure was imposed was causing actual serious injury. Further increases could only aggravate the serious injury. These are not hypothetical conclusions, but conclusions based on import trends observed during the analysis period and the injury they caused during that period. In determining the threat of injury, the authorities always have to anticipate future events. However, when future trends are projected on the basis of objective evidence of imports in the recent past, the results can never be considered as mere speculation or conjecture.”

<sup>16</sup> The market share of imports also increased during the period, from 12 per cent in terms of volume in 1991 to 21 per cent in 1995 (see Act No. 338, page 47, and the CNCE Technical Report, sheet 5504 and Table 21a, sheet 5505). According to the CNCE's estimates, domestic production in the sector fell by 15 per cent between 1991 and 1995, while the replies to the questionnaires from the medium and large enterprises showed a sharper decrease of 24 per cent during the same period (see Act No. 338, pages 16 to 17).

<sup>17</sup> The CNCE determined, on the basis of the replies to the questionnaires for large and medium enterprises, that sales fell by 27 per cent in volume and 15 per cent in value between 1991 and 1995 (see Act 338, page 18).

<sup>18</sup> The data on profitability showed consistent weakness during the period. Profitability indexes showed significant decreases in all cases (including operating profits, sales profitability, earning power of assets and yield of capital) (Act No. 338, page 24, and Annex 4, Table 8, sheet 5467 of the CNCE Technical Report).

<sup>19</sup> See CNCE Technical Report, sheet 5467 and sheet 5665, Annex 4, Table 9, which shows a decline in the ability to cover interest costs from 1993-1995, with a recovery in 1996 to a level still below the 1993 level.

<sup>20</sup> The small increase in the value of production during this period clearly did not generate enough income to cover costs. The decrease in sales profits narrowed the gap between sales revenue and the "turning-point". In 1995 and 1996, sales revenue was below the "turning-point" and enterprises were unable to cover their fixed and variable costs and convert sales into profits (Act No. 338, page 24, and CNCE Technical Report, sheet 5471, and Table 12 and Chart 23, sheets 5472 and 5473.)]

The allegation that the increase in imports was "at the expense of national production"

5.340 The European Communities states that the issue of the increase in imports has been sufficiently discussed in connection with the EC arguments under Article 2.1. It is only necessary to recall that the increase was established by including MERCOSUR imports, comparing the beginning of the investigation period to the end and ignoring the *trend* at the end of the period. In any event, the European Communities continues, there is no justification for the suggestion that domestic production was suffering. Argentine statistics clearly demonstrate that the domestic industry was capturing an ever increasing share of the domestic market during the end of the period.<sup>339</sup> In 1996, the domestic industry occupied 72 per cent of the market.<sup>340</sup>

The allegation that the increase in imports was causing sales to fall

5.341 The European Communities notes that the authority for the allegation that the increase in imports was causing sales to fall is said in footnote 17 to be at page 18 of Act 338. This corresponds to page 16 of notification G/SG/N/8/ARG/1 in Exhibit EC-16. The referenced text is simply a description of the sales of part of the Argentine industry and contains no analysis of any causal link to imports.

5.342 The European Communities in particular draws the attention of the Panel to the fact that the figures provided on sales related to *the domestic sales of own-production footwear by the sample group of large and medium enterprises*. Of course, the European Communities asserts, such a fall could also be explained by sales of non-own-production footwear or even by loss of sales to companies outside the sample group of large and medium enterprises. Indeed, two paragraphs further it is revealed that 34 per cent of the responding small enterprises said that their sales had *increased*. Furthermore, and as a further example of the lack of representativity of the figures on sales and of the inconsistent approach followed during the investigation, it should be noted that the CNCE specifically stated that "companies exclusively producing footwear experienced, in general, increases in the amount of their sales and profits."<sup>341</sup>

<sup>339</sup> The EC refers to EC Graph-2.

<sup>340</sup> Exhibit EC-16, at page 26.

<sup>341</sup> Exhibit ARG-3, Technical Report, sheet 5471.

5.343 According to the European Communities, the unreliable and unrepresentative character of these sales figures is also clear when they are contrasted with the positive developments on production which increased by 7.7 per cent over the reference period. If there was a drastic fall in sales by the Argentine industry over the reference period as suggested by Argentina, the European Communities asks how can production have increased by 7.7 per cent and where in the determination can any explanation of this contradiction be found?

The allegation that decline in production and increase in costs had been directly responsible for a decrease in profitability

5.344 The European Communities argues that no authority is given for the allegation in Argentina's answer to Question 21 that imports caused inventories and associated costs to increase. The only authority which is given is in footnote 18 which is supposed to support the allegation that this increase in inventories and associated costs (together with the alleged decline in production) was "directly responsible for a decrease in profitability". The relevant reference in footnote 18 is to Act No. 338, page 24, and Annex 4, Table 8, sheet 5467 of the CNCE Technical Report. The European Communities invites the Panel to refer to page 24 of Act No. 338 (which corresponds to page 20 of notification G/SG/N/8/ARG/1 in Exhibit EC-16). It should first be noted that this page is purely descriptive and contains no causality analysis. It is also important to note Argentina's admission in its notification (and Act 338) that:

"out of the total number of cases for which the corresponding accounting information could be obtained (six "large" and six "medium" enterprises) a subset consisting of firms devoted exclusively to footwear production was split off. Although this subset does not constitute a representative sample of the sector, since it consists of only four "medium" enterprises, it was taken as a guide since the trend is not affected by other activities (imports or the production of other goods).<sup>342</sup>"

5.345 In other words, the European Communities contends, this description of the financial position cannot be taken as representative even of large and medium companies. The underlying data referred to (Annex 4, Table 8, sheet 5467 of the CNCE Technical Report – Exhibit ARG-3) does in any event not show an industry showing "serious injury."

The allegation that decline in production and increase in costs resulted in an inability to service debts or remain above "break-even point"

5.346 The European Communities submits that the authority given for the allegation that the decline in production and increase in costs resulted in an inability to service debts is given in footnote 19 which refers to sheet 5467 and sheet 5665, Annex 4, Table 9 of the CNCE Technical Report, which is said to show "a decline in the ability to cover interest costs from 1993-1995, with a recovery in 1996 to a level still below the 1993 level."

5.347 The European Communities argues that the authority given for the allegation that the decline in production and increase in costs resulted in an inability to *remain above "break-even point"* is given in footnote 20 which refers to page 24 of Act No. 338 and sheet 5471, and Table 12 and Chart 23, sheets 5472 and 5473 of the CNCE Technical Report.

5.348 The European Communities has already noted that page 24 of Act No. 338 corresponds to page 20 of notification G/SG/N/8/ARG/1 in Exhibit EC-16 which is describing the situation of an unrepresentative subset of large and medium-sized companies.

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<sup>342</sup> See first paragraph of Section 9 on page 20 of Notification G/SG/N/8/ARG/1 in Exhibit EC-16.

The rest of Argentina's answer to Question n° 21

5.349 The European Communities asserts that Argentina draws on the above findings and a quotation from the conclusion to its injury analysis to make an unwarranted statement that "the decline in profitability took place simultaneously and was directly related to the increase in imports". According to the European Communities, the simultaneity and direct relationship are nowhere shown by Argentina. In fact, the Argentine import statistics illustrated in EC Graph 1 demonstrate the opposite, since it shows imports declining since 1993.

5.350 The European Communities notes that the only authority quoted by Argentina in its answer to support its claim is the determinations concerning GDP trends. This is a reference back to the Charts 7 and 8 discussed at the first meeting of the Panel. It is true that there was a *relative* decline of the footwear industry in Argentina between 1992 and 1993 but this did not continue as reference to these Charts shows.

5.351 In any event, the European Communities challenges Argentina's assertion that a relative decline in relation to the manufacturing industries as a whole can be considered "serious injury" within the meaning of the Agreement on Safeguards. Finally, the European Communities agrees that the Agreement on Safeguards does not require that all of the factors considered in Article 4:2(a) need be negative. The Agreement does however require that the relevant injury factors be shown to be *caused by* increased imports and that Argentina has not done.

(iv) *Rebuttal by Argentina*

5.352 Argentina notes that the concept of causality calls for the establishment of a link between the growth of imports and the existence of the injury factors relevant to the situation of the industry. The CNCE based its conclusion that there was such a causal link on the interaction between the rapid growth of imports and the deteriorating performance of the footwear industry which led to the replacement of domestic production by imports.

5.353 Argentina submits that if it disaggregates the components of this relationship, it cannot but agree with the European Communities concerning the absence, in the Agreement on Safeguards, of a precise definition of "objective evidence".<sup>343</sup> According to Argentina, the European Communities cannot argue that Argentina has not used objective evidence as a basis for the analysis of the factors set forth in Article 4.2(a). The objective evidence which, in Argentina's view, proved the existence of a causal link is contained in the file of the investigation.

5.354 Argentina notes that the European Communities quotes the Panel Report on "*Brazil – Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community*"<sup>344</sup>, explaining that it is not enough for the competent authority to recite facts. Argentina certainly does not dispute this assertion. The panel's conclusions in the mentioned Report refer strictly to Administrative Order 297 of the Government of Brazil which imposed a provisional measure (qualitatively different, surely, from a definitive measure). In this case, the definitive measure was based not only on the CNCE Technical Report, which provided the justification for Part XIII of Act No. 338 (final opinions of the CNCE) setting forth in detail the reasons and methods behind the CNCE's evaluation of the evidence (pages 46-48), but also on the evaluation contained in the Final Report of the Department of Foreign Trade, which forms part of the reasoned substantiation of the causal link.

5.355 Moreover, Argentina continues, to draw an even clearer distinction between the "*Brazil – Powdered Milk*" case and the safeguard measure applied by Argentina, paragraph 292 of the above-

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<sup>343</sup> *Supra*, para. 5.306.

<sup>344</sup> SCM/179.



mentioned Report specifies that the disputed Brazilian order (which established provisional duties) does not include a definition of such elements as domestic industry, and the panel could not therefore discern how the authorities had examined the volume of the imports, the price effects of the imports and the consequent impact of the imports on the domestic industry. In this case, Argentina argues, the CNCE clearly defined the domestic industry, analysed the volume of imports both in absolute and relative terms, defined the so-called "break-even point" (negative impact on prices) and confirmed the specific effect of imports on the industry.

5.356 Argentina argues that if all of the elements by which Argentina substantiated the causal link on which its decision was based are borne in mind, i.e. the CNCE Technical Report, the notification of injury submitted to the Committee in accordance with the agreed format, and Resolution 987/97 itself, published in the Official Bulletin, the two cases appear to be quite different from each other.

5.357 Argentina notes that the investigating authority assessed the pressure being exercised by imports and their replacement of domestic production. Argentina questions, if this does not constitute a reasoned development of the causal link, what in the way of Cartesian logic might be more convincing to the European Communities, or when could the legal standard be met?

(b) Other factors – Second sentence of Article 4.2(b)

(i) *Argument of the European Communities*

5.358 The European Communities states that the second sentence of Article 4.2(b) of the Agreement on Safeguards requires an investigating authority to eliminate the effect of other factors than the increased imports in its causality analysis and provides that injury caused by these "shall not be attributed to increased imports." Thus, even if it were correct for Argentina to assess the volume of imports by including MERCOSUR imports and it had been able to show a causal link between these overall increased imports and serious injury (*quod non*), the European Communities submits that it would still have been necessary for Argentina to examine whether and to what extent the MERCOSUR imports had been causing injury and to have allowed for this effect so as not to attribute this injury to the increased imports subject to the proceeding.

5.359 The European Communities argues that another factor which could have been contributing to any injury which might have existed and which should have been allowed for under the second sentence of Article 4.2(b), is the general economic situation. According to the European Communities, Argentina admits the relevance of macroeconomic difficulties where it refers in the "Final Opinions" of the injury analysis<sup>345</sup> to the fact that "[i]t was not foreseen that the pressure exerted on the market by imports would develop so rapidly in a period in which the national economy was experiencing macroeconomic difficulties". Furthermore, Argentina also refers to the so-called "tequila effect" as being relevant<sup>346</sup>.

5.360 Furthermore, the European Communities notes that Argentina acknowledges in Resolution 226/97<sup>347</sup>, imposing provisional safeguard measures, that

"the technical report of the above-named body [the National Foreign Trade Commission] considered the *difficult situation* of the domestic industry and the financial situation of the main footwear companies,

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<sup>345</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 38. See also Exhibit EC-17, document G/SG/N/10/ARG/1, G/SG/N/11/ARG/1, at page 3, where Argentina notes a significant drop in consumption in 1995, due to the "economic recession".

<sup>346</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 14.

<sup>347</sup> See Exhibit EC-12, document G/SG/N/6/ARG/1/Suppl. 1, G/SG/N/6/ARG/1/Suppl. 1, at page 2.

whose debts are increasing as domestic sales fall, and this *partly as a result of import trends*". (emphasis added)

5.361 The European Communities argues that although Resolution 226/97 concerns the imposition of provisional safeguard measures, this statement is equally relevant for definitive safeguard measures, since it relates to the alleged existence of a "difficult situation" which would be partly the result of import trends. Whilst such an alleged "difficult situation" (i.e. the alleged existence of serious injury) is also the basis for the imposition of definitive safeguard measures, Argentina did not, in its investigation, analyse the other factors which it had admitted existed and could be the possible cause of such situation.

5.362 With respect to the Industrial Specialisation Law, the European Communities states that Argentina says that the Industrial Specialisation Law was investigated and found to be "insignificant". The European Communities finds this difficult to believe and submits that it has searched in vain in the volumes of data produced by Argentina to determine what "insignificant" means. Why, the European Communities queries, did the investigating authority not consider the figures for imports and exports of footwear under this regime? The European Communities points out that there was no data anywhere in the voluminous reports which could help to establish what "insignificant" means. Only in its reply to the European Communities' questions did Argentina state that in 1996 the proportion of total imports benefiting from this regime was 9.7 per cent.<sup>348</sup>

5.363 The European Communities would repeat that such a figure is more significant than it appears at first sight since only Argentine manufacturers can benefit from the scheme and then only on condition that they export equivalent quantities. Imports under the Industrial Specialisation Law as a percentage of the total imports by Argentine manufacturers would be much higher.

5.364 The European Communities maintains its position that Argentina should have taken account of the impact of the Industrial Specialisation Law in its causality analysis and was wrong to dismiss it as "insignificant". First, its purpose was to increase subcontracting and would have had the effect of increasing imports, exports and sales on non-own-production footwear during the latter part of the investigation period. It therefore had an effect on many of the statistics which Argentina analysed in order to assess the impact of imports. Its effects should have been taken into account in order to validly compare the beginning of the reference period with the end. This was all the more important because it was a temporary phenomenon and was suspended in August 1996.<sup>349</sup>

5.365 With regard to indebtedness, the European Communities argues that Argentina has repeatedly claimed that its industry is suffering from indebtedness. However, and apart from the fact that the data obtained during the investigation on profit and losses are not representative, the European Communities asserts that nowhere has Argentina assessed the origin of such debts and their effect on the alleged injury of the industry. Any such debts do not appear in any event to be related to imports and would accordingly be another factor, alleged by Argentina in its injury determination, but which the Argentine authorities have failed to assess in their causality determination. In reality, any such debts would appear to be the result of the miscalculation of the Argentine producers which, according to Argentina<sup>350</sup>, significantly increased its installed capacity without due regard to the evolution of the local and foreign footwear markets.

(ii) *Argument of Argentina*

5.366 Argentina argues that it addressed the only other factor considered relevant to the injury to its industry, the so-called "tequila effect", and ensured that the injury caused by that factor was not

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<sup>348</sup> This is the figure given in Argentina's answer to EC Question 4.

<sup>349</sup> Reply of Argentina to Panel question, *infra*, note 353.

<sup>350</sup> *Supra*, para.5.273.

attributed to increased imports (as required under Article 4.2(b) of the Agreement on Safeguards). Argentina points out that during 1995, market conditions had grown worse; in any case, the CNCE specifically verified that imports were particularly damaging in the context of these depressed macroeconomic conditions.<sup>351</sup> Argentina states that it was under no obligation to evaluate any other possible factor, but to be sure that imports were the cause of the serious injury.

5.367 Argentina also maintains that it found that imports under the Industrial Specialisation Regime were insignificant and, consequently, could not cause injury.<sup>352</sup> Thus, contrary to the European Communities' claims, Argentina argues that it did evaluate this "other factor". The analysis took account of the conditions in which the imports took place in the context of the mentioned regime, and concluded that they had contributed marginally to a change in production patterns of Argentine enterprises in the footwear sector<sup>353</sup>.

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<sup>351</sup> Exhibit ARG-2, Act No. 338, page 47.

<sup>352</sup> Exhibit ARG-2, Act No. 338, page 28.

<sup>353</sup> In response to questioning by the **Panel** concerning the nature and operation of the Industrial Specialization Programme, Argentina clarified that the Industrial Specialization Programme was described in Argentina's notification to the Committee on Subsidies and Countervailing Measures on 24 July 1997.<sup>353</sup> According to Argentina, the operation of the Industrial Specialization Programme can briefly be described as consisting in granting a benefit to certain enterprises by permitting them to import goods subject to the payment of an import duty of 2 per cent over the first three years (1993-1996), subsequently increasing according to a formula contained in the regulations to Decree 2641/92 creating the Industrial Specialization Programme. The benefit is granted to enterprises which undertake to carry out exports exceeding the quantities exported in 1992 by a given amount. The enterprises in question are supplied with a certificate which they must present to the General Customs Directorate (DGA) in order to obtain the benefit. The certificate is only issued if the enterprises registered in the Industrial Specialization Programme provide a document proving that they have carried out the exports as provided for in the programme and are thus entitled to the benefits. Argentina states that these benefits were available until August 1996, when it was decided to suspend them in respect of new enterprises. Indeed, Decree 977/96 ordered this suspension as from August 1996. In any case, the programme was to be concluded in 1999. Following the suspension in August 1996, the programmes originally submitted by enterprises and approved the implementing authority remained in force. Argentina further explained that when the DIEMs were imposed, the enterprises that had been approved under the Industrial Specialization Programme wished to continue importing at the reduced duty rate of 2 per cent under the benefit. Subsequently, it was decided to limit this benefit and apply a formula for calculating import duties to be paid by enterprises benefiting from the Industrial Specialization Programme. Although continuing to receive a benefit in that they were able to pay an import duty lower than the DIEMs, the beneficiary enterprises nevertheless had to pay substantially more than the original 2 per cent. Argentina asserts that this adjustment was introduced by MEYOSP 543/95.

**5. Article 5.1 of the Agreement on Safeguards - Alleged failure to demonstrate that the safeguard measure was applied only to the extent "necessary" to prevent or remedy serious injury and facilitate "adjustment"**

(a) Argument of the European Communities

(i) "necessary"

5.368 The European Communities points out that the first sentence of Article 5.1 of the Agreement on Safeguards provides that: "A Member shall apply safeguard measures only to the extent *necessary* to prevent or remedy serious injury and to facilitate *adjustment*. [...]". The European Communities states that, for the reasons outlined, it cannot accept that a safeguard measure should have been imposed in this case. However, even if the Panel should find that Argentina's analysis of increased imports, serious injury and causation was correct, the European Communities submits that Argentina violated Article 5.1 of the Agreement on Safeguards because the measures were not necessary and the most suitable to remedy any serious injury and facilitate adjustment.

5.369 According to the European Communities, the fact that safeguard measures are "limitative and deprivational in character or tenor and impact upon Member countries and their rights or privileges and upon private persons and their acts" was clearly recognised by the Appellate Body in *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*.<sup>354</sup> In the light of that characterisation, the Appellate Body drew the conclusion that an importing Member should not be allowed "an enhanced ability to restrict the entry into its territory of goods in the exportation of which no unfair trade practice such as dumping or fraud or deception as to the origin, is alleged or proven"<sup>355</sup>, by taking safeguard action beyond the strict limits laid down in the relevant WTO provisions.

5.370 The European Communities contends that the term "necessary" in Article 5.1 indicates the "fit" between the cause of injury and any safeguard measure to be applied. In other words, Article 5:1 requires that the safeguard measure be specifically tailored to remedy the injury; the measures may neither be so broad as to overcompensate for the injury, or so narrow as to fail to remedy the injury. As stated in the last sentence of Article 5.1: "Members should choose measures most suitable for the achievements of these objectives."

5.371 Furthermore, the European Communities continues, Article XIX:1(a) GATT<sup>356</sup> requires that safeguard measures must be necessary to remedy serious injury. Article 5.1 of the Agreement on Safeguards requires that the temporary protection from foreign competition must be necessary to prevent or remedy serious injury, as well as to facilitate adjustment by the domestic industry<sup>357</sup>. The rationale for these two provisions is clearly that protection of an inefficient industry sector with no recovery prospects by means of safeguard measures should be excluded. A WTO Member seeking to take a measure under the Agreement on Safeguards must put forward convincing evidence demonstrating that such a measure is, in its scope and level, "necessary".

5.372 The European Communities submits that Argentina failed to provide any justification as to the reasons why the specific minimum duties applied were "necessary" in the present case. First, the

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<sup>354</sup> Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, 10 February 1997, at page 13.

<sup>355</sup> Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, 10 February 1997, at page 14.

<sup>356</sup> Article XIX:1(a) GATT 1994 refers, in virtually identical terms, to the "extent and for such time as may be necessary to prevent or remedy such injury".

<sup>357</sup> See also the Preamble of the Agreement on Safeguards, second last paragraph: "[r]ecognizing the importance of structural adjustment and the need to enhance rather than limit competition in international markets."

European Communities notes that Argentina imposed definitive safeguard measures on a full range of footwear products which, according to the Argentine analysis, were divided into 5 categories of footwear. Whilst Argentina failed to demonstrate the existence of serious injury or threat thereof in all and each of these sectors, it imposed safeguard measures to the products included in all five categories. Such measures clearly were not "necessary". The European Communities particularly objects to the fact that there is no justification, or even explanation, of the level of minimum specific duties imposed by Argentina. The calculation of the duties appears completely arbitrary.

5.373 Second, the European Communities argues that Argentina's analysis of the years 1991-1995 was based on imports from both MERCOSUR countries and non-MERCOSUR countries, while the safeguard measure only applies to the latter. Clearly, if the analysis would demonstrate that all imports (from both sides) had caused serious injury to the domestic industry, *quod non*, a safeguard measure limited to non-MERCOSUR imports would violate Article 5.1 of the Agreement on Safeguards, since the application of a safeguard measure to non-MERCOSUR countries *only* would place the burden of the measure beyond what was "necessary" to remedy the limited degree to which those countries had contributed to the injury. In short, Argentina would have overcompensated for the degree to which non-MERCOSUR imports had contributed to the injury.<sup>358</sup>

5.374 Finally, the European Communities submits, as noted above, the alleged serious injury occurred despite the presence of minimum specific duties of a similar, and in many cases identical, amount as those applied by the safeguard measure now in force. Since Argentina claims to have found actual serious injury during the investigation period, the minimum specific duties have therefore not been effective to remedy injury to the domestic industry. Thus, the same minimum specific duties in the form of a safeguard measure cannot be considered "necessary" in the sense of Article 5.1 of the Agreement on Safeguards.

5.375 The European Communities points out that Argentina misrepresents the EC argument as meaning that it (Argentina) should be prevented from applying safeguard measures because the European Communities considers that the industry has no hope of recovery. The first reason that this is inaccurate is that the European Communities does not consider the Argentine industry injured at all. The point the European Communities was making however is that the majority of imports and all the increase in imports is coming from MERCOSUR countries.<sup>359</sup> and that that safeguard measures which according to Argentina cannot be applied to MERCOSUR would have no hope of preventing or remedying the supposed serious injury and no prospect of facilitating adjustment. They are therefore neither necessary nor suitable. Therefore, applying the burden of the safeguard measure only on non-MERCOSUR countries places the burden of the measure beyond what was "necessary" to remedy the limited degree to which those countries had contributed to the injury. In other words, Argentina has overcompensated for the degree to which non-MERCOSUR imports had contributed to the injury.

5.376 The European Communities argues that the objective of the safeguard instrument is to provide temporary relief during a limited period of time so that a domestic industry, which has suffered

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<sup>358</sup> In response to questioning by the **Panel**, the **European Communities** stated that Article 5.1 of the Agreement on Safeguards sets out that a safeguard measure shall only be applied "to the extent necessary" to prevent or remedy the serious injury which is being caused by increasing imports. If safeguard measures are not to be applied within a regional integration area, such as a customs union, a positive injury determination may only be made if the serious injury is caused by the extra-zone imports. Thus, according to the **European Communities**, it is not a question of "overcompensation" but rather of whether increased extra-zone imports cause the serious injury to the domestic industry, and subsequently what measure, given this link, is necessary to prevent or remedy such injury. If serious injury is caused by other factors, for example intra-zone imports, no measure should be imposed on extra-zone countries.

<sup>359</sup> EC Graph-1.

"serious injury", can adjust<sup>360</sup>. This objective is incorporated in the text of Article 5.1, which speaks of "adjustment" and in the text of Article 7, which underlines the "temporary" aspect of safeguard measures. The safeguard instrument is therefore a useful tool to help an industry through a difficult period. Furthermore, as has already been noted, any alleged injury situation could not have been redressed by imposing safeguard measures solely on decreasing non-MERCOSUR imports, whilst exempting from the measure rapidly increasing MERCOSUR imports. The European Communities concurs with the United States where it claims<sup>361</sup> that Argentina violated Article 5.1 of the Agreement on Safeguards. The United States states<sup>362</sup> that "[d]espite identifying MERCOSUR as the source of the injurious imports, however, Argentina proceeded to implement a safeguard measure that was not designed to affect the imports that caused the injury, and thus could not remedy the serious injury suffered by the domestic industry nor facilitate its adjustment to import competition." These comments by the United States closely resemble what the European Communities has said in its own submission.

5.377 According to the European Communities, Argentina has, in attempting to defend its measure further demonstrated its excessive nature. The European Communities states that Argentina has explained in response to a question from the European Communities that the Undersecretary recommended that an "acceptable level of imports" would be 11 million pairs.<sup>363</sup> The European Communities notes that the 21 February 1997 notification<sup>364</sup> nowhere refers to this number, or to the Report of the Undersecretary in general, which Argentina for the first time made available, as an Annex to its first submission. The European Communities notes that the arbitrary figure of 11 million pairs is far below the average of import figures of 1993, 1994 and 1995, which were 22 million, 20 million and 15 million pairs respectively. The European Communities also notes that Argentina gave no explanation as to why the years 1990, 1991 and 1992 were chosen and not the three years which preceded the safeguard measure.

5.378 The European Communities submits that if the measure would have been introduced as a '*quantitative restriction*' in terms of the Safeguards Agreement, which it was not, such low level of imports would have clearly violated the requirement set out in Article 5.1 of this Agreement, which would have obliged Argentina "not [to] reduce the quantity of imports below the level of a recent period which shall be the average of imports of the last three representative years for which statistics are available." The notification of 21 February 1997 contains no analysis whatsoever as to why this figure was chosen by the Argentine Undersecretary and not another, higher number. Accordingly, the European Communities submits, Argentina has also violated Article 5.1 of the Agreement on Safeguards by adopting a measure designed to bring the level of imports down below the limit indicated in the second sentence of Article 5.1 in respect of quantitative restrictions.

5.379 Finally, the European Communities asserts that it is concerned by the confusion which persists in the mind of the drafters of Argentina's Submissions. For example, Argentina insists -- again -- that its

"decision to exempt Mercosur from the measure is consistent with the various international provisions by which Argentina is legally bound: with Article XXIV:8(a)(i) [...] and with Common Market Council Decision 17/96."<sup>365</sup>

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<sup>360</sup> The US, *infra*, para. 6.34, states that "the purpose of a safeguard measure is to provide the affected domestic industry with a temporary buffer from increasing imports that are causing or threatening serious injury to the industry. This 'time out' permits the beleaguered domestic industry to adjust to import competition either through technological or economic advances, or through a transition to other productive uses."

<sup>361</sup> *Infra*, para. 6.33-6.39.

<sup>362</sup> *Infra*, para. 6.36.

<sup>363</sup> *Supra*, note 259.

<sup>364</sup> Document G/SG/N/6/ARG/1, G/SG/N/7/ARG/1, Exhibit EC-11.

<sup>365</sup> Emphasis added.

5.380 The European Communities repeats -- again -- that *this* issue is not contested, neither under Article XXIV, nor under Article XIX, nor under the footnote of Article 2:1, nor under Article 2:1 itself, nor under Article 5:1 Agreement on Safeguards. The European Communities has never -- in any of its written or oral statements -- made the point that Argentina was not allowed to exempt the members of the customs union from the measure. It therefore asks the Panel to disregard Argentina's conclusions that somehow the EC's position would imply that

"Mercosur cannot constitute a customs union in the footwear sector if any of its members is required to apply a safeguard measure"

or, *a contrario*, that the EC's position would be tantamount to

"a denial of the right of members of a customs union to eliminate a restriction to trade, such as a safeguard."

5.381 The European Communities argues that these allegations have no ground in the observations made by the European Communities and they can therefore only confuse the matter and give a wrong impression of the EC's position. What the European Communities has objected to was that Argentina interpreted Article 2:1 Agreement on Safeguards (and its footnote) in such a way as to allow for a "methodology" whereby Mercosur imports would be included in a determination of "increased imports" while not applying measures to those countries. The European Communities stresses that it is this inconsistency which defines the so-called "Mercosur Question", not the exclusion of the application of the safeguard measure to members of the customs union as such.

(ii) *Adjustment plan*

5.382 According to the European Communities, Argentina submitted<sup>366</sup> only very limited and unconvincing information as to the adjustment plan which would allegedly restore the domestic industry's competitiveness while its footwear industry would be temporarily shielded from foreign competition. The adjustment plan does not appear to contain detailed plans of changes to be achieved or targets to be attained. For example, it is silent on the time-span during which the programme would be in force; on the detailed objectives to be achieved (where the sector should be after a certain period of time with regard to production, employment, quality, etc); on the public support for the plan; on the instruments to be used (subsidies, interest rate reductions, etc); on the criteria to be used; and on specific actions for SME's; etc. Furthermore, the European Communities argues, the Argentine authorities acknowledged<sup>367</sup> that they have been "unable to reach firm conclusions with regard to the plan's prospects of success". It is clear that by not giving sufficient and convincing consideration to the adjustment plan, *a fortiori*, Argentina has failed to examine how that measure could be necessary to "facilitate adjustment". Regarding the argument by Argentina that no information needs to be notified concerning an adjustment plan, the European Communities notes that this statement is contradicted by Argentina's own analysis of the safeguard instrument<sup>368</sup>, where the conditions of a "viable plan for restructuring the industry" is mentioned in addition to other requirements.

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<sup>366</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 34-36. See also Exhibit EC-20, document G/SG/N/10/ARG/1/Suppl. 1, G/SG/N/11/ARG/1/Suppl. 1, at page 2.

<sup>367</sup> See Exhibit EC-16, document G/SG/N/8/ARG/1, at page 35.

<sup>368</sup> Exhibit EC-16, at page 37.

## (b) Argument of Argentina

5.383 Argentina states that the Argentine authorities decided to apply a safeguard measure on the basis of the investigation carried out in conformity with the provisions of the Agreement on Safeguards (Articles 2 and 4) and in order to remedy the injury and facilitate adjustment of the domestic industry as provided for in Article 5. According to Argentina, the interpretation provided by the European Communities is unacceptable in that it is subjective, and fails to analyse the various elements contributed by the investigation.

5.384 Argentina begins by rejecting the European Communities' statement that a measure may not be applied in order to protect an inefficient sector with "no recovery prospects". The Agreement on Safeguards speaks only of applying a measure in order to remedy injury and to facilitate adjustment, and does not lay down any standard or provide a definition of an "inefficient" industry or one with "no recovery prospects". According to Argentina, acceptance of this EC principle would imply that any industry of a WTO Member country could be prevented from having recourse to the safeguard remedy merely on the basis of a judgement pronounced unilaterally by another Member of the Agreement. What counts is compliance with the requirements of the Agreement on Safeguards, not the subjective description of an industry by another Member which, as in this case, is in fact questioning the measure.

5.385 Secondly, Argentina maintains, the duties applied were calculated according to the criterion of maintaining a volume of imports of 11 million pairs per year. Defining a volume and applying a measure designed to achieve that result is very different from the "arbitrary calculation" that the European Communities claims the Argentine authorities applied.

5.386 Argentina argues that the only specific requirement in the Agreement on Safeguards concerning the adjustment plan for the original measure is that the measure must be necessary to facilitate adjustment (Article 5.1). Argentina notes that the Agreement on Safeguards does not require the specific elements mentioned by the European Communities to be included in the adjustment plan (for example, "objectives", "time-spans", etc.). In fact, the Agreement on Safeguards does not lay down any requirements concerning the adjustment plan. Only in the case of the extension of a measure, Article 12.2 calls for the submission of evidence that the industry concerned is adjusting. Argentina states that the Argentine Government found specifically that the industry had assumed the commitments of the adjustment plan that it had submitted, which would be supervised by the competent authority (Resolution 987/97 – G/SG/N/10, and 11/ARG/1/Suppl.1 of 10 October 1997). These commitments are set forth in detail in Part XI of Act No. 338.

5.387 According to Argentina, the problems of fulfilling the Article 5.1 objectives to remedy the injury and facilitate adjustment detected during the application of the measure do not derive from the design of the measure – i.e. from exempting MERCOSUR from the application of the measure – as claimed by the European Communities, and the United States. The decision to exempt MERCOSUR from the measure is consistent with the various international provisions by which Argentina is legally bound: with Article XXIV.8(a)(i) which authorises the dismantling of trade restrictions in the context of a customs union, and with Common Market Council Decision 17/96 by which the above obligation is implemented within MERCOSUR.

5.388 Argentina submits that to claim that the objective of Article 5.1 was doomed from the outset by the exclusion of MERCOSUR imports from the measure is tantamount to asserting either that MERCOSUR cannot constitute a customs union in the footwear sector if any of its members is required to apply a safeguard measure or, *a contrario*, to a denial of the right of members of a customs union to eliminate a restriction to trade such as a safeguard.

5.389 Argentina stresses that it does not dispute the fact that the objective of the safeguard measure is to provide relief to the domestic injury experiencing difficulties, although it does not share the EC



view that by applying the measure only to imports from outside the MERCOSUR zone it was preventing the objective of Article 5.1 from being attained. Argentina states that it is important to point out that the imports from outside the MERCOSUR zone did not decline in the period following the adoption of the safeguard measure - in fact, they increased. Even more serious, they increased in 1997 and 1998, showing that imports from outside MERCOSUR have not been penalised. Indeed, the figures for those years confirm that the original level of 11 million pairs that Argentina intended to achieve and that the European Communities questions was an acceptable level for the domestic industry to adjust to the new conditions of competition in the market.

**6. Article 12.1 and 12.2 of the Agreement on Safeguards – Alleged failure to fulfil procedural requirements**

(a) Sufficiency of notifications on findings of serious injury and causation

(i) *Argument of the European Communities*

5.390 The European Communities submits that it has explained extensively<sup>369</sup> that the information provided by Argentina in its notifications did not contain all pertinent information and evidence to demonstrate the requirements set out in Article 2.1 of the Agreement on Safeguards. Therefore, the European Communities submits that the notifications put forward by Argentina do not meet the standard set by Article 12.2 of the Agreement on Safeguards.

5.391 In response to Panel questions regarding in what respect the European Communities considered that Argentina's notifications did not contain all pertinent information and evidence, and regarding whether in the European Communities' view conclusions can be drawn from Argentina's notifications as to the consistency of the safeguard investigation with Articles 2 or 4 of the Agreement, the European Communities responded that, regarding Article 12.2 of the Agreement on Safeguards, Argentina's notifications are inadequate because they do not contain sufficient information on "increased imports", "serious injury or threat thereof" and a "causal link". In fact, a violation of Article 12.2 Agreement on Safeguards derives from a violation of Article 2 and 4 Agreement on Safeguards. The violation of Article 12.2 would have been of more significance if Argentina had attempted to justify its measure on the basis of information not contained in the notifications.

5.392 The European Communities argues that *all pertinent information* should, according to Article 12.2 of the Agreement on Safeguards be provided to the Committee on Safeguards. Such information would therefore necessarily contain all facts, investigated data and evaluations needed to establish that "increased imports", "serious injury" or the threat thereof, and a "causal link" were present before a safeguard measure was taken. It is therefore incorrect to state, as Argentina has done<sup>370</sup>, that certain information, relevant for the determination of compliance with the requirements of Article 2 and 4 Agreement on Safeguards, could be missing from the notification. The European Communities queries how, if this were allowed, WTO Members would be able to verify whether the conditions of Article 2 and 4 had been met.

5.393 According to the European Communities, Article 12.2 is clear: it mandates Argentina, and any other WTO Member that wishes to rely on the safeguard instrument, to set out clearly every bit of information which is "pertinent". This shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalisation."

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<sup>369</sup>In those parts of its first submission which discuss the Argentine investigation on "increased imports", "serious injury or threat thereof" and "causal link".

<sup>370</sup>*Infra*, para. 5.403.

Therefore, if Exhibit ARG-21, which was not notified but only now made available, were to contain such *pertinent* information, Argentina would have violated Article 12:2 Agreement on Safeguards. In this respect, the European Communities submits that the "making available for Members to consult in the Argentine Mission in Geneva", as Argentina has indicated on the cover note of its communication of 25 July 1997 (Exhibit EC-16) is not a correct "notification". A document, containing all pertinent information, should be handed over to the Committee on Safeguards, not made available for someone to consult somewhere. The European Communities has -- as the Chairman has ruled -- the opportunity to comment on document Exhibit ARG-21 and will do so, if need be, as soon as possible.

5.394 Finally, the European Communities makes some comments on the double violations of Articles 2 and 4 on the one hand and Article 12 on the other. The European Communities does not "confuse", as Argentina claims<sup>371</sup>, the substantive and notification requirements of the Agreement on Safeguards. It is clear that these requirements are separate conditions in the Agreement. However, the fact that these obligations are separate does not exclude the possibility that a violation of one of the conditions can lead to the violation of another. For example, if a WTO Member would not provide sufficient proof that all elements of the requirements in Articles 2 and 4 were fulfilled, then it automatically did not provide the evidence necessary to establish the requirements set out in Article 12. In other words, the European Communities continues, a violation of Article 12.2 *derives from* a violation of Article 2 and 4. However, the European Communities maintains, Article 12.2 also can be violated without relying on Articles 2 and 4, for example when a justified safeguard measure is taken without any (or improper) notification.

5.395 The European Communities disagrees with Argentina's claim that, if the methodology followed by the European Communities were followed "we would have to add the entire file to the notification", which could include more than 10,000 pages. The European Communities asserts that what is required by Article 12:2 Agreement on Safeguards, is that "all pertinent information is notified". This, according to the European Communities, does not require the notification of ten thousand pages. The notification to be transmitted to the Committee on Safeguards should however contain the essential information and in particular a convincing statement of the reasons which are supposed to justify the adoption of the measure.

5.396 In response to a question by Argentina, the European Communities recalls that it never required Argentina to submit the full report of 10,000 pages. The European Communities has only claimed that Argentina should comply with the requirements set out in Article 12:2 Agreement on Safeguards, including the condition that all 'pertinent' information should be provided. The European Communities reiterates that a WTO Member may not satisfy its notification requirements by informing Members that a document is available for consultations at a given place. The notification must be sufficient in itself, although of course there is no objection against indicating that additional 'non-essential' information can be consulted elsewhere

(ii) *Argument of Argentina*

5.397 Argentina states that it followed the notification format approved by the Committee, and moreover, the notification of serious injury (Act No. 338 of the CNCE) of 25 July 1997 specifically indicated that the remaining documents of the investigation ("the full text of the Report on determination of injury") would be available for Members to consult at the Argentine Mission in Geneva.

5.398 According to Argentina, the European Communities' comments confuse the formal notification requirements (which Argentina more than fulfilled) with the substantive requirements for the application of a measure set forth in Article 2.1. When it states that the information provided to the Committee did not contain all pertinent information and evidence to demonstrate the

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<sup>371</sup> *Infra*, para. 5.400.

"requirements" set out in Article 2.1, the European Communities is adding the substantive requirements under Article 2.1 to the notification obligations under Article 12, implying a double failure by Argentina to comply with the Agreement and establishing a standard of notification that the Agreement on Safeguards does not provide for.

5.399 Furthermore, Argentina argues, if Argentina were to follow the methodology proposed by the European Communities, in order to comply with the requirements of Article 12, Argentina would have to add the entire file to the notification (in this case more than 10,000 pages); in fact, Argentina has made the file available to WTO Members at its Mission in Geneva in August 1997. Argentina submits that it bears repeating that the notification obligations contained in Article 12.2 are implemented through the format that was agreed upon in the Committee on Safeguards.

5.400 Argentina points out that in its replies to certain questions by the Panel<sup>372</sup>, the European Communities seems to persist in confusing the formal requirements contained in the Agreement on Safeguards, to be implemented through the negotiated notification formats, with the substantive requirements established by the Agreement on Safeguards for applying the measure. In doing so, it is undermining the legal basis for the application of the measure by adducing that the information contained in the notifications provides insufficient justification.

5.401 To Argentina, it is important to point out that the decision to adopt the measure was based on all of the elements of objective evidence contained in the complete file of the investigation which, as Argentina pointed out in its reply to a Panel question, includes the Technical Report containing the relevant findings and conclusions. At the same time, Argentina points out, in its reply to a further question by the Panel, Argentina provided a summary of the content of that Report which, owing to its physical volume, could not be included in the notification formats agreed upon by the Committee.

5.402 Argentina contends that by concluding that the Argentine measure is inconsistent with Article 2 of the Agreement on Safeguards because the content of its notifications (which follow the appropriate format) is insufficient, the European Communities is in fact ignoring the true legal basis for the decision adopted. The decision is sustained by the objective evidence contained in the CNCE Technical Report which, together with the Report of the Department of Foreign Trade and Resolution 987/97, constitutes the "findings" and "reasoned conclusions" to which Article 3.1 refers.

5.403 Argentina states that, as can be inferred from the Panel's question to the European Communities<sup>373</sup>, the relevant information for evaluating compliance with Articles 2 and 4 of the Agreement on Safeguards cannot consist only of the information notified to the Committee according to the approved formats.

(b) Non-notification of Resolutions 512/98, 1506/98 and 837/98

(i) *Argument of the European Communities*

5.404 The European Communities states, on 28 April 1998, Argentina published Resolution 512/98<sup>374</sup>, modifying Resolution 987/97 in relation to the liberalisation schedule of the definitive safeguard measures imposed under the latter Resolution. The former Resolution suspends the entry into force of the liberalisation of the measures which had been foreseen for 1 May 1998 by Resolution

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<sup>372</sup> *Supra*, para. 5.391.

<sup>373</sup> Cited *supra*, para. 5.391.

<sup>374</sup> Exhibit EC-28.

987/97<sup>375</sup>. Furthermore, it modifies Article 9 of Resolution 987/97 by introducing the possibility of further changes in the liberalisation schedule.

5.405 The European Communities submits that the original safeguard measure was notified by Argentina.<sup>376</sup> However, Resolutions 512/98, 1506/98 and 837/98 do not seem to have been notified to the WTO. By not notifying these Resolutions, Argentina violated Article 12.1(c) and 12.2 of the Agreement on Safeguards. The European Communities agrees in this respect with the United States, which believes<sup>377</sup> that "Argentina's implicit contention that it does not have to notify a new and more stringent 'modification' of its safeguard measure would defeat the very purpose of the notification provisions of Article 12." The European Communities takes issue with Argentina's implicit interpretation of Article 12 Agreement on Safeguards, in particular with Article 12:1(c) and 12:2 Agreement on Safeguards, that Argentina believes that it was required just to notify the original safeguard measure. However, the European Communities submits, Argentina does not consider it necessary to notify subsequent applications or further modifications of the original measure, leaving other WTO Members in the dark about any changes made to the regime in the meantime, notably any stricter changes to the regime.

5.406 The European Communities submits that the ordinary meaning of the combination of the terms "apply" (in Article 12.1(c)) and "precise description of the measure" (in Article 12.2) leads it to conclude that what is required is proper notification of the measure *actually applied*.<sup>378</sup> According to the European Communities, it cannot be so that only the content of the original measure should be made known, but that subsequent applications or modifications are kept internal. If Argentina's interpretation of the notification requirements would be allowed to stand, it would effectively empty the object and purpose of Article 12 Agreement on Safeguards, according to the European Communities. In addition, the obvious object and purpose of Article 12 is to fully inform WTO Members of the use which is made of the safeguard instrument. The Panel should therefore not accept the implicit interpretation by Argentina that a notification requirement exists for the original measure only. If such interpretation were accepted, the security and predictability of the multilateral trading system would be at risk.

5.407 The European Communities therefore submits that Argentina violated Article 12.1(c) and 12.2 of the Agreement on Safeguards by not notifying to the WTO Committee on Safeguards Resolutions 512/98, 1506/98 and 837/98.

(ii) *Argument of Argentina*

5.408 Argentina maintains that it notified all of the measures adopted to the WTO Committee on Safeguards from the initiation of the investigation to the publication of the definitive measures, including the results of the consultations and the exceptions to the application of the safeguard where appropriate. Argentina notes that Article 12.1 and 12.2 of the Agreement on Safeguards do not impose the obligation to notify a measure modifying the timetable for gradual liberalisation if the final objective of the liberalisation does not change.

5.409 Argentina notes that the European Communities accepts that Argentina's notification in Resolution 987/97 was correctly made, and questions why the European Communities, in its pleadings, persists in claiming that Argentina is still violating Article 12. According to Argentina, now that the European Communities has recognised that Argentina properly notified Resolution 987/97, it should not try to broaden the scope of the terms of reference of this Panel by introducing the subjects of Resolutions 512/98, 1506/98 and 837/98 as examples of non-compliance with the

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<sup>375</sup> Exhibit EC-20, document G/SG/N/10/ARG/1/Suppl. 1, G/SG/N/11/ARG/1/Suppl. 1, at page 6, 7.

<sup>376</sup> *Ibid.*

<sup>377</sup> *Infra*, note 398.

<sup>378</sup> *Ibid.*

obligation to notify under Article 12.1. For Argentina, two considerations are in order: first, the said Resolutions are not part of the terms of reference of this Panel, and those terms of reference set forth the legal elements of the dispute that the Panel is called upon to settle. In the alternative, if the Panel rejects this interpretation, the European Communities allegation of non-compliance with Article 12.1 of the Agreement on Safeguards is unfounded, since the text of Article 12.1(c) speaks of "taking a decision to apply or extend a safeguard measure." Argentina applied a safeguard measure through Resolution 987/97, duly notified it to the Committee and never extended it. Thus, the European Communities cannot claim that Argentina violated its obligations under 12.1(c).

5.410 Argentina also observes that the European Communities also claims that Argentina violated Article 12.2 of the Agreement on Safeguards. According to Argentina, this is irrelevant to the resolutions concerned, since the introductory part of Article 12.2 concerns "the notifications referred to in paragraphs 1(b) and 1(c)". This text merely describes the elements to be included in the notification required under Article 12.1. In Argentina's view, the only resolution to be notified under Article 12.1(c) of the Agreement on Safeguards was Resolution 987/97. Consequently, the requirements of Article 12.2 do not apply to Resolutions 512/98, 1506/98 and 837/98.

D. PROVISIONAL SAFEGUARD MEASURE

**1. Arguments of the European Communities**

5.411 The European Communities observes that Article 6 of the Agreement on Safeguards reads as follows:

"In *critical circumstances* where delay would cause damage which it would be difficult to repair, a Member may take a provisional safeguard measure pursuant to a preliminary determination that there is clear evidence that *increased imports* have *caused* or are threatening to cause *serious injury*. [...]" (emphasis added).

5.412 Therefore, according to the European Communities, in order to be allowed to take a provisional safeguard measure, Argentina must establish that footwear was being imported under certain conditions, all of which must be fulfilled and examined correctly. The European Communities asserts that it will demonstrate that Argentina has failed to satisfy the above-mentioned requirements. The European Communities considers that the imposition of a provisional safeguard measure in this case was manifestly unjustified and that Argentina therefore violated Article 6 Agreement on Safeguards.

5.413 The European Communities submits that there are no critical circumstances justifying the adoption by Argentina of provisional safeguard measures. In this respect, there is no reference to an imminent danger of damage in the notification documents, except the fact that the "mere absence of minimum specific duties would recreate the critical circumstances required for the adoption of provisional safeguard measures."<sup>379</sup> The European Communities submits that it is unacceptable that Argentina would base its decision on "critical circumstances" which are not actually present but only anticipated. Even if a "threat of critical circumstances" were a legitimate basis for provisional measures, they cannot be considered to arise merely out of a voluntary act or from the fact that a WTO Member complies with its obligations, i.e. the removal of the previous WTO-illegal minimum specific duties.<sup>380</sup>

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<sup>379</sup> See Exhibit EC-12, document G/SG/N/6/ARG/1/Suppl.1, G/SG/N/7/ARG/1/suppl.1, at page 2.

<sup>380</sup> *Nemo auditur propriam turpitudinem allegans*

5.414 The European Communities contends that Argentina confirmed that it believed that it was justified to claim "critical circumstances" on the basis of an anticipated situation. The European Communities asserts that Argentina noted that "imports would have continued the growth trend [...] if the specific import duties had not been applied"<sup>381</sup> and that "without the specific duties regime, imports would grow even beyond existing levels".<sup>382</sup> According to the European Communities, these statements by Argentina do not seek to discard the European Communities' claim on legal grounds, but instead confirm that what the European Communities has stated is correct, *i.e.* that Argentina based itself on a hypothetical situation to demonstrate "critical circumstances". The European Communities submits that Article 6 of the Agreement on Safeguards does not allow for such an interpretation, for which Argentina does not put forward any evidence. The European Communities therefore requests the Panel to rule that Argentina violated Article 6 by not demonstrating actual "critical circumstances".

5.415 The European Communities states that the Agreement on Safeguards does not recognise that serious injury or threat of serious injury can be caused by a factor other than increased imports. Since in the present case imports from non-MERCOSUR countries decreased, the imposition of provisional measures was in clear violation of Argentina's obligations. Even if imports from both MERCOSUR countries and non-MERCOSUR countries had been taken into consideration, total imports had still decreasing continuously since 1993 and did not justify the adoption of provisional safeguard measures.

5.416 The European Communities contends that according to Argentine figures mentioned<sup>383</sup> in its notification under Article 12:1(a) of the Agreement on Safeguards, import levels of footwear decreased from 21.78 (million pairs) in 1993, to 19.84 in 1994 and 15.11 in 1995. Since the factors which should have been analysed by Argentina are those prevailing at the time before a safeguard measure would be taken (*i.e.* a continuous decrease in imports), it is surprising that Argentina decided to impose provisional safeguard measures. Finally, if a safeguard measure is only applied to non-MERCOSUR countries, imports of only non-MERCOSUR countries should have been considered in the analysis.

5.417 Furthermore, the European Communities states, according to Article 6 of the Agreement on Safeguards, there must be clear evidence of serious injury or a threat of injury. The European Communities submits that no clear evidence in this respect existed and, thus, the imposition of provisional safeguard measures by Argentina violated this provision.

5.418 In addition, according to the European Communities, the WTO notification document presented by Argentina does not contain any evidence of a causal link between increased imports and the condition of the domestic industry. On the contrary, Argentina stated<sup>384</sup> that the situation of the domestic industry is only partly a result of import trends. Therefore, the European Communities submits that the application of safeguard measures in this case was not justified: even the Argentine authorities acknowledge that increased imports could not be the cause of the alleged serious injury.

5.419 The European Communities submits that compliance with the *causality* requirement is extremely important, since the purpose of a safeguard measure is to allow the domestic industry to adjust to an unforeseeable change in the terms of trade in a particular product. If the condition of the industry is caused by any other factor than imports, such as the natural consolidation of the industry by increasing its productivity or a general economic crisis (the "tequila" effect in 1995, for example), then the serious injury, allegedly suffered by the domestic industry, can not be regarded as being caused by increased imports, and consequently, no safeguard measure can be imposed.

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<sup>381</sup> *Infra*, para. 5.422.

<sup>382</sup> Argentina's reply to the Panel. *Infra*, para. 5.424.

<sup>383</sup> See Exhibit EC-11, document G/SG/N/6/ARG/1, G/SG/N/7/ARG/1, at page 5.

<sup>384</sup> See Exhibit EC-12, document G/SG/N/6/ARG/1/Suppl.1, G/SG/N/7/ARG/1/Suppl.1, at page 2.

5.420 The European Communities states that Argentina does not appear to have substantially addressed its claims that Argentina had not complied with the other requirements set out in Article 6 Agreement on Safeguards, including the condition that there is "clear evidence that *increased imports* have *caused* or are threatening to cause *serious injury*".

## 2. Argument of Argentina

5.421 Argentina argues that the CNCE concluded that the absolute and relative increase in imports during the period under investigation was the cause of serious injury to the industry, and that there could be a further increase in imports and deepening of the injury already verified in the absence of safeguard measures (Act No. 338, page 47).

5.422 Argentina observes that the European Communities argues that Argentina based its safeguard measures and its conclusion of the existence of critical circumstances on a "hypothetical" increase in imports. Argentina states that the basis for the conclusion with respect to the threat of serious injury and the existence of critical circumstances lies in the fact that the imports would have continued the growth trend already verified throughout the investigation period if the specific import duties had not been applied. Argentina further states that the European Communities is completely mistaken when it says that serious injury cannot be found coexisting with restrictive measures. Argentina cites a safeguard investigation on footwear conducted by the European Communities in 1988, in which the European Communities reached the same conclusion regarding injury, despite the effects of a quota applied during the review period. "However, the growth of imports from Taiwan has been restrained by the national quota applied during this period to some of the types of footwear which were the subject of the inquiry." This situation is comparable to the circumstance in which an examination of injury is conducted during a period in which an anti-dumping measure or other restriction on imports is being applied.

5.423 Argentina asserts that the Argentine authorities analysed the evidence gathered during the preliminary determination and confirmed the existence of serious injury reflected in the evolution of production and sales, the state of indebtedness and the financing capacity of the enterprises, concluding that these facts constituted "critical circumstances" because they affected the continuity and subsistence of the footwear manufacturers. In the immediate term, these companies faced the risk of new closures of factories and increased unemployment. According to Argentina, the confidential information contained in the file made it possible to confirm the impossibility of refinancing debts contracted by the large enterprises and the difficulty in renewing short-term lines of credit for the small and medium-sized enterprises. In the first half of 1997, there was a high probability that the companies would cease to operate, with consequences difficult to repair.

5.424 The Panel asked Argentina to identify the "critical circumstances", in addition to the absence of minimum specific duties after their repeal on 14 February 1997, justified the imposition of provisional safeguard measures. Argentina responded that in making its determination prior to the opening of the investigation, the CNCE found that at that stage, the vulnerability of the industry due to imports was verified and that the industry was therefore already suffering a serious injury. In its final determination, the CNCE confirmed the existence of this serious injury. Thus, since the final determination confirmed the validity of the preliminary determination, the provisional measure was, in Argentina's view, correctly introduced. The investigation revealed that at the moment the provisional measure was issued, there was clear evidence in the petition and in the preliminary investigation that without the specific duties regime, imports would grow even beyond existing levels which were already causing injury.<sup>385</sup> Similarly, in its preliminary determination of critical circumstances, the Department spoke of "high unemployment, the precarious financial situation of the companies, the fall in their production, and the fall in utilisation of capacity in spite of a decrease in

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<sup>385</sup> Exhibit ARG-1, Preliminary report of the Department, page 31.

installed capacity during the period under examination, reflected in the decreasing share of that industry in the GDP" due to the increase in imports.<sup>386</sup> Consequently, the Department endorsed, in its recommendations, the application of provisional measures. In other words, Argentina contends, there were critical circumstances.<sup>387</sup>

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<sup>386</sup> Exhibit ARG-1, Preliminary report of the Department, page 32.

<sup>387</sup> Exhibit ARG-1, Preliminary report of the Department, pages 31-32.



## VI. ARGUMENTS OF THIRD PARTIES<sup>388</sup>

### A. BRAZIL, PARAGUAY AND URUGUAY

6.1 In order to comply with the Panel's request that the intervention by third parties be as short as possible, the delegations of Brazil, Paraguay and Uruguay decided to present a joint statement conveying their views on certain aspects of the case that is before the Panel.

6.2 Brazil, Paraguay and Uruguay state that it will come as no surprise to the Panel that the issues that they wish to address concern certain aspects of the interpretation given by the European Communities to Article 2.1 and 4 of the Agreement on Safeguards. They want to make sure that their rights under those provisions, as well as their rights under the Agreement on Safeguards and other WTO Agreements are not altered.

6.3 The first element of the European Communities' interpretation on which Brazil, Paraguay and Uruguay wish to comment relates to the issue of whether imports from Members of a customs union, or of a free-trade area, can be included in the determination of serious injury and excluded from the application of the safeguard measure. Brazil, Paraguay and Uruguay maintain that it is clear that the European Communities is not questioning the right, and in their view obligation, of a Member of MERCOSUR to exclude other Members of the customs union from the application of the measure.<sup>389</sup> That is something that the European Communities could not question without questioning itself and its rights under Article XXIV of the GATT.

6.4 Brazil, Paraguay and Uruguay assert that what the European Communities is questioning is Argentina's methodology in the investigation, and here, one does not need to go further than the Agreement on Safeguards itself. Brazil, Paraguay and Uruguay believe that Argentina acted in accordance with the provisions of Article 2.1 and with the complementary provisions of Article 4. They find nothing in the text of paragraph 1, or, for that matter, in any other Article of the Agreement on Safeguards, to support the EC contention that Argentina was obliged to exclude imports from

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<sup>388</sup> Except as otherwise noted, the footnotes and citations, and the emphasis in the text are as contained in the parties' submissions.

<sup>389</sup> In response to questioning from the **Panel** concerning whether Article XXIV:8 of GATT 1994 prohibits the maintenance or introduction of safeguard measures between the member States of a customs union or free-trade area during its formation or after its completion, **Brazil, Paraguay and Uruguay** responded that it was not a matter of being precluded from imposing WTO safeguards against the other members of MERCOSUR. Argentina has specific rights under Article 2.1 of the Agreement on Safeguards and Article XXIV of the GATT 1994. According to Brazil, Paraguay and Uruguay, Argentina also has contractual rights and obligations under the MERCOSUR. They referred the Panel, for example, to the Treaty of Asuncion (L/7370/Add.1), which contains the decision concerning the non-application of safeguards within the customs union as of 31 December 1994. Responding to questioning of the **Panel** concerning the relationship between the footnote to Article 2.1 of the Agreement on Safeguards and the MFN obligation contained in Article 2.2, **Brazil, Paraguay and Uruguay** noted, as a preliminary point, that there is no disagreement between the parties to the dispute concerning the fact that the safeguard should not be applied to the members of MERCOSUR and that this should, therefore, not be an issue for the Panel. They added that the footnote to Article 2.1 can be divided into two parts, the first one relating to the two different modalities of application of a safeguard measure by a customs union and to the parameters for such an application; the second part relating to the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV. According to Brazil, Paraguay and Uruguay, Article 2.2 of the Safeguards Agreement relates to the application of the safeguard. Article 2.1 gives consideration to the fact that a safeguard measure can be applied by a customs union as a whole or on behalf of one of its member countries. Article 2.2 does not address this issue. They underlined that Article 2.2 should not be read in such a way as to invalidate a Member's rights under other WTO provisions, including Article 2.1 and its footnote, and Article 9 of the Agreement on Safeguards.

Brazil, Paraguay and Uruguay from the investigation. Article 2.1 only refers to "imports". There is no reference regarding the source of imports. Article 4 does not contain, either, any sort of limitation concerning the origin of imports. It only refers to "increased imports".

6.5 Brazil, Paraguay and Uruguay assert that Argentina makes an important point that exceptions and specific situations are explicitly provided for in the text of the Agreement. There is no reason, therefore, for the European Communities, or for this Panel, to create an exceptional provision concerning the conduct of investigations by Members of customs unions that does not exist in the clear terms of the Agreement. Furthermore, Brazil, Paraguay and Uruguay are of the view that Argentina has correctly shown that the European Communities gave little attention to footnote 1 to Article 2.1.

6.6 Brazil, Paraguay and Uruguay note that, as the Panel is aware, Argentina has stated that MERCOSUR does not yet have in place the complete legislation and institutions that would permit it to apply safeguard measures "as a single unit". MERCOSUR is advancing in the matter but, as of today measures still have to be applied on behalf of member States, in accordance with their national legislation.

6.7 Brazil, Paraguay and Uruguay state that the footnote provides that "all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State". There are no specific qualifications to the word "conditions". As Argentina pointed out, all conditions that seem relevant to the investigating authorities have to be taken in to account. They add that what happens after the investigation has been concluded is a separate matter. Other rights and obligations come into effect.

6.8 Brazil, Paraguay and Uruguay argue that Footnote 1 also contains an additional element which recommends the caution to which they referred above. It relates to the relationship between Article XIX and paragraph 8 of Article XXIV of GATT. If "nothing prejudices the interpretation" of the above-mentioned GATT provisions, any interpretation that goes beyond the clear terms of Article 2.1 the Safeguards Agreement, whether apparently "logical" or not, should be undertaken with the utmost care.<sup>390</sup>

6.9 Brazil, Paraguay and Uruguay state that there are other elements of the European Communities' interpretation of the Agreement on Safeguards which they do not share, and they also relate both to the way the European Communities reads the terms of the Agreement or creates additional obligations that simply do not exist.

6.10 As an example, which is also related to Article 2.1, Brazil, Paraguay and Uruguay refer to the European Communities' continuing wish to translate the expression "under such conditions" into a price analysis that determines the existence of low priced imports. While they understand that the European Communities would like to transform the Agreement into a reflection of its own internal legislation, they do not share its restrictive reading of the expression "under such conditions". It will be up to each Member, in a specific situation, to determine what are the "conditions" that require the application of a safeguard measure.

6.11 According to Brazil, Paraguay and Uruguay, a second example refers to the analysis of the evolution of investments. While they believe that each Member is free to evaluate relevant factors

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<sup>390</sup> In response to questioning from the **Panel** concerning the significance of the placement of footnote 1 to Article 2.1 immediately after the word "Member", and whether this could imply that the footnote refers only to those customs unions that are themselves Members of the WTO, **Brazil, Paraguay and Uruguay** stated that footnote 1 to Article 2 applies equally to all members of the WTO. If that were not the case, they assert, it would defeat the purpose of Article XXIV of the GATT 1994. Moreover, there is no obligation for customs unions to become Members of the WTO in order for Members of the WTO which are members of customs unions to enjoy their rights under the WTO Agreement.

other than those referred to in Article 4, they do not believe that there is an obligation to evaluate investments, nor that the evaluation is standardised and can only be done in a specific way.

6.12 Brazil, Paraguay and Uruguay note that while they are fully aware that the Panel acts in accordance with its terms of reference, they respectfully submit that the consideration of certain aspects of this case – as normally happens in panel proceedings – may have effects that go beyond the rights and obligations of the parties to this dispute and should be considered in such a light.

## B. INDONESIA

6.13 Indonesia states that it is a significant exporter of footwear to Argentina. In 1996 and 1997, Indonesia was the third largest supplier of footwear to Argentina, following Brazil and China. (Exhibit IND-1) However, since 1993 Indonesia's export of footwear to Argentina continues to encounter restrictions. Starting in December 1993, specific duties were imposed on Indonesia's imports of footwear in Argentina. Although Argentina withdrew its high specific duties on footwear and reduced its 3 per cent statistical tax after the United States challenged these measures in a WTO dispute in October 1996, in July 1997 Argentina notified the WTO that it had replaced its specific duties with equally restrictive specific duties in the form of a "safeguard measure". Under the current regime of minimum specific duties in the form of a "safeguard measure", import of footwear from Indonesia, and from elsewhere, subject to duties as high as US\$12.00 per unit on imports with an average unit value between US\$11.00 and US\$19.00, the *ad valorem* equivalents of which exceed 70 per cent in some cases (Exhibit IND-2). The data show that Indonesia's footwear exports to Argentina declined in 1997, both in terms of volume and in value, as compared to 1996 (Exhibit IND-3).

6.14 Indonesia asserts that on 25 July 1997, Argentina submitted to the WTO a notification under Article 12.1(b) of the Safeguards Agreement of a Finding of Serious Injury or Threat Thereof Caused by Increased Imports (G/SG/N/8/ARG/1, dated 21 August 1997). The notification includes the report of the National Foreign Trade Commission. Indonesia is of the view that the decision of the Argentine National Foreign Trade Commission to impose safeguard measures on imported footwear reveals serious inconsistencies with the Government of Argentina's obligations under the WTO Agreement on Safeguards and Article XIX of GATT.<sup>391</sup>

6.15 According to Indonesia, the Commission's decision fails to demonstrate that the domestic industry was suffering from serious injury and fails to prove the requisite causal link between an increase in imports and any serious injury. In reaching its determination of serious injury, or threat thereof, the Commission failed to provide a "detailed analysis of the case" or a "demonstration of the relevance of factors examined", as required by the Agreement on Safeguards. The Commission found that imports were higher in 1995 than in 1991. However, the Commission ignored the import volume for 1996. The Commission failed to consider the trends between 1991 and 1996 in its evaluation of the domestic footwear industry. In fact, by 1996, footwear imports declined nearly 40 per cent from the 1993 levels.<sup>392</sup>

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<sup>391</sup> With respect to the relationship between Article XIX of the GATT 1994 and the Agreement on Safeguards concerning "unforeseen developments", Indonesia is of the view that the Agreement on Safeguards was negotiated and agreed to complement the provisions contained in Article XIX of GATT 1994. Therefore, the requirements of Article XIX of GATT 1994 and the Agreement on Safeguards should be applied on a cumulative basis. According to Indonesia, the complementary nature of the Agreement on Safeguards and Article XIX of GATT 1994 is clearly provided for in the second paragraph of the preamble and in Articles 1, 10 and 11(a) and (c) of the Agreement on Safeguards.

<sup>392</sup> In response to questioning by the **Panel, Indonesia** expressed its view that it would be WTO-inconsistent to judge the introduction of any safeguard measure based exclusively on the trend of imports at the end of the investigation period, even if it is still higher than at the beginning of the investigation period. As required by Article 4.2(a) of the Agreement, in the investigation to determine whether increased imports have

6.16 Indonesia asserts that a thorough review of the entire record shows an increase in domestic sales, an increase in domestic market share by domestic producers, an increase in domestic prices, an increase in exports, and a strong financial condition in the major footwear producers in Argentina. It does not show a decline in production, a rise in unemployment, or other negative indication claimed by the Argentine National Foreign Trade Commission. If the Commission had considered all of the relevant factors based on the full record of evidence, Indonesia argues that it would have found that Argentine footwear industry is not suffering serious injury or the threat thereof.

6.17 Similarly, Indonesia continues, the Commission failed to demonstrate a causal link between serious injury, or threat thereof, and an increase in imports, as stipulated in Article 4.2(b) of the Agreement on Safeguards. Here, again, consideration of the full evidentiary record demonstrates that imports were declining into 1996, were losing market share, and did not cause price suppression. If the domestic footwear industry were injured, the injury was not caused by imports. In addition, the Commission's conjecture that the industry would be threatened with serious injury if WTO-inconsistent specific duties were removed was unfounded and insufficient to meet the definition of "threat of serious injury" set forth in the Agreement on Safeguards.

6.18 Indonesia is very concerned over Argentina's application of the final safeguard measure which, Indonesia argues, also violates Article 2.2 of the Agreement on Safeguards. Argentina improperly excluded from the final safeguard measures imports coming from its MERCOSUR trading partners – the very imports that had the highest volume, the greatest rate of increase, and the lowest average unit values.<sup>393</sup> As a result, Indonesia argues, Argentina limited the application of the final safeguard measure in such a way as to exclude those imports that the Commission found most injurious. Thus, exports from Brazil, Indonesia's largest competitor, are exempted from the safeguard measure even though Argentina took the impact of imports from Brazil into account when assessing the injury. Indeed, according to Indonesia, if the National Foreign Trade Commission had administered the Agreement on Safeguards properly, it would have excluded Brazil and other MERCOSUR imports entirely from the determination of injury.<sup>394</sup>

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caused or are threatening to cause serious injury to a domestic industry, the competent authorities should "evaluate all relevant factors of an objective, and quantifiable nature." If a "reduced" safeguard measure were introduced to the extent necessary to prevent or remedy serious injury and facilitate adjustment within the meaning of Article 5.1, the competent authorities shall not, in determining the appropriate level of such measure, reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years.

<sup>393</sup> In response to questioning from the **Panel**, **Indonesia** clarified that it is of the view that Article XXIV:8 of the GATT 1994 prohibits the maintenance or introduction of safeguard measures between the member States of a customs union or free-trade area after its completion and not during its formation. In response to questioning from the **Panel** concerning the significance of the placement of footnote 1 to Article 2.1 immediately after the word "Member", and whether this could imply that the footnote refers only to those customs unions that are themselves Members of the WTO, **Indonesia** asserted that the purpose of the placement of footnote 1 to Article 2 immediately following the word "Member" is to explain how and under what condition a customs union that is bound by WTO obligations may apply a safeguard measure as a single unit or on behalf of a member States. In Indonesia's view, the word "Member" in footnote 1 refers only to a customs union that is itself a Member of the WTO.

<sup>394</sup> In response to questioning from the **Panel** concerning the relationship between the footnote to Article 2.1 and Article 2.2 of the Agreement on Safeguards, **Indonesia** replied that Article 2.1 stipulates that a Member may apply a safeguard measure to a product only if that Member has determined that a product being imported has caused serious injury, or threat thereof, pursuant to the provisions set out in the Agreement, in particular Article 4 thereof; and Article 2.2 of the Agreement stipulates that a safeguard measure shall be applied to a product being imported irrespective of its source. According to Indonesia, paragraphs 1 and 2 of Article 2 of the Agreement should not be read nor applied separately. A detached reading of these paragraphs would lead to a discrepancy between the object of the determination of injury and the object of application of a safeguard measure. As required by paragraph 2 of Article 2, the safeguard measures imposed shall be applied on an MFN basis. This is to maintain consistency between the determination of injury and the application of a

6.19 Indonesia strongly believes that Argentina's imposition of a safeguard measure on imported footwear is inconsistent with its obligations under the Agreement on Safeguards and Article XIX of GATT. Accordingly, Argentina's safeguard measure on imported footwear should be removed immediately.

C. UNITED STATES

**1. Introduction**

6.20 The United States would like to touch briefly on a number of issues arising out of the submissions of Argentina and the European Communities in this matter. These issues are significant not just for this dispute, but for the conduct of Members in general in the area of safeguards. The United States is addressing these issues here because it has a strong systemic interest in the interpretation of Article XIX of the GATT and the Agreement on Safeguards.

6.21 The United States submits that the safeguard measure which has been applied by Argentina with respect to certain imports of footwear contravenes the requirements of the Agreement on Safeguards. The European Communities has raised a number of procedural and substantive deficiencies in the application of the Argentine safeguard measure; in this statement, the United States will address a number of points with respect to the inconsistency of Argentina's safeguard measure with Articles 2 and 5 of the Agreement on Safeguards. The United States also brings to the Panel's attention the recent modification by Argentina of its safeguard measure introducing a "quantitative restriction" on certain footwear imports. This purported modification would appear to be inconsistent with Articles 7 and 12 of the Agreement on Safeguards.

**2. Standard of Review**

6.22 The United States asserts that it is important that a panel reviewing disputed safeguard measures apply a standard of review that provides for meaningful surveillance to ensure that these measures were investigated and applied in keeping with Members' obligations under the WTO Agreement. At the same time, however, a panel must recognise that Article 4 of the Agreement on Safeguards specifically assigns responsibility for the investigation and evaluation of relevant factors to the competent investigating authorities. These national competent authorities are in the best position to evaluate the relevant factual evidence. Thus, the role of a panel is not to engage in a *de novo* review, but rather to ensure that the contested measure comports with the obligations of the applying Member pursuant to Article XIX and the Agreement on Safeguards.

6.23 The United States recalls the panel in *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear* arrived at a similar determination regarding the standard of review applicable to the Agreement on Textiles and Clothing (ATC). The *Underwear* panel concluded that its function was not to engage in a *de novo* review, but rather to examine the consistency of a Member's actions with its international obligations. (*Underwear*, at paras. 7.12-7.13). In that context, the panel decided to make an objective assessment of the written decision of the US authorities embodying their determination and findings; this objective assessment entailed an examination of whether those authorities had examined all relevant facts before them, whether adequate explanation had been provided of how the facts as a whole supported the determination

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safeguard measure. Consequently if, as required under Article 2.1, a Member has determined that a product being imported from certain countries found to have caused or threatened to cause serious injury to the domestic market, then the safeguard measures imposed in order to prevent or remedy serious injury shall be applied to that product being imported irrespective of its source. According to Indonesia, Article 2.2 prohibits Members from excluding any country from the application of a safeguard measure, specifically those included in the investigation and found to have caused or threatened to cause serious injury to the domestic market.

made, and, *consequently*, whether the determination made was consistent with the international obligations of the United States. (*Id.*, at para. 7.13).

6.24 Similarly, the United States continues, the panel on *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India* followed this standard of review in its assessment of another textile safeguard action by the United States pursuant to the ATC. The panel made a close examination of the written decision of the US authorities; it commented on factors addressed in the written decision, and dealt as well with the decision's failure to address certain factors, and with the issue of causation. Finally, the panel made an overall assessment of the US determination. However, at no time did the *Wool Shirts* panel engage in a *de novo* review.

6.25 The United States observes that the findings of these two panels concerning the issue of standard of review were adopted by the DSB without any modification by the Appellate Body.

6.26 According to the United States, the standard articulated above is also the appropriate standard of review for disputes involving the application of the Agreement on Safeguards in the context of safeguard determinations made by national authorities. National authorities are in the best position to evaluate the facts and determine the applicable weight to be accorded to various factors. As the Appellate Body properly noted in *EC - Measures Concerning Meat and Meat Products (Hormones)*, panels "are poorly suited to engage in such review." (*Id.*, at para. 117). Moreover, the Appellate Body also noted in *Hormones* that the role of a panel is to make an objective assessment of the matter in dispute, both as to the facts and the law, as mandated by Article 11 of the DSU. (*Id.*, at para. 118). The United States submits that a panel would be assured of arriving at an "objective assessment" of the matter in dispute if it applied a standard of review, consistent with *Underwear* and *Wool Shirts*, that examines whether (1) the domestic authority has examined all relevant facts before it, including the factors listed in Article 4:2(a); (2) adequate explanation has been provided of how the facts as a whole supported the determination made; and (3) consequently, whether the determination made is consistent with the international obligations of the Member.

### 3. Legal Arguments

#### (a) Argentina's Safeguard Measure Violates Article 2 of the Agreement on Safeguards

6.27 The United States concurs with the European Communities that the CNCE did not demonstrate that a product "is being imported" into Argentina "in such increased quantities, absolute or relative to domestic production," as to cause or threaten to cause serious injury, as required by Article 2.1. As noted by the European Communities, the phrase "is being imported" in Article 2.1 deals with current imports, as opposed to imports in years past. In the light of Article 2.1's focus on current imports, the United States submits that the CNCE erred in basing its increased imports finding on import levels at the beginning and end of a 6-year period, without considering the level of imports during the intervening years.<sup>395</sup> The United States agrees with the European Communities that a Member must examine imports during the full period under review to ensure that imports are *currently* increasing, and that such increase is *currently* causing or threatening serious injury.

6.28 The United States asserts that while the CNCE found that imports were higher in 1996 than in 1991 in value terms, it did not analyse in its report import data for the intervening years. Those data

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<sup>395</sup> In response to a question from **Argentina** concerning the English and Spanish texts of Article 2.1 of the Agreement on Safeguards, the **United States** asserts that it does not view the English and Spanish texts of Article 2.1 to be inconsistent with each other with regard to the increased imports requirement. The English text implies a retrospective analysis, requiring that a Member determine that a product "is being imported ...in such increased quantities...." This means that current imports must be at a higher level than previous imports. Thus, as under the Spanish text, imports must "have increased". Both texts convey the understanding that imports must have increased, and that such increased imports are causing or threatening to cause serious injury to the domestic industry.

(as reflected in table 1 in section VII of the CNCE's report) show that total imports, as measured by value, peaked in 1993 and declined each year thereafter; the table shows that imports in 1996 were lower than in any year except 1991 (*see* G/SG/N/8/ARG/1, at 21; Exhibit EC-16). The table also shows that imports, as measured in value, were highest in 1994, and then fell sharply in 1995 and then increased slightly in 1996; imports in 1996 were well below the 1993 level and only slightly above the 1992 level. Information in the CNCE report shows that the ratio of imports to domestic production declined irregularly between 1993 and 1996, from 34 percent to 28 percent (*see id.*, at 26). The CNCE reported but did not evaluate the data for the intervening years, or explain how it concluded, notwithstanding the downward trend in imports, that footwear "is being imported" in such increased quantities as to cause or threaten to cause serious injury to the Argentine footwear industry. The United States does not wish to imply that the CNCE, under these import numbers, was absolutely precluded from finding that a product "is being imported . . . in such increased quantities". However, the United States agrees with the European Communities that the CNCE report fails to demonstrate, in the face of the CNCE's own data, the relevance of the factors examined.

6.29 The United States must disagree, however, with the inference in the European Communities' submission that it was inappropriate for the CNCE to *review* import data for a 5-6 year period in determining whether imports have increased. Article 2.1 does not specify a time period to be examined, but only requires that the Member find that the product "is being imported" in such increased quantities. In the view of the United States, a period of 5 years would not be inappropriate, since it would allow the competent authority to examine imports over a period of time and put current imports in perspective. A 5-year period also may allow the competent authority to examine fully the factors other than imports that may affect the industry's performance. The US International Trade Commission, which makes the injury determinations under the US safeguard law, typically examines imports over a period of 5 years. According to the United States, what the CNCE must show, and failed to show, is that, based on an evaluation of the import data before it, a product "is being imported . . . in such increased quantities" as to cause or threaten to cause serious injury to the domestic industry.

6.30 Similarly, the United States disagrees with the European Communities' assertion that Argentina violated Article 2.1, *inter alia*, because the CNCE failed to "demonstrate convincingly that imports had gone up *sharply* over the most recent period . . ." (emphasis added) Article 2.1 does *not* specify an amount or degree by which imports must have increased. However, the amount or degree of the increase in the level of imports would be relevant to the question of causation.

6.31 In response to questioning from the **Panel** concerning the relationship between the footnote to Article 2.1 of the Agreement on Safeguards and the MFN obligation contained in Article 2.2, the **United States** asserted that Article 2.2 of the Agreement on Safeguards contains a general requirement that safeguard measures be applied to a product on an MFN basis; as a general rule, safeguard measures may not be applied in a manner that discriminates between or among WTO Member countries. The footnote to Article 2.1, on the other hand, references a specific instance where derogation from the MFN principle is permissible – that is, where a customs union or free-trade area is implicated. Furthermore, the footnote to Article 2.1 maintains that "[n]othing in this Agreement prejudices the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT". The relationship between the MFN requirement of Article 2.2 and the footnote to Article 2.1 of the Agreement on Safeguards parallels the relationship between the general requirement of MFN treatment under Article I of the GATT, and the provisions of Article XXIV recognising the discriminatory elements inherent in customs unions and free trade areas. Accordingly, the footnote makes clear that nothing in the Agreement on Safeguards prejudices the interpretation of the relationship between the MFN obligation in Article 2.2 and the ability of Members to derogate from that obligation as part of a customs union or free-trade area.

6.32 In response to questioning from the **Panel** concerning the significance of the placement of footnote 1 to Article 2.1 immediately after the word "Member", and whether this could imply that the footnote refers only to those customs unions that are themselves Members of the WTO, the United States maintained that the placement of the footnote did not reflect the intention that the footnote refer only to customs unions that are WTO Members. The United States submitted, therefore, that the Panel and the parties should refrain from reading a purpose into the text that was never intended. Reviewing the drafting history of the provision, the United States submitted that the placement of the footnote after "contracting party" in paragraph 2 of the text up through 1991 was necessary because the text only applied to contracting parties and the European Communities was never a contracting party to the GATT. In 1992, when the Legal Drafting Group substituted the word "Member" for the phrase "contracting party", the group could not alter the placement of footnote 1 because such a change would have been viewed as a substantive change going beyond the explicitly limited mandate of the Legal Drafting Group<sup>396</sup>.

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<sup>396</sup> To understand the drafting and placement of this footnote, it is helpful to review the drafting history of the Agreement on Safeguards and to inspect this footnote as it stood at representative points in time. The Punta del Este Ministerial Declaration on the Uruguay Round provided that safeguards would be a subject for negotiation, and stated that "a *comprehensive* agreement on safeguards is of particular importance to the strengthening of the GATT system and to progress in the Multilateral Trade Negotiations". (BISD 33S/24, emphasis added) In pursuance of that mandate, Negotiating Group 9 on Safeguards produced a text labelled as "Agreement on Safeguards" which took the legal form of a decision of the CONTRACTING PARTIES to the GATT 1947. The text was arranged in consecutively numbered paragraphs and it provided for obligations which would be binding on all contracting parties to the GATT. Indeed, because of the nature of safeguards action, any agreement in this area would not be effective unless it applied to every contracting party; a Tokyo Round-style Code approach would not work. The negotiators therefore settled on a text that would interpret and apply the GATT, such that if a safeguards action satisfied the requirements of that text, it would satisfy the requirements of GATT Article XIX.

The Chairman of the Negotiating Group tabled a safeguards text on 31 October 1990 with the statement that "This text represents the level of agreement that could be reached at this stage." The Negotiating Group accepted the text as "a working paper for the very final phase of the negotiations" (MTN.GNG/NG9/W/25/Rev.3, 31 October 1990). The Negotiating Group then decided to send the text forward (MTN.GNG/NG9/21, 31 October 1990). The text was included in the Draft Final Act of the Uruguay Round circulated for the Brussels Ministerial Meeting (MTN.TNC/W/35/Rev.1, dated 3 December 1990). The relevant pieces from this text were as follows:

2. A contracting party<sup>1</sup> may apply a safeguard measure to a product only if the importing contracting party has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

<sup>1</sup> A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or threat thereof under this agreement shall be based on the conditions existing in the customs union as a whole. When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State. It is understood that when a safeguard measure is applied by a customs union on behalf of a member State, [any injury attributable to competition from producers established in other member States in the customs union shall not be attributed to increased imports, in conformity with the provisions of sub-paragraph 7(b)] [such a measure shall be applied to imports from other member States of the customs union].

The commentary preceding the safeguards text listed among the outstanding issues: "What should be the obligations of a customs union in relation to safeguard actions? (Footnote 1 to paragraph 2)."



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The same passages in the safeguards text in the Dunkel Draft Final Act (MTN.TNC/W/FA, 20 December 1991) read as follows:

2. A contracting party<sup>1</sup> may apply a safeguard measure to a product only if the importing contracting party has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

<sup>1</sup>A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or threat thereof under this agreement shall be based on the conditions existing in the customs union as a whole. When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State. Nothing in this agreement prejudices the interpretation of the relationship between Article XIX and Article XXIV:8 of the General Agreement.

The Dunkel Draft also included an early draft of the Multilateral Trade Organization Agreement. It was at that point that the decision was made that the final Uruguay Round results would include the creation of an MTO with Members. In January 1993, the Trade Negotiations Committee established a Legal Drafting Committee whose mandate was limited to considering the institutional and dispute settlement provisions in the Dunkel text, and making necessary legal rectifications in the other provisions in that text.

The Legal Drafting Group met during the spring of 1992 and worked on successive drafts of the MTO Agreement, and also made systematic changes in the texts in the Dunkel Draft to integrate them into the legal framework of the MTO. As part of its work, the Group mechanically substituted the word "Member" for the phrase "contracting party."

As of the 12 December 1993 close of negotiations in the Uruguay Round, the same passages read as follows:

2. A Member<sup>1</sup> may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

<sup>1</sup>A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole. When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State. Nothing in this Agreement prejudices the interpretation of the relationship between Article XIX and Article XXIV:8 of GATT 1994.

The capitalization of "member State" in the footnote occurred during the final legal drafting process in February-March 1994. The present arrangement of the text in articles and paragraphs also dates from the final legal drafting process (see MTN/FA/Corr.3 dated 21 February 1994, p. 173ff).

The placement of the footnote after "contracting party" in paragraph 2 of the text up through 1991 was necessary because that text only applied to contracting parties, and the European Communities was never a contracting party to the GATT. In 1992, when the Legal Drafting Group substituted the word "Member" for the phrase "contracting party," the group could not alter the placement of footnote 1 because such a change would

(b) Argentina's Safeguard Measure Violates Article 5 of the Agreement on Safeguards

6.33 The United States notes that in conducting its investigation, Argentina included imports from MERCOSUR countries for purposes of determining whether imports were increasing during the period of investigation. In constructing its safeguard measure, however, Argentina excluded MERCOSUR countries from the application of the safeguard measure. The United States does not contest, *per se*, either the practice of investigating all relevant imports or excluding partners in a customs union from the application of a safeguard measure.<sup>397</sup> In this instance, however, the United States submits that Argentina's safeguard action is inconsistent with the terms of Article 5.1 of the Agreement on Safeguards.

6.34 The United States asserts that Article 5.1 permits safeguard measures "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment." Thus, the purpose of a safeguard measure is to provide the affected domestic industry with a temporary buffer from increasing imports that are causing or threatening serious injury to the industry. This "time out" permits the beleaguered domestic industry to adjust to import competition either through technological or economic advances, or through a transition to other productive uses. In order for a safeguard measure to be effective, and to comport with Article 5.1, it must affect the imports that are causing the injury. Thus, Argentina contends that "[t]he objective of the safeguard measure is to allow the domestic industry to reach the capacity to compete with a determined level of imports sourced both from MERCOSUR and other countries." However, by failing to construct a safeguard measure that addresses the imports that are causing the injury, Argentina ensures the failure of its stated objective.

6.35 In short, the United States argues, Argentina appears to concede that the source of its injurious footwear imports is MERCOSUR. In its final determination of serious injury, notified to the Committee on Safeguards on August 21, 1997 (G/SG/N/8/ARG/1), the CNCE acknowledged that the MERCOSUR countries, Brazil in particular, were the principal suppliers of subject footwear products, and that MERCOSUR imports had, in large part, supplanted global footwear imports. Specifically, the CNCE concluded that:

The MERCOSUR countries and in particular Brazil, not being affected by the DIEM, were the sources to benefit from an increase in Argentine purchases by diversion of trade. Brazil's share of total imports rose from 7.7 per cent in c.i.f. value terms in 1993 (\$9.9 million) to 31 per cent (\$36.1 million) in 1996, which made it the principal foreign footwear supplier.

The CNCE also concluded that:

Between 1994 and 1996 the value of imports from the rest of the world fell by more than \$45 million, whereas the increase in imports of MERCOSUR origin was \$22 million, so that total imports declined significantly after 1994.

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have been viewed as a substantive change going beyond the explicitly limited mandate of the Legal Drafting Group.

<sup>397</sup> In response to questioning from the **Panel**, the **United States** clarified that it does not view Article XXIV:8 of GATT 1994 as prohibiting the maintenance or introduction of safeguard measures between the member States of a customs union or free-trade area, whether during its formation or after its completion.

6.36 The United States maintains that despite identifying MERCOSUR as the source of the injurious imports, however, Argentina proceeded to implement a safeguard measure that was not designed to affect the imports that caused the injury, and thus could not remedy the serious injury suffered by the domestic industry nor facilitate its adjustment to import competition.

6.37 Again, the United States does not question the propriety of investigating imports from all sources or excluding customs union partners from the application of a safeguard measure. What the United States finds troubling, however, is Argentina's use of MERCOSUR imports for its increased-imports analysis when there was *no possibility* that those imports could be included in any safeguard action, even where those imports are demonstrably the cause of the injury suffered by the domestic industry. (As the Panel is aware, under Article 98 of the MERCOSUR regulations, MERCOSUR members exclude each other from the application of their safeguard measures).

6.38 In response to this dilemma, the United States submits, Argentina merely posits that "it is reasonable to consider them [MERCOSUR and third-country imports] on equal terms for injury analysis purposes since in the absence of DIEM or protective measures there would be at least an equal flow of imports from the rest of the world into the Argentine Republic." According to the United States, this response is purely speculative and does not address the problem presented. In short, the effect of Argentina's action is to penalise producers from third countries for the injurious imports emanating from MERCOSUR. In the US view, Argentina's safeguard measure therefore violates Article 5:1 of the Agreement on Safeguards because it does not address the injurious imports; thus, the measure can neither remedy the serious injury nor facilitate the domestic industry's adjustment to import competition.

6.39 In response to questioning from the **Panel** concerning whether the introduction of any safeguard measure would be WTO-inconsistent in a situation where imports showed a decreasing trend at the end of an investigation period even where imports at the end were still higher than at the beginning of the investigation period, the **United States** asserted that the fact that imports showed a decreasing trend towards the end of the investigative period does not preclude a Member from applying a safeguard measure. The question is whether the evidence demonstrates, as required by Article 2.1 of the Agreement on Safeguards, that the product under investigation "is being imported ... in such increased quantities ... as to cause or threaten to cause serious injury to the domestic industry". Imports may show a decreasing trend towards the end of the investigative period for a number of reasons, including the timing of shipments, the seasonality of the product, or importer concern about the investigation. In deciding whether the requirements of Article 2.1 are satisfied, a Member should carefully consider whether it is temporary or of longer duration. A trend of several months may simply reflect irregular shipments. A trend of several years would normally imply a more permanent change in direction of imports of a given product, and suggest that the product is not being imported in increased quantities. In the US view, in this instance, the CNCE's own data show that Argentina footwear imports have trended downward in recent years. The CNCE has failed to demonstrate how it concluded, in the face of such data, that footwear "is being imported" into Argentina "in such increased quantities" as to cause or threaten to cause serious injury to the Argentina footwear industry. According to the United States, assuming a Member has made an adequate injury determination, the fact that imports show a decreasing trend towards the end of the investigative period has no direct bearing on the standard that a Member must apply in fashioning a safeguard measure. The Agreement on Safeguards contains only one standard for applying a safeguard measure, the standard set out in Article 5.1. Article 5.1 states that a Member "shall apply a safeguard measure only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment." Thus, the measure applied will depend upon the facts of the case, including the nature and extent of injury found to exist or threatened, and circumstances relating thereto, and the adjustment to be facilitated.

(c) Argentina's Purported Modification of its Safeguard Measure Violates Article 7.4 of the Agreement on Safeguards

6.40 The United States wishes to bring to the Panel's attention a recent and troubling development in Argentina's safeguard measure on certain footwear imports. Argentina recently issued Resolution 1506, which purports to modify its current footwear safeguard by establishing a "quantitative restriction" *in addition to* the safeguard duty. The Resolution is somewhat unclear, but it appears to impose either a quota or a tariff-rate quota (TRQ) of 3.9 million pairs on imports of footwear falling within certain Universal Nomenclature of MERCOSUR (NCM) numbers. The established quota amount represents less than 50 per cent of footwear imports from third countries over the last 3 years. Under the terms of the Resolution, Argentina's safeguard measure appears to function as follows: Footwear imports that are below the quota limit are subject to a safeguard duty, as detailed in the Resolution. Once the quota limit is filled for each NCM number, imports above the limit will be assessed a duty rate that is 100 per cent of the current safeguard duty. In addition, the Resolution postpones any liberalisation of the safeguard until November 30, 1999, whereupon the quota will be increased by 10 per cent. Although not clear from the terms of the Resolution, the United States can only assume that MERCOSUR imports will not be counted towards the 3.9 million quota limit.

6.41 The United States asserts that this alleged modification of Argentina's safeguard measure presents issues of grave concern to the United States. In the US view, Argentina seems to have crafted a safeguard-upon-safeguard barrier that is unnecessary and may, at the very least, violate Article 7.4 of the Agreement on Safeguards. Article 7.4 specifically requires that certain safeguard measures be *progressively liberalised* at *regular intervals* during the period of application. Argentina's modification fails on both counts. The United States asserts that, first, rather than liberalising, Argentina has clearly made its safeguard measure more stringent. Potential exporters of footwear to Argentina must now contend with a quota or TRQ in addition to a safeguard duty. Second, Argentina has not liberalised the measure at regular intervals. As previously notified to the Committee on Safeguards on September 15, 1997 (G/SG/N/10/ARG/1 and G/SG/N/11/ARG/1), Argentina was to have liberalised the safeguard on 1 May 1998, 16 December 1998 and 1 August 1999. Argentina has already postponed one scheduled liberalisation period, and Resolution 1506 would again delay liberalisation until 1999. According to the United States, such actions violate both the letter and the spirit of the Agreement on Safeguards.

6.42 Moreover, the United States submits, Argentina's safeguard modification highlights the original safeguard measure's inconsistency with Article 5.1 of the Agreement on Safeguards. In failing to address the source of the injurious imports, Argentina's safeguard measure has not prevented or remedied the domestic industry's alleged serious injury nor has it facilitated adjustment. Adding more restrictive elements to the safeguard measure merely aggravates the problem and compounds the inconsistency of the measure with Argentina's obligations under the Agreement on Safeguards.

6.43 Finally, the United States questions whether Argentina has notified Resolution 1506 to the Committee on Safeguards, as is required by Article 12 of the Agreement on Safeguards.<sup>398</sup>

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<sup>398</sup> **Argentina** asked the United States where in Article 12 the obligation to notify the Safeguards Committee of Resolution MEYOSP 1506/98 could be found. The **United States** replied that assuming arguing the modification was consistent with the Agreement on Safeguards, it would have to be notified under Article 12.1(c). The United States further maintained that acceptance of Argentina's implicit contention that it does not have to notify a new and more stringent "modification" of its safeguard measure would defeat the very purpose of the notification provisions of Article 12. Article 12 maintains the transparency of the system and ensures that Members are kept informed of the most current status of safeguard measures in all Member countries taking such measures. The logical consequence of Argentina's position that Article 12 requires Members to notify the taking of a safeguard action, but that further "modification" of the measure need not be

- (d) The Requirements of Article XIX of GATT 1994 are Subsumed by the Agreement on Safeguards

6.44 The United States disagrees with the European Communities' assertion that a Member may only impose a safeguard measure if, *inter alia*, the increase in imports results "from both 'unforeseen developments' and 'compliance with GATT obligations,' including tariff liberalisation according to a party's schedules of concessions." Article XIX:1(a) of the GATT must now be read in accordance with the rights and obligations set out in the Agreement on Safeguards, as required by Article 11:1(a) of that Agreement. The Agreement on Safeguards has defined, clarified, and in some cases modified, the package of rights and obligations of a potential user of safeguard measures, and Article 2 of the Agreement on Safeguards makes clear that a demonstration of "unforeseen developments" and a causal nexus to GATT obligations are no longer prerequisites to the application of a safeguard measure.

6.45 According to the United States, the Agreement on Safeguards clarifies and expands on the provisions of Article XIX, and establishes procedures for the application of safeguard measures. Thus, the preamble to the Agreement on Safeguards "recognis[es] the need to *clarify* and reinforce the disciplines of GATT, and specifically those of its Article XIX", while Article 1 "establishes rules for the application of safeguard measures . . . provided for in Article XIX of GATT." The United States submits that the two agreements must be read *in tandem* and, together, they create a *new* package of rights and obligations which are distinct from the rights and obligations contained in the original GATT provision. The United States recalls that the Appellate Body arrived at a similar determination in *Brazil - Measures Affecting Desiccated Coconut*, wherein the Appellate Body, quoting the panel, asserted:

Article VI of GATT 1994 and the SCM Agreement represent a new and different package of rights and obligations, as among WTO Members, regarding the use of countervailing duties. . . . The SCM Agreements do not merely impose additional substantive and procedural obligations on a potential user of countervailing measures. Rather, the SCM Agreements and Article VI together define, clarify and in some cases modify the whole package of rights and obligations of a potential user of countervailing measures.<sup>399</sup>

6.46 In addition, the United States points out, the negotiators of the Agreement on Safeguards were specific in their intent to subsume Article XIX under the new regime established by the Agreement on Safeguards. Thus, Article 11:1(a) of the Agreement on Safeguards establishes the relationship between GATT Article XIX and the Agreement as follows:

A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article *applied in accordance with this Agreement*.

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notified, is to approve the dissemination of misleading information. In failing to notify its action to the Committee on Safeguards, Argentina erroneously maintains to the World Trade Organization that the only applicable safeguard measure on footwear imports is the safeguard duties as notified, while in reality Argentina is applying both a safeguard duty and a TRQ. Such action is counter to Article 12.1(c), which requires notification of the measure *actually applied*. There simply is no basis to argue that Article 12 merely requires notification of the "initial" safeguard measure, even if subsequent "modifications" render the notified measure obsolete.

<sup>399</sup> WT/DS22AB/R (21 February 1997), at p.16. (Emphasis in original).

(Emphasis added). In the US view, the phrase “applied in accordance with this Agreement” is significant in that it demonstrates the intent of the negotiators to subsume Article XIX under the new rights and obligations created by the Agreement on Safeguards. This intention is made even more apparent when the language in Article 11:1(a) is contrasted, for example, with language in the Agreement on Subsidies and Countervailing Measures (SCM) where there is *not* a similar intent to subsume Article VI of GATT under the SCM. Thus, Article 10 of the SCM provides:

Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is *in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement.* (emphasis added)

6.47 The United States argues that in Article 10 of the SCM Agreement, the term “in accordance with” modifies both Article VI of the GATT *and* the SCM Agreement, while in Article 11:1(a) of the Agreement on Safeguards, “in accordance with” modifies solely “this Agreement,” meaning the Agreement on Safeguards. Therefore, the proper reading of Article 11:1(a) must be that a safeguard action has to conform with Article XIX, which in turn must be applied in accordance with the Agreement on Safeguards. In other words, Article XIX has been subsumed by the Agreement on Safeguards, and the provisions of Article XIX that continue to have force and effect are those that are in accordance with the Agreement on Safeguards. According to the United States, this interpretation is further borne out by the fact that the Agreement on Safeguards negotiators conspicuously reiterated in Article 2 every sentence of Article XIX:1(a) *except* the language concerning “unforeseen developments” and GATT obligations. Since the Agreement on Safeguards is the definitive interpretation of Article XIX, a safeguard measure that satisfies the Agreement on Safeguards necessarily satisfies the requirements of Article XIX.

#### **4. Conclusion**

6.48 In conclusion, the United States respectfully requests the Panel to find that the safeguard measure implemented by Argentina on certain imports of footwear products is inconsistent with Articles 2 and 5 of the Agreement on Safeguards. Moreover, Argentina’s purported modification of its safeguard measure, at the very least, violates Article 7 of the Agreement on Safeguards.

## VII. INTERIM REVIEW

7.1 The Panel issued its interim report on 21 April 1999 and informed the parties that requests for the review of precise aspects of the interim reports had to be filed by 5 May 1999. On 30 April 1999, Argentina requested an extension of one week of the time-period for submitting comments on the interim report. On 3 May 1999, the Panel granted an extension until 10 May 1999.

7.2 On 10 May 1999, Argentina and the European Communities requested the Panel to review, in accordance with Article 15.2 of the DSU, precise aspects of the interim report. Argentina requested a further meeting with the Panel, whereas the European Communities did not consider such a meeting necessary. The interim review meeting with the parties was held on 20 May 1999.

7.3 The European Communities submitted a number of specific comments. The comments on the section entitled "the imposition of safeguard measures in the case of a customs union" addressed in particular the Panel's description of the European Communities' position on this issue and the specific phrasing of the legal reasoning interpreting the relationship between Articles XIX and XXIV of the GATT. Further to that, the European Communities made minor editing suggestions concerning the sections on "standard of review", "increased imports" and "the application of safeguard measures". Moreover, it suggested modifying the Panel's characterisation of the reason why the European Communities raised a claim under Article 5. The European Communities also criticised the Panel's reasoning on why it refrained from ruling on the EC's claim against the provisional safeguard measure. In response to these comments, we modified paras. 8.78, 8.79, 8.94, 8.287, and 8.292.

7.4 Argentina submitted a number of specific comments on the interim report which it grouped into three major categories: (i) comments concerning the descriptive part; (ii) comments related to the section entitled "factual background" introducing the Panel's findings and conclusions; and (iii) comments on the section of the findings addressing the EC's claims under Articles 2 and 4 of the Safeguards Agreement.

7.5 (i) As to the descriptive part, Argentina suggested changes to the account of events concerning its submission to the Panel of the entire record of the national investigation (Exhibit ARG-21). We carefully considered these suggestions but continue to believe that the description of the sequence of events in paras. 4.37-4.39 is accurate. We did introduce a sentence into para. 4.37 at the suggestion of Argentina, and made a few editing changes to this paragraph. Argentina further requested some editing changes in sections describing its arguments, including those concerning "the imposition of safeguard measures in the case of a customs union", some of which the Panel accepted in paras. 5.90, 5.97, 5.141, 5.269, 5.303, and 5.352. However, the Panel did not accept Argentina's proposals to shorten the description of certain responses by the European Communities to arguments made by Argentina.

7.6 (ii) With respect to the section dealing with the "factual background" to this case, the Panel did not accept Argentina's request to delete portions of this introductory section to the findings because they are an accurate summary of events discussed by both parties concerning the context of this dispute.

7.7 (iii) Argentina's fundamental criticism of the findings addressing the EC's claims under Articles 2 and 4 of the Safeguards Agreement was that it believed that the Panel had carried out a de novo review of the national authority's determinations of increased imports, serious injury and causation. Argentina argued that the Panel's review should have been restricted to considering whether the Comisión Nacional de Comercio Exterior (CNCE) had evaluated the proper factors in its report and whether it had a reasonable basis for its conclusion that negative effects on those factors were a result of increased imports. Argentina alleged that the Panel instead substituted its judgement and proceeded to identify those trends and evidence it considered the most relevant. In Argentina's

view, the Panel asked the national authority to explain why it found certain evidence to be compelling, rather than properly asking whether the evidence as a whole supported the CNCE's judgement, especially when asking Argentina to provide a complete analysis of any purportedly "adverse" data to the conclusion it reached. Argentina claimed that in not doing so, the Panel exceeded its authority because it was not the Panel's task to reweigh the evidence. Argentina submitted that it was for the national authority, as the trier of fact, to weigh all of the evidence and reach a conclusion. For Argentina it was the role of the Panel to determine whether the judgement of the national authority was one possible legitimate interpretation of the evidence, and not whether it was the correct interpretation because the standard based on international law principles is basically "what is not prohibited, is permitted".

7.8 While we do recognise the general interpretative principle "in dubio mitius"<sup>400</sup> raised by Argentina, we do not share Argentina's apparent opinion that under the Safeguards Agreement it is for the national authority to choose one of several possible factual or legal interpretations. Rather, regarding legal interpretations, a treaty must be interpreted, pursuant to Article 31 of the Vienna Convention, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Under the Safeguards Agreement, it is incumbent upon a national authority to adequately explain its factual conclusions on the basis of the evidence contained in the record of this case, and it is these explanations in the light of that evidence that we have reviewed in accordance with our standard of review, as explained in section VIII.E.3 of the findings. In this regard, the Safeguard Agreement is clear that the existence of increased imports, serious injury or threat, and causal link between the two, must be made on the basis of objective and quantifiable evidence on all relevant factors having a bearing on the situation of the industry, including factors other than increased imports that at the same time are causing injury. The Agreement also is clear that the detailed report on the case must set forth the findings and reasoned conclusions, and must demonstrate the relevance of the factors considered.

7.9 We consider Argentina's allegation that our findings amount to a de novo review of the case as unfounded. We believe that in addressing the EC claims we have kept with our decision not to engage in a de novo review. In accordance with Article 11 of the DSU,<sup>401</sup> a panel is required to make an objective assessment of the matter before it, including an objective assessment of the facts. In interpreting that article, the *United States - Underwear* panel found, a policy of total deference to the findings of the national authorities could not ensure an "objective assessment" as foreseen by this article.<sup>402</sup> The panel on *New Zealand - Transformers* was also confronted with the argument of New Zealand that the determination of "material injury" by the competent authority of New Zealand could not be scrutinised by the panel.<sup>403</sup> The *Transformers* panel responded that

"the responsibility to make a determination of material injury caused by dumped imports rested in the first place with the authorities of the importing contracting party concerned. However, the Panel could not share the view that such a determination

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<sup>400</sup> The Appellate Body noted: The interpretative principle of *in dubio mitius*, widely recognized in international law as a 'supplementary means of interpretation', has been expressed in the following terms: 'The principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.' ..." Appellate Body Report on *European Communities - Measures Concerning Meat and Meat Products (Hormones)*, adopted on 13 February 1998, para. 165, footnote 154.

<sup>401</sup> Article 11 of the DSU: "... a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements ...".

<sup>402</sup> Panel Report on *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear (United States - Underwear)*, (complaint by Costa Rica), WT/DS24/R, adopted on 25 February 1997, para. 7.10.

<sup>403</sup> Panel Report on *New Zealand - Imports of Electrical Transformers from Finland*, adopted on 18 July 1985, BISD 32S/55.



could not be scrutinised if it were challenged by another contracting party. On the contrary, the Panel believed that if a contracting party affected by the determination could make a case that the importation could not in itself have the effect of causing material injury to the industry in question, that contracting party was entitled, under the relevant GATT provisions and in particular Article XXIII, that its representations be given sympathetic consideration and that eventually, if no satisfactory adjustment was effected, it might refer the matter to the CONTRACTING PARTIES, as had been done by Finland in the present case. To conclude otherwise would give governments complete freedom and unrestricted discretion in deciding anti-dumping cases without any possibility to review the action taken in the GATT. This would lead to an unacceptable situation under the aspect of law and order in international trade relations as governed by the GATT."<sup>404</sup>

7.10 As noted in para. 8.119, the *United States - Underwear* panel<sup>405</sup> followed an approach similar to that developed by the *New Zealand - Transformers* panel. We agreed with this statement of the *New Zealand - Transformers* and the *United States - Underwear* panels in paras. 8.118-8.119 of our findings. Accordingly, we consider that, while it is in the first place the responsibility of the national authority of the importing country to carry out a safeguard investigation and make a determination, we must address in our findings the objections raised by the European Communities to the determinations made by the CNCE. In our view, Article 11 of the DSU requires us to conduct an assessment of the claims and the facts of the case before us as safeguard determinations made by a national authority are subject to scrutiny by a panel if they are challenged by another Member (para. 8.118).

7.11 In our review, we followed the test developed by the *United States - Underwear* and the *United States - Shirts and Blouses* panels (para. 8.119-8.120) which held that "an objective assessment would entail an examination of whether (i) the [national authority] had examined all relevant facts before it (including facts which might detract from an affirmative determination ...), (ii) whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, (iii) whether the determination made was consistent with the international obligations of the [Member concerned]."<sup>406</sup>

7.12 According to this test, one essential element of a Panel's review of a national investigation is to evaluate whether "adequate explanation had been provided of how the facts as a whole supported the determination made". This standard of review is different from a *de novo* review by a panel of a national investigation and the determination made. As set forth in paras. 8.205-8.207, in our view, an

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<sup>404</sup> *Ibid*, para. 4.4.

<sup>405</sup> This panel did not see its "review as a substitute for the proceedings conducted by national investigating authorities or by the Textiles Monitoring Body (TMB). Rather ... the Panel's function should be to assess objectively the review conducted by the national investigating authority, in this case the CITA. We draw particular attention to the fact that a series of panel reports in the anti-dumping and subsidies/countervailing duties context have made it clear that it is not the role of panels to engage in a *de novo* review. In our view, the same is true for panels operating in the context of the ATC, since they would be called upon, as in the context of cases dealing with anti-dumping and/or subsidies/countervailing duties, to review the consistency of a determination by a national investigating authority imposing a restriction under the relevant provisions of the relevant WTO legal instruments, in this case the ATC. ..." *United States - Underwear*, *op.cit.*, para. 7.12.

<sup>406</sup> The *United States - Underwear* panel also noted in footnote 18 to para. 7.13 to that report: "This approach is largely consistent with the approach adopted by the panel reports cited in footnote 16 (*Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*, adopted on 27 April 1993, BISD 40S/205; *United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, adopted on 27 April 1994; *United States - Initiation of a Countervailing Duty Investigation into Softwood Lumber Products from Canada*, adopted on 3 June 1987, BISD 34S/194) although it should be pointed out that the standard of review was expressed in slightly different terms in each of the aforementioned panel reports."

assessment of whether an *explanation* was *as a whole adequate* concerns the logical relationship between two given benchmarks, i.e., the facts of a case as collected by a national authority, on the one hand, and the safeguard determination made by it, on the other. Our assessment of this case has not involved questioning the facts as determined by the national authority; indeed, the European Communities did not challenge the facts gathered and compiled by the CNCE, but rather alleged that the determinations made could not be logically drawn from the facts as reflected in the CNCE's record of the investigation. As a result of these EC allegations it was necessary for the objective assessment which we are required to conduct to evaluate whether the explanation given by the national authority in evaluating the facts before it adequately supported the conclusions drawn with respect to the crucial conditions (i.e., (i) increases in imports, (ii) serious injury or threat thereof, and (iii) the existence of a causal link) and the safeguard determination made. The discussion of the *adequacy* of an explanation cannot merely consist in taking the explanation presented by a national authority at face value; it requires a process of evaluation of the reasoning by the national authority in its determination, in the light of arguments advanced by the complaining Member, and of responses by the respondent Member. Moreover, for an explanation to be adequate as a whole it must provide adequate reasoning on how the conclusions drawn flow from the facts of the case, including those facts that would appear to detract from such conclusions.

7.13 Argentina further alleged that the Panel created a new concept by requiring that for each single factor of injury analysis it is necessary to elaborate a reasonable explanation linking the data to the conclusion for each factor in isolation. In Argentina's view, it is sufficient to comply with the standard set by the Safeguards Agreement for a national authority to examine the totality of the data.

7.14 In para. 8.123, we noted that the text of Article 4.2(a) of the Safeguards Agreement explicitly requires the evaluation of "all relevant factors of an objective and quantifiable nature having a bearing on the industry", in particular those listed therein. We also noted that despite the absence of an express requirement of a similar nature in the Agreement on Textiles and Clothing (ATC), the panels on *United States - Underwear* and *United States - Shirts and Blouses* ruled that each and every injury factor mentioned in Article 6.4 of the ATC had to be considered by the national authority. In our view, for an evaluation of how the facts *as a whole* supported the determination made it is necessary for the national authority to link through an adequate explanation *each of the relevant factors* within the meaning of Article 4.2(a) to the overall determination, including where such factors seem to detract from that determination. We believe that in our discussion of the EC's claims under Articles 2 and 4 we have done nothing more than evaluate whether each of the identified factors was analysed and whether adequate explanations are contained in the record of the investigation as carried out by the national authority regarding how each of the relevant injury factors supported or was reconciled with the overall determination made.

7.15 Argentina further submits that under the Safeguards Agreement national authorities have a broad discretion how to conduct a safeguard investigation. Therefore, there is no specific requirement as to the methodology to be used to measure increases in imports or as to how thoroughly any factor must be considered, as long as the approach is reasonable and not in conflict with the specific requirements provided for in the Agreement. In Argentina's opinion, in several instances the Panel has imposed standards and requirements which have no basis in the Agreement.

7.16 In this context, we recall that we endorsed in para. 8.120 the statement by the panel on *United States - Shirts and Blouses* which reasoned that

"this is not to say that the Panel interprets the ATC as imposing on the importing Member any specific method either for collecting data or for considering and weighing all the relevant economic factors upon which the importing Member will decide whether there is need for a safeguard restraint. The relative importance of particular

factors including those listed in Article 6.3 of the ATC is for each Member to assess in the light of the circumstances of each case."<sup>407</sup>

7.17 We agree in principle with Argentina that the Safeguards Agreement leaves a margin of discretion to the national authority to choose its methodology for carrying out its investigation, in particular with respect to data collection and the weighing of the relative importance of all relevant economic factors provided that an adequate explanation is given of how the facts as a whole supported the determination made. However, a juxtaposition of data and conclusions without adequate reasoning linking them is not sufficient under the terms of the Safeguards Agreement.

7.18 We did not find fault with the duration of the investigation period chosen by Argentina for measuring whether increases in imports occurred, nor with the beginning and end years of that period (1991 to 1995) as selected by the CNCE. Nor did we consider an end-point-to-end-point analysis of a given investigation period to be problematic *per se* under the Safeguards Agreement. However, in the light of Article 4.2(a)'s requirement that "the rate and amount of the increase in imports" be evaluated, we considered that only end-point-to-end-point data are not enough but also that analysis of import trends during the entirety of an investigation period is required (para. 8.159). In a factual situation where the variation by one year of the beginning and the end points of an investigation period yielded substantially different results and where intervening trends of declines in imports were of a more than temporary nature, we considered a mere end-point-to-end-point analysis to be insufficient for demonstrating an increase in import quantities as required by Article 2 of the Safeguards Agreement. We further note Argentina's statement that certain portions of the record, in some cases even not explicitly cited by the authorities, were nevertheless within their knowledge and should be assumed to have been considered by the administering authority. In this regard, we recall our conclusion, consistent with the previous panel reports mentioned above, that the national authority of the importing Member has the obligation to examine, at the time of its determination, at least all of the factors listed in Article 4.2(a) and to publish a report setting forth, in accordance with Article 3.1, its findings and reasoned conclusions reached on all pertinent issues of law and of fact. We cannot endorse a theory that certain portions of a record of 10,000 plus pages should be assumed, absent adequate reasoning in the published report on the investigation, to have been considered by the national authority when making its determination.

7.19 With respect to the publication of a report setting forth findings and reasoned conclusions, Argentina also emphasised that the Technical Report is an integral part of Act 338, and that these documents cannot be separated from each other. Accordingly, it is Argentina's position that both of these documents constitute Argentina's published report setting forth the competent authority's findings and reasoned conclusions reached on all pertinent issues of fact and law. We note that Argentina largely relied on Act 338 in its argumentation. We also recall our statements in paras. 8.126-8.128 that we deemed Act 338 to be the most important document, but that we also took the Technical Report into consideration where that report contained more specific and additional information. However, we noted that consideration of the raw data of the investigation in the 10,000-plus page investigation record appeared to be of lesser importance given that the contents were organised and summarised by the CNCE in Act 338 and the Technical Report. Nonetheless, pursuant to Argentina's comments, we modified the end of para. 8.128.

7.20 Furthermore, Argentina pointed at certain legal and factual arguments which it believed the Panel should have addressed. In Argentina's view, failing to refer to these arguments, or relegating them to footnotes or final observations, would be a denial of procedural fairness. In this regard, we recall that the Appellate Body characterised an allegation that a panel has failed to conduct an

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<sup>407</sup> Panel Report on *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India (United States - Shirts and Blouses)*, adopted on 23 May 1997, para. 7.52.

"objective assessment" in the meaning of Article 11 of the DSU as a very serious allegation.<sup>408</sup> In the Appellate Body's opinion, a panel may be said to have failed in this basic duty if it deliberately disregards or distorts a fact or a piece of evidence,<sup>409</sup> if in assessing the facts before it, it exhibits "gross negligence amounting to bad faith",<sup>410</sup> or an "egregious error that calls into question the good faith of a panel",<sup>411</sup> or if it "arbitrarily ignores or manifestly distorts evidence".<sup>412</sup> In the context of other fact-intensive cases -- similar to the one before us -- the Appellate Body noted that "a panel cannot realistically refer to all statements made by the experts advising it and should be allowed a substantial margin of discretion as to which statements are useful to refer to explicitly".<sup>413</sup> In the *Korea - Liquor Tax* case, the Appellate Body also stated that "it is not an error ... for the panel to fail to accord the weight to the evidence that one of the parties believes should be accorded to it".<sup>414</sup> In light of these considerations, we believe that in making our assessment of the matter before us we have ensured fundamental fairness and due process for both parties.

7.21 In particular, Argentina made specific comments on the Panel's factual description and evaluation of the adequacy of the CNCE's explanation regarding specific injury factors. In reaction to these comments, we modified para. 8.173 in the section on "production". With respect to "sales", we modified paras. 8.175 and 8.180, and we added paras. 8.177 and 8.181. As regards "productivity", we added language to paras. 8.183 and 8.211. In respect of "profits and losses" we added information to the table on "accounting data" (para. 8.188) and modified or shortened the discussion of profits and losses in the section on "differences in data", especially regarding the break-even point analysis in para. 8.224. In response to Argentina's comments concerning the factor "employment" we did not consider any adjustments necessary. Following a comment on market shares of imports, we also modified footnote 551.

7.22 Concerning the treatment by the CNCE of data for the year 1996, Argentina stated that 1996 data from the questionnaires were incomplete at least as to the financial indicators because the petitioners filed their request for safeguard action in October 1996. We recall our consideration in para. 8.213 that Argentina should have taken into account 1996 data as a relevant factor in the meaning of Article 4.2(a) to the extent such data were collected during the investigation and are contained in the CNCE's record of the case. In the alternative, the national authority should have given an adequate explanation why such consideration of available 1996 data by the national authority was unnecessary or irrelevant in the particular circumstances of this case. However, by no means did we imply an obligation for a national authority to constantly update its data collection. Nor do we consider our statement inconsistent with our acceptance of Argentina's choice of an investigation period from 1991 to 1995. More specifically, we modified footnote 540 to identify the extent to which the CNCE had data from 1996 available in the investigation record with respect to particular injury factors.

7.23 Argentina further criticised that the findings in para. 8.163 mentioned only the preliminary decision as referring to the impact of the imposition of DIEMs on imports as of 1993, but fail to mention that the CNCE's final determination also held that imports had declined after 1993 because of the imposition of the DIEMs. We inserted footnote 529 to refer in that respect to the CNCE's final determination. At any rate, regardless of whether Argentina raised this argument only in the preliminary report or also in the final report, a *threat of increased imports* cannot be held to amount to

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<sup>408</sup> Appellate Body Report on *European Communities - Measures Affecting the Importation of Certain Poultry Products (European Communities - Poultry)* adopted on 23 July 1998, para. 133.

<sup>409</sup> Appellate Body Report on *European Communities - Hormones*, para. 139.

<sup>410</sup> Appellate Body Report on *European Communities - Hormones*, para. 138.

<sup>411</sup> Appellate Body Report on *European Communities - Hormones*, para. 133.

<sup>412</sup> Appellate Body Report on *European Communities - Hormones*, para. 145.

<sup>413</sup> Appellate Body Report on *European Communities - Hormones*, para. 138.

<sup>414</sup> Appellate Body Report on *Korea - Taxes on Alcoholic Beverages (Korea- Liquor Tax)*, adopted on 17 February 1999, para. 164.

a *threat of serious injury*. We reiterate our consideration (para. 8.284) that the Safeguards Agreement requires *actual* imports in increased quantities (in absolute terms or relative to domestic production) as one of the preconditions for imposing a safeguard measure and that a threat of additional imports as such is insufficient for a finding of a threat of serious injury.

7.24 Argentina also alleged that the Panel failed to reference a "cornerstone" of the CNCE's causation decision, i.e., the specific correlation of increasing import trends for footwear in 1991-1993 with declines in the gross domestic product (GDP) for footwear in the same period. In Argentina's view, this argument was reinforced by comparative declines in the Argentine footwear GDP versus increases of the Argentine GDP for the overall manufacturing sector. Argentina also pointed out that import increases in 1991 and 1992 were much higher in the footwear sector than overall imports to Argentina during the same period. We reflected this argument in para. 8.231 but continue to believe that above-average sectoral import increases and above-average sectoral GDP declines *per se* do not necessarily justify the imposition of safeguard measures in economic sectors whose performance is less successful than the performance of the national economy as a whole. We believe that a causal link needs to be established from an analysis of the impact of increased imports on the injury factors identified in the Safeguards Agreement.

7.25 With regard to the issue of whether the phrase "under such conditions" in Article 2.1 requires national authorities to carry out a price analysis, we refer to our discussion and conclusion in paras. 8.249ff that this phrase does not constitute a specific legal requirement for a price analysis and that products may compete on other bases than price, as enumerated in para. 8.251. We recall, however, as reflected in para. 8.254, that although in our view a price analysis is not a requirement of Article 2.1, in this case the alleged price underselling by imports was a major basis for Argentina's causation finding. Consequently, it was necessary for the CNCE to collect and analyse data to support this finding. We note, however, that the investigation neither developed nor analysed data on import prices, and that Argentina informed the Panel that references in the final determination to "cheap imports" had to do with underinvoicing rather than underselling (paras. 8.258-8.262). In the absence of evidence on or an assessment of import prices, we concluded that the CNCE did not adequately explain how it was possible for the CNCE to infer that lower-priced imports had had an injurious effect on the domestic industry.

## VIII. FINDINGS

### A. FACTUAL BACKGROUND

8.1 This case concerns a challenge by the European Communities to provisional and definitive safeguard measures taken by Argentina to limit imports of footwear. The recent history of Argentina's actions concerning footwear imports includes several measures and developments.

8.2 On 31 December 1993, Resolution 1696/93 introduced minimum specific duties (derechos de importación específicos mínimos or "DIEMs") on certain footwear imports. This measure originally foresaw the possibility of a single non-renewable extension of six months. However, it was extended several times. The last extension took place on 7 January 1997 by Resolution 23/97.<sup>415</sup>

8.3 On 4 October 1996, the United States requested consultations in respect of *Argentina - Certain Measures Affecting Footwear, Textiles, Apparel and Other Items*<sup>416</sup> ("*Argentina - Textiles and Apparel*"). The US request covered DIEMs on footwear and other products and alleged violations of Articles II, VII, VIII and X of GATT.<sup>417</sup>

8.4 On 25 October 1996, the Chamber of the Footwear Industry (Cámara de la Industria del Calzado "CIC") petitioned the National Foreign Trade Commission (Comisión Nacional de Comercio Exterior "CNCE") of the Subsecretaría de Comercio Exterior ("Subsecretaria") of the Ministerio de Economía y Obras y Servicios Públicos ("MYOSEP") to initiate a safeguard investigation in respect of footwear.

8.5 On 14 February 1997, the Argentine Ministry of Economy and Public Works repealed the DIEMs on footwear by Resolution 225/97. On the same day, the CNCE initiated a safeguard investigation and imposed provisional measures in the form of minimum specific duties on footwear (Resolution 226/97 of 14 February 1997).

8.6 On 21 February 1997,<sup>418</sup> pursuant to Article 12.1(a) of the Agreement on Safeguards ("Safeguards Agreement"), Argentina notified the WTO Committee on Safeguards of the initiation of the investigation and the reasons for it, as well as of its intention to apply a provisional safeguard measure. On 25 February 1997, the provisional safeguard measure entered into force<sup>419</sup>. On the same day, the panel requested by the United States on *Argentina - Textiles and Apparel* was established by the DSB.

8.7 Subsequently, the panel on *Argentina - Textiles and Apparel* decided not to rule on the DIEMs on footwear which had been revoked on 14 February 1997. During that panel proceeding, the European Communities participated as a third party.

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<sup>415</sup> Panel Report on *Argentina - Certain Measures Affecting Footwear, Textiles, Apparel and other Items* (WT/DS56), adopted 22 April 1997, para. 2.4.

<sup>416</sup> WT/DS56.

<sup>417</sup> On 23 April 1997, the **European Communities** initiated consultations regarding the same measures (WT/DS77).

<sup>418</sup> "Notification under Article 12.1(a) of the Agreement on Safeguards on initiation of an investigation and the reasons for it" and "Notification under Article 12.4 of the Agreement on Safeguards before taking a provisional safeguard measure referred to in Article 6" (G/SG/N/6/ARG/1, G/SG/N/7/ARG/1) which were circulated to WTO Members on 25 February 1997. On 5 March 1997, Argentina added a supplement to these notifications (G/SG/N/6/ARG/1/Suppl.1, G/SG/N/7/ARG/1/Suppl.1) which was circulated to WTO Members on 18 March 1997.

<sup>419</sup> Official Journal of the Argentine Republic No. 28.592 of 24 February 1997.

8.8 On 25 July 1997, Argentina notified the Committee on Safeguards, pursuant to Article 12:1(b) of the Safeguards Agreement, of the determination of serious injury made by the CNCE.<sup>420</sup>

8.9 On 1 September 1997, Argentina notified the Committee on Safeguards, pursuant to Article 12.1(c) and Article 9 (footnote 2) of the Safeguards Agreement, of the intention of the Argentine authorities to impose a definitive safeguard measure.<sup>421</sup>

8.10 In accordance with Article 12.3 of the Safeguards Agreement, consultations were held between the European Communities and Argentina on 9 September 1997.<sup>422</sup>

8.11 On 12 September 1997, Argentina imposed a definitive safeguard measure (Resolution 987/97) in the form of minimum specific duties on imports of footwear, effective as of 13 September 1997.<sup>423</sup> The measure is valid for three years (as of the entry into force of the provisional safeguard measure on 25 February 1997) and provides that it shall be liberalised on 1 May 1998, 16 December 1998 and on 1 August 1999.

8.12 However, Article 9 of Resolution 987/97<sup>424</sup> provides that if imports increase by more than 30 per cent in the first year after the imposition of the definitive measure in comparison to the year preceding it, the Ministry of Economy and Public Works may suspend the liberalisation schedule for half a year and extend the safeguard measure accordingly.

8.13 On 26 September 1997, the definitive safeguard measure was notified to the Committee on Safeguards by Argentina<sup>425</sup> and by Uruguay as Presiding Member State of MERCOSUR.<sup>426</sup>

8.14 On 3 April 1998,<sup>427</sup> the European Communities made a request for consultations with Argentina pursuant to Article XXII:1 of GATT entitled *Argentina - Safeguard Measures on Footwear* (DS 121).

8.15 On 22 April 1998, the DSB adopted the reports of the Panel and the Appellate Body on *Argentina - Textiles and Apparel* (WT/DS56) which found Argentina's minimum specific import duties on a range of textiles and apparel products to be inconsistent with Article II of GATT "because

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<sup>420</sup> Notification under Article 12.1(b) of the Agreement on Safeguards on finding a serious injury or threat thereof caused by increased imports (G/SG/N/8/ARG/1) which was circulated on 21 August 1997.

<sup>421</sup> G/SG/N/10/ARG/1 and G/SG/N/11/ARG/1, dated 15 September 1997, and G/SG/N/10/ARG/1/Corr.1, G/SG/N/11/ARG/1/Corr.1, dated 18 September 1997.

<sup>422</sup> The outcome of these consultations was notified, pursuant to Article 12.5, to the Committee on Safeguards on 10 September 1997.

<sup>423</sup> Official Journal of the Argentine Republic No. 28,729.

<sup>424</sup> Article 9 of Resolution 987/97: "The Secretariat of Industry, Trade and Mining shall monitor total imports and the adjustment plan provided for in the commitments undertaken by the petitioner.

(a) To this end, the Secretary of Industry, Trade and Mining shall prepare a report to determine whether there has been an increase in imports subject to the safeguard measures and imports originating in the countries covered by Article 9, paragraph 1, of the Agreement on Safeguards. The report will provide a comparison between total imports measured in pairs in the period September 1997-August 1998 and the same imports for the immediately preceding 12-month period up to September 1997. The Ministry of the Economy and Public Works and Services shall examine the report of the Secretary of Industry, Trade and Mining, and if the increase in imports is greater than 30 per cent it may suspend the liberalisation provided for the period between 30 December 1998 and 31 July 1999, in which case the measure in force at the time will continue until 31 July 1999; while for the remaining period during which the safeguard measure is in effect, the liberalisation timetable provided for in Annex I of this Resolution shall be maintained. ...".

<sup>425</sup> Resolution 987/97 was circulated to Member on 10 October 1997 (G/SG/N/10/ARG/1/Suppl.1 and G/SG/N/11/ARG/1/Suppl.1).

<sup>426</sup> G/SG/N/10/ARG/1/Suppl.2 and G/SG/N/11/ARG/1/Suppl.2 of 22 October 1997.

<sup>427</sup> WT/DS121/1, dated 8 April 1998.

the DIEM regime, by its structure and design, results, with respect to a certain range of import prices in any relevant tariff category to which it applies, in levying of customs duties in excess of the bound tariff rate of 35 per cent *ad valorem* in Argentina's Schedule".<sup>428</sup>

8.16 The consultations in the case on *Argentina - Safeguard Measures on Footwear* (DS 121) were held on 24 April 1998, but did not lead to a satisfactory resolution of the matter.

8.17 On 28 April 1998, Argentina enacted, in accordance with Article 9 of Resolution 987/97, Resolution 512/98<sup>429</sup> which modifies the definitive safeguard measure by postponing the liberalisation schedule.

8.18 On 10 June 1998,<sup>430</sup> the European Communities requested the establishment of a panel. The DSB established this Panel on 23 July 1998 and it was composed on 15 September 1998.

8.19 On 16 November 1998, Argentina published Resolution 1506/98 which provided for another modification of the original definitive safeguard measure.<sup>431</sup> Article 2 of Resolution 1506/98 provides for a further extension of the liberalisation schedule and introduces a tariff quota system.

8.20 On 7 December 1998, Argentina published Resolution 837/98<sup>432</sup> which implements Resolution 1506/98 by regulating the distribution of three-month quota allocations within the tariff quota system introduced by the latter resolution.

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<sup>428</sup> Appellate Body Report on *Argentina - Textiles and Apparel* (WT/DS56/AB/R), adopted on 22 April 1997, para. 87(a).

<sup>429</sup> Resolution 512/98: Amendment of Resolution No. 987/97, which provided for the closure of a safeguard investigation into footwear imports as regards the liberalization schedule (Exhibit EC-28):

Article 1: "The liberalization schedule established in Annex I to Resolution ... No. 987/[97], of 10 September 1997 shall be modified in accordance with the new schedule contained in Annex I to this Resolution".

Article 2: "The Secretariat ... shall monitor imports ..."

(a) "To that end, an analysis shall be carried out with a view to determining the evolution of imports as from the date of application of the safeguard measure and to compare those imports with the quantities imported during a previous representative period ...".

"On the basis of the result of these evaluations the Secretary ... shall submit a report to the Ministry ... on the appropriateness of maintaining the established liberalization schedule as provided for in the Annex to this Resolution."

<sup>430</sup> WT/DS121/3, dated 11 June 1998.

<sup>431</sup> Resolution 1506/98 (Exhibit EC-32):

Article 1: "The liberalization schedule established in Annex I to Resolution No. 512 of the Ministry ... of 24 April 1998, amending Resolution No. 987 of the Ministry ... of 10 September 1997, shall be modified in accordance with the new liberalization schedule contained in Annex I which ... is an integral part of this Resolution".

Article 2: "A *quantitative restriction* is hereby imposed on imports of footwear cleared through customs under MERCOSUR Common Nomenclature tariff headings ... as listed in Annex II which ... is an integral part of this Resolution". (Emphasis added).

Article 4: "A levy shall be paid on imports of footwear exceeding the quantity of pairs established in Article 2 at the rate of the Minimum Specific Duties of the Safeguard Measure described in Annex I to this Resolution, Article 1 of which amends Resolution No. 512 ... dated 24 April 1998, amending Resolution No. 987/97 ... of 10 September 1997, increased by 100 per cent (100%) as listed in Annex III which ... is an integral part of this Resolution".

<sup>432</sup> Resolution 837/98 setting forth the arrangements for the allocation and distribution of the three-month footwear import quotas established in Annex II to Resolution No. 1506/98 (Exhibit EC-35):

Article 1: "The allocation of three-month footwear import quotas established in Annex II to Resolution ... 1506/98 shall be under the responsibility of the Directorate-General of Customs".

Article 4: "In no case shall the figure of 25 per cent (25%) of the total three-month quota assigned to each tariff heading per importer be exceeded".



B. CLAIMS

8.21 The European Communities alleges that the provisional and the definitive safeguard measure are in breach of Argentina's obligations under the Agreement on Safeguards and under the GATT. The European Communities alleges breaches of:

- Article XIX of GATT 1994 (in particular the lack of "unforeseen developments");

and of the following provisions of the Safeguards Agreement:

- Article 2 (especially the requirement of determining in an investigation that certain conditions are present and the non-discrimination obligation);
- Article 4 (in particular that all relevant factors must be investigated and the obligation to demonstrate the existence of a causal link);
- Article 5 (especially the condition that measures must only be applied to prevent or remedy serious injury);
- Article 6 (in particular the requirement of evidence of "critical circumstances"); and
- Article 12 (especially the notification obligations).

C. TERMS OF REFERENCE AND SCOPE OF THE MEASURES IN DISPUTE

**1. Minimum specific duties (DIEMs)**

8.22 The EC's position is that the previous panel on *Argentina - Textiles and Apparel (DS 56)*<sup>433</sup> should have reviewed the WTO compatibility of the DIEMs on footwear, but it does not ask this Panel to declare these DIEMs WTO-inconsistent. Argentina requests the Panel not to take into account any claims made by the European Communities regarding the DIEMs on footwear. In view of the facts that the DIEMs on footwear were repealed on 14 February 1997, that they were not specifically identified in the request for the establishment of this Panel, and that the European Communities makes no claims related thereto, we see no basis to make a ruling concerning them.

**2. Subsequent modifications of the definitive safeguard measure**

8.23 The European Communities claims that Resolutions 512/98, 1506/98 and 837/98 fall within this Panel's terms of reference since the definitive safeguard measure (Resolution 987/97) was listed in its panel request and is still in effect - albeit in a modified form.

8.24 Argentina responds that Resolution 512/98 of 28 April 1998, Resolution 1506/98 of 16 November 1998 and Resolution 837/98 of 4 December 1998 concerning the modification of the liberalisation schedule of the definitive safeguard measure are not within the terms of reference of this Panel given that the EC's request for the establishment of this Panel specifically mentions only Resolution 226/97 of 14 February 1997 on the imposition of a provisional measure and Resolution 987/97 of 12 September 1997 on the imposition of a definitive measure.

8.25 In response to a Panel question regarding how Argentina reconciles its arguments that Resolutions 512/98 and 1506/98 are based on and flow out of Article 9 of Resolution 987/97, on the

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<sup>433</sup> Panel Report on *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, adopted on 22 April 1998, WT/DS56/R, paras. 6.14 - 6.15.

one hand, and that these resolutions are outside the Panel's terms of reference because they are new measures, Argentina indicates that it does not refer to two new measures. Rather, in Argentina's view, these are foreseen modifications to the measure adopted by Resolution 987/97, but do not come within the terms of reference of this Panel.

8.26 In the EC's view, Argentina itself has admitted that the subsequent resolutions are a simple application of Article 9 of Resolution 987/97 and thus an integral part of the definitive safeguard measure. Accordingly, they are modifications of Resolution 987/97 rather than new safeguard measures. The European Communities further points out that, contrary to the *Guatemala - Cement*<sup>434</sup> case where Mexico referred to an antidumping investigation, but failed to identify the definitive anti-dumping measure in its panel request, the European Communities has identified the definitive safeguard measure in its request for the establishment of this Panel.

8.27 Before addressing these questions, we recall that Article 6.2 of the DSU requires that both the "specific measures at issue" and the "legal basis for the complaint" (or the "claims") be identified in a request for the establishment of a panel. We note that the relevant part of the EC's request for the establishment of this Panel reads:

"Under Resolution 226/97, published in the Official Journal of the Argentine Republic No. 28592 on 24 February 1997, Argentina imposed a provisional safeguard measure in the form of minimum specific duties on imports of footwear effective as of 25 February 1997. Under Resolution 987/97, published in the Official Journal of the Argentine Republic No. 28729 on 12 September 1997, Argentina imposed a definitive safeguard measure in the form of minimum specific duties on imports of footwear effective as of 13 September 1997."<sup>435</sup>

8.28 In *Guatemala - Cement*, the Appellate Body recently addressed in detail the issues of the terms of reference in Article 7 of the DSU and the specificity requirements set forth in Article 6.2 of the DSU:

"[T]he task of a panel is to examine the 'matter referred to the DSB'. ... Article 7 of the DSU itself does not shed any further light on the meaning of the term 'matter'. However, when that provision is read together with Article 6.2 of the DSU, the precise meaning of the term 'matter' becomes clear. Article 6.2 specifies the requirements for a complaining Member to refer the 'matter' to the DSB. In order to seek the establishment of a panel to hear its complaint, a Member must make, in writing, a 'request for the establishment of a panel' (a 'panel request'). In addition to being the document which enables the DSB to establish a panel, the panel request is also usually identified in the panel's terms of reference as the document setting out 'the matter referred to the DSB'. "<sup>436</sup>

8.29 Consequently, as a preliminary issue, we have to ascertain which "measures" have been specified consistently with the requirements of Article 6.2 of the DSU so as to fall within our terms of reference.

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<sup>434</sup> Appellate Body Report on *Guatemala - Anti-dumping Investigation regarding Portland Cement from Mexico* (WT/DS60/AB/R), adopted on 25 November 1998, para. 86.

<sup>435</sup> WT/DS121/3, circulated on 11 June 1998.

<sup>436</sup> Appellate Body Report on *Guatemala - Cement*, para. 72.

8.30 In addressing Argentina's objections to inclusion of Resolutions 512/98, 1506/98 and 837/98 in this Panel's terms of reference, we recall that in *Brazil - Desiccated Coconut*,<sup>437</sup> the Appellate Body stated that:

"a panel's terms of reference are important for two reasons. First, terms of reference fulfil an important due process objective - they give parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute."<sup>438</sup>

8.31 The panel request in this dispute clearly identified that Argentina's provisional and definitive measures on footwear are at issue in this dispute. The European Communities does not contest the obvious fact that the subsequent Resolutions which modified the definitive safeguard measure were not explicitly mentioned in the panel request. The question then becomes whether subsequent modifications of a definitive measure which are not explicitly mentioned in this request fall within the meaning of Article 6.2 of the DSU, i.e., that "the specific measures at issue" must be identified in the panel request.

8.32 The *European Communities - Bananas III*<sup>439</sup> panel addressed the issue of measures to be deemed covered by a panel's terms of reference in the light of the requirements of Articles 6.2 and 7 of the DSU. The panel request by Ecuador, Guatemala, Honduras, Mexico and the United States in *European Communities - Bananas III* read as follows:

"The European Communities maintains a regime for the importation, sale and distribution of bananas established by Regulation 404/93(O.J. L 47 of 25 February 1993, p.1), and subsequent EC legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement on Bananas, which implement, supplement and amend that regime."

8.33 Therefore, in the *European Communities - Bananas III* panel request, the "basic EC regulation at issue" was identified, and in addition, the request referred in general terms to "subsequent EC legislation, regulations and administrative measures ... which implement, supplement and amend [the EC banana] regime". The *European Communities - Bananas III* panel found that for purposes of Article 6.2 this reference was sufficient to cover all EC legislation dealing with the importation, sale and distribution of bananas because the measures that the complainants were contesting were "adequately identified", even though they were not explicitly listed.<sup>440</sup> The Appellate

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<sup>437</sup> Appellate Body Report on *Brazil - Measures Affecting Desiccated Coconut*, (WT/DS22/AB/R) adopted 20 March 1997, p. 22.

<sup>438</sup> Appellate Body Report on *Brazil - Desiccated Coconut*, p. 22. In this case, the Appellate Body also referred to the following Panel Reports: Panel Report on *United States - Imposition of Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, adopted on 27 April 1994, BISD 41S/229, para. 229. *United States - Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, adopted on 28 April 1994, BISD 41S/576, para. 212; *United States - Denial of Most-favoured-nation treatment as to Non-rubber Footwear from Brazil*, adopted on 19 June 1992, BISD 39S/128, para. 6.2; *European Communities - Imposition of Anti-dumping Duties on Imports of Cotton Yarn from Brazil*, adopted on 30 October 1995, BISD 42S/17, para. 456.

<sup>439</sup> Panel Report on *European Communities - Regime for the Importation, Sale and Distribution of Bananas* (WT/DS/27/R), adopted on 25 September 1997, para. 7.35; Appellate Body Report on *European Communities - Regime for the Importation, Sale and Distribution of Bananas* (WT/DS/27/AB/R), adopted on 25 September 1997, para. 142.

<sup>440</sup> Panel Report on *European Communities - Bananas III*, para. 7.27.

Body agreed that the panel request "contains sufficient identification of the measures at issue to fulfil the requirements of Article 6.2".<sup>441</sup>

8.34 In the present dispute, Argentina's procedural objections concern modifications of the definitive safeguard measure which is a situation quite similar to the "subsequent EC legislation, regulations and administrative measures ... which implement, supplement and amend [the EC banana] regime" and were found to be within that panel's terms of reference. If there is a difference between *European Communities - Bananas III* and the case before us, it is the fact that the EC banana regime encompassed dozens of subsequent regulations which implemented, but also supplemented and amended the original Regulation 404/93 on the common market organisation for bananas. In the case before us, however, the subsequent resolutions change the legal form or the form of application of the definitive safeguard measure, while the safeguard investigation made at the outset, which remains the basis for the definitive safeguard measures, has not changed.

8.35 We further recall that the *Japan - Film* panel<sup>442</sup> considered certain measures which had not been listed in the panel request to be within its terms of reference because they were "implementing measures" based on a basic framework law, specifically identified in the panel request, which specified the form and circumscribed the possible content and scope of such implementing measures. From this we infer that a legal act not explicitly listed in a panel request but which has a direct relationship to a measure that is specifically described therein, can be said to be sufficiently identified to satisfy the requirements of Article 6.2. In this respect, we agree with the *Japan - Film* panel's statement that the requirements of Article 6.2 could be met in the case of a legal act that is subsidiary to or so closely related to a measure specifically identified, that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party.<sup>443</sup> The *Japan - Film* panel reasoned:

"The two key elements - close relationship and notice - are inter-related. Only if a legal act is subsidiary or closely related to a specifically identified measure will notice be adequate. For example, where a basic framework law dealing with a narrow subject matter that provides for implementing acts is specified in a panel request, implementing acts might be considered in appropriate circumstances as effectively included in the panel request as well for purposes of Article 6.2."<sup>444</sup>

8.36 Accordingly, the *Japan - Film* panel excluded from its terms of reference measures which were based on a framework law of broad scope,<sup>445</sup> but included closely related and subsidiary measures which were based on a framework law with a narrow focus and a specific delegation of powers to take implementing measures.<sup>446</sup>

8.37 In case before us, the three subsequent Resolutions at issue are modifications of and based directly on the original definitive safeguard measure (in particular on Article 9 of Resolution 987/97) in a way that, in our view, is analogous to the situation where implementing measures are based on a

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<sup>441</sup> Appellate Body Report on *European Communities - Bananas III*, para. 140.

<sup>442</sup> Panel Report on *Japan - Measures Affecting Consumer Photographic Film and Paper* (WT/DS/44/R), adopted on 22 April 1998, para. 10.8.

<sup>443</sup> Panel Report on *Japan - Film*, paras. 10.10.

<sup>444</sup> Panel Report on *Japan - Film*, paras. 10.8.

<sup>445</sup> The *Japan - Film* panel considered the 1971 Japan Fair Trade Commission (JFTC) Rule No. 1 (International Contract Notification Requirement) not to be covered by its terms of reference because the explicitly listed Japanese Antimonopoly Law is a law of such a broad scope that the respondent could not be considered to be on notice of that rule.

<sup>446</sup> The *Japan - Film* panel considered the 1967 JFTC Notification No. 17 on premiums between businesses and the 1977 JFTC Notification No. 5 on premiums to customers to be covered by its terms of reference because the explicitly listed Japanese Premiums Law is a law of narrow focus and authorizes, in its Article 3, the JFTC to limit, if necessary, the use of premiums for purposes of consumer protection.

framework law that specifies form, content and scope. Article 9<sup>447</sup> makes it clear that Resolution 987/97 and the definitive safeguard measure imposed by it remain in force, i.e., that the subsequent resolutions have not in any sense repealed or replaced it. Rather, these later resolutions have only modified particular aspects of the definitive measure as originally applied (i.e., suspended its liberalisation timetable and changed its form from a specific duty to a tariff rate quota) within the parameters set out in the original definitive safeguard measure. We find evidence of this in the fact that, first, Resolutions 512/98 and 1506/98 are explicitly characterised in this way as “modifying” “the safeguard measure” pursuant to Article 9 of Resolution 987/97, and second, Resolution 837/98 is characterised as only implementing the tariff rate quota system introduced by Resolution 1506/98 on a quarterly basis. Thus, the legal framework provided for in the “definitive safeguard measure” as such clearly remains in force, although its specific implementation has been subsequently modified in form.<sup>448</sup> This can clearly be distinguished from, e.g., the situation preceding this dispute when the DIEMs on footwear were repealed and replaced with an entirely new and legally distinct measure (albeit taking the same form), i.e., the safeguard measure at issue.

8.38 In the panel and Appellate Body reports concerning the dispute on *Australia - Measures Affecting Importation of Salmon*,<sup>449</sup> we find that a measure not explicitly mentioned in the request for the establishment of a panel may nevertheless be covered by its terms of reference. In its panel request, Canada identified the measure(s) in dispute as the "Australian Government's measures prohibiting the importation of fresh, chilled or frozen salmon ... which include Quarantine Proclamation 86A, dated 19 February 1975, and any amendment or modification to it."<sup>450</sup> Throughout the case, the complainant referred to the Quarantine Proclamation 86A, as well as to the so-called "1988 Conditions"<sup>451</sup> and the so-called "1996 Requirements",<sup>452</sup> which concerned a heat-treatment requirement, and to the so-called "1996 Decision" which prohibited imports of fresh salmon from North America.<sup>453</sup> The Appellate Body found that the "1988 Conditions" and the "1996 Requirements" could not be considered to be included in that panel's terms of reference because they did not refer to an import prohibition of fresh salmon, but to a heat treatment requirement applicable to smoked salmon and salmon roe. At the same time, the Appellate Body considered that the "1996 Decision" fell within the panel's terms of reference because it referred to an import prohibition. From that Appellate Body finding we see that not explicitly listed legal acts which might modify the legal form but confirm in substance a previous measure identified in the panel request (i.e., QP86A) may fall within a panel's terms of reference.

8.39 The most recent case in which the Appellate Body extensively addressed the issue of a panel's terms of reference is the dispute on *Guatemala - Anti-dumping Investigation regarding Portland Cement from Mexico*. In this case, Mexico requested that a panel be established "to examine the

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<sup>447</sup> Article 9 of Resolution 987/97 provides that: "... The Ministry ... shall examine the report of the Secretary ..., and if the increase in imports is greater than 30 per cent it may suspend the liberalisation provided for the period between 30 December 1998 and 31 July 1999, in which case the measure in force at the time will continue until 31 July 1999; while for the remaining period during which the [definitive] safeguard measure is in effect, the liberalisation timetable provided for in Annex I of this Resolution shall be maintained. ...".

<sup>448</sup> For example, Resolution 837/98 implements and is thus clearly subsidiary to Resolution 1506/98. By the same token, Resolutions 512/98 and 1506/98 modify, and thus are clearly subsidiary to, Resolution 987/97, which remains the legal basis and sets out the parameters of the definitive safeguard measure.

<sup>449</sup> Panel Report and Appellate Body Report on *Australia - Measures Affecting Importation of Salmon*, (WT/DS/18/R and WT/DS/18/AB/R), adopted on 6 November 1998.

<sup>450</sup> WT/DS18/2, dated 10 March 1997.

<sup>451</sup> Conditions for the Importation of Salmonid Meat and Roe into Australia.

<sup>452</sup> Requirements for the Importation of Individual Consignments of Smoked Salmonid Meat.

<sup>453</sup> The so-called "1996 Decision" provides that "having regard to Australian Government policy on quarantine and after taking account of Australia's international obligations, importation of ... salmonid product ... should not be permitted on quarantine grounds". Appellate Body Report on *Australia - Salmon*, paras. 90-105.

consistency of the antidumping investigation by the Government of Guatemala into Guatemalan imports of portland cement with Guatemala's obligations ... contained in the Anti-dumping Agreement." Although Mexico did not identify any provisional or definitive anti-dumping measure in its request, that panel refrained from dismissing the case. The Appellate Body found fault with this because "[a]s we understand the Panel, it would, in effect, suffice, under Article 6.2 of the DSU, for a panel request to identify only the 'legal basis for the complaint', without identifying the 'specific measure at issue'".<sup>454</sup> The Appellate Body indicated that "the Panel was entitled to examine Mexico's claims concerning the initiation and conduct of the investigation in this case only if the panel request properly identified a relevant anti-dumping measure as the "specific measure at issue" in accordance with Article 6.2 of the DSU".<sup>455</sup> Therefore, according to the Appellate Body in *Guatemala - Cement*, the measures to be identified in an anti-dumping case could be the provisional or definitive measure, or a price undertaking.

8.40 In the dispute before us, while the EC's panel request does cite the numbers of resolutions (226/97 and 987/97) and the promulgations in Argentina's Official Journal that imposed the provisional and the definitive measures, respectively, we consider that the EC's request primarily and unambiguously identifies the provisional and definitive measures (rather than only the cited resolutions and promulgations as such). In our view, it is the identification of these measures (rather than merely the numbers of the resolutions and the places of their promulgation in the Official Journal) which is primarily relevant for purposes of Article 6.2 of the DSU. Therefore, we consider that it is the provisional and definitive measures in their substance rather than the legal acts in their original or modified legal forms that are most relevant for our terms of reference. In our view, this is consistent with the Appellate Body's findings in the *Guatemala - Cement* case.

8.41 Moreover, it appears that an interpretation whereby these subsequent Resolutions are considered to be measures separate and independent from the definitive safeguard measure, and thus outside our terms of reference, could be contrary to Article 3.3 of the DSU. Such an interpretation could allow a situation where a matter brought to the DSB for prompt settlement is not resolved when the defendant changes the legal form of the measure through a separate but closely related instrument, while the measure in dispute remains essentially the same in substance. In this way, Members could always keep one step ahead of any WTO dispute settlement proceeding because in such a situation, the complaining Member would indeed, challenge a "moving target", and panel and Appellate Body's findings could already be overtaken by events when they are rendered and adopted by the DSB.

8.42 These considerations are particularly relevant where, as in the case before us, the crucial question before the panel is whether the safeguard investigation and determination at issue could serve as the legal basis for *any* safeguard measure, and not only the particular original definitive measure, or the subsequent modifications at issue. In our view, multilateral surveillance of safeguard investigations and determinations could be circumvented if, in such a dispute, a finding that there was no legal basis for a safeguard measure could not, for procedural reasons, have any remedial effect on the definitive safeguard measure in its then-current legal form only because the definitive measure (while continuing to have its original legal basis and identity in substance) had been modified in some way from its original legal form.

8.43 Finally, we recall the important due process objectives fulfilled by a panel's terms of reference, as emphasised by the Appellate Body in the *Brazil - Desiccated Coconut*<sup>456</sup> case. *Inter alia*, the terms of reference provide notice to the parties and third parties concerning the claims and measures at issue in a dispute, in order to allow them an opportunity to respond to the complainant's allegation. In the light of the fact that the main question before us is whether the safeguard

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<sup>454</sup> Appellate Body Report on *Guatemala - Cement*, para. 69.

<sup>455</sup> Appellate Body Report on *Guatemala - Cement*, para. 81.

<sup>456</sup> Appellate Body Report on *Brazil - Measures Affecting Desiccated Coconut*, (WT/DS22/AB/R) adopted 20 March 1997, p. 22.

investigation and findings at issue can serve as the legal basis for a safeguard measure, and not just the particular legal form of the original definitive safeguard measure as identified in the panel request, in our view, the examination of the definitive safeguard measure in its original legal form but also in its subsequent legal modifications through Resolutions 512/98, 1506/98, and 837/98 could not in any way deprive Argentina or third parties of their right to adequate notice and due process concerning the claims of the European Communities in the present dispute. In this context, we recall the Appellate Body's statement in the case on *European Communities - Computer Equipment* that it could not see "how the alleged lack of precision of the terms, LAN equipment and PCS with multimedia capability, in the request for the establishment of a panel affect the rights of defence of the European Communities *in the course* of the panel proceedings. As the ability of the European Communities to defend itself was not prejudiced by a lack of knowing the measures at issue, we do not believe that the fundamental rule of due process was violated by the Panel".<sup>457</sup> Similarly, in the present case, the ability of Argentina to defend itself was not prejudiced by a lack of knowledge of which measures were of concern to the European Communities.

8.44 Indeed, for these modifications to be new safeguard measures, they would have to be based on a new investigation, and the conditions for the re-application of a safeguard measure, including the waiting period foreseen in Article 7.5, would have to be observed. In this respect, we note that Argentina itself considers the subsequent resolutions in substantive terms to be based on the same safeguard investigation as the definitive safeguard measure as originally applied, (Resolution 987/97), while arguing at the same time that these subsequent modifications are in procedural terms outside our terms of reference.<sup>458</sup> We further note that Argentina does not argue that these modifications are extensions of the safeguard measure within the meaning of paragraphs 2 and 4 of Article 7.

8.45 We do not here wish to imply that an expansion of the terms of reference of a panel in the complainant's first submission or even later could be permissible under Article 6.2 of the DSU. Clearly, due process and adequate notice would not be served if a complaining party were free to add new measures or new claims to its original complaint as reflected in its panel request at a later stage of a panel proceeding. But this is not the situation in the present dispute because, in our view (and also in the view of both parties), the subsequent resolutions do not constitute entirely new safeguard measures in the sense that they were based on a different safeguard investigation, but are instead modifications of the legal form of the original definitive measure, which remains in force in substance and which is the subject of the complaint.

8.46 In the light of these considerations, we find that our terms of reference include Argentina's provisional and definitive safeguard measures on footwear in their original legal form (Resolutions 226/97 and 987/97) as well as in their subsequently modified forms of application (Resolutions 512/98, 1506/98 and 837/98).

#### D. THE CLAIM UNDER ARTICLE XIX OF GATT 1994 AND "UNFORESEEN DEVELOPMENTS"

8.47 The European Communities raises a separate claim under Article XIX:1(a) of GATT with respect to the failure by Argentina to examine whether the import trends of the products under investigation are the result of "unforeseen developments" and the "effect of the obligations incurred by a Member under [the GATT], including tariff concessions". Since tariff concessions and other obligations are an additional element to "unforeseen developments", it necessarily follows for the European Communities that trade liberalisation *per se* cannot constitute such unforeseen developments. The European Communities submits that Argentina's trade liberalisation within MERCOSUR and the WTO framework was a conscious commercial policy and that the large increase

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<sup>457</sup> Appellate Body Report on *European Communities - Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS/68/AB/R, adopted on 22 June 1988, para. 70.

<sup>458</sup> Argentina's answer to question 35 by the Panel, see para. 4.11 of the descriptive part.

in imports occurred "immediately after the opening up of the economy which began in 1989/90".<sup>459</sup> Therefore, the European Communities concludes that increased imports of footwear cannot be considered "unforeseen developments" within the meaning of Article XIX:1(a) of GATT because increases in imports have to be the result of other unforeseen developments.

8.48 Argentina opposes the EC's theory that the criterion of "unforeseen developments" applies to safeguard action taken under the WTO agreements. First, Argentina considers that there is a conflict with respect to the criterion of "unforeseen developments" between Article XIX and the WTO Safeguards Agreement and that, pursuant to the General Interpretative Note to Annex 1A to the Agreement Establishing the WTO, the latter prevails. In the alternative, Argentina argues that it could not have foreseen the extent of the surge of footwear imports resulting from the liberalisation programmes mentioned by the European Communities.

8.49 Article XIX:1(a) of GATT on "Emergency Safeguard Measures" reads:

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

Article 2.1 of the WTO Agreement in turn provides:

*"A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products."* (footnote omitted).

8.50 While it is true that the Safeguards Agreement by and large incorporates and further develops in greater detail the conditions for the imposition of safeguard measures provided for in Article XIX of GATT, there is at least one difference. The condition in Article XIX that safeguard measures may not be imposed unless the increased imports alleged to cause or threaten serious injury are a result of unforeseen developments and of the effect of the obligations incurred by a Member does not appear in the Safeguards Agreement.

8.51 We note that the parties and third parties have addressed in some detail the questions (i) whether the provisions of the Safeguards Agreement prevail over the "unforeseen developments" criterion of Article XIX of GATT because they are in conflict with one another, (ii) whether all the requirements of Article XIX (including the criterion of "unforeseen developments") are subsumed by the provisions of the Safeguards Agreement,<sup>460</sup> and (iii) whether the requirements of Article XIX of GATT and the Safeguards Agreement have to be complied with on a cumulative basis. The parties seem to agree that, since the entry into force of the WTO agreements, safeguard measures can no longer be imposed through the exclusive application of Article XIX of GATT in and of itself.

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<sup>459</sup> G/SG/N/8/ARG/1, Exhibit EC-16, p.3.

<sup>460</sup> Third party submission by the United States, see descriptive part, section VI.C.1.(d).



8.52 We start our analysis by examining whether any provision of the new Safeguards Agreement addressed the relationship between the Safeguards Agreement and Article XIX of GATT. In this respect we note that Article 1 of the Safeguards Agreement provides:

"This Agreement establishes rules for the application of safeguard measures, which shall be understood to mean those measures provided for in Article XIX of GATT 1994".

Article 11.1(a) of the Safeguards Agreement on the "Prohibition and Elimination of Certain Measures" in turn requires that:

"[a] Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement."

8.53 In the light of these provisions, we need to interpret the phrases "provisions of ... Article [XIX] applied in accordance with this [Safeguards] Agreement", "application of safeguard measures", i.e., "those provided for in Article XIX of GATT". In accordance with the "customary rules of interpretation of public international law" referred to in Article 3.2 of the DSU, i.e., Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), we deem it appropriate to approach these questions in the light of the ordinary meaning, the context and the object and purpose of the Safeguards Agreement, Article XIX of GATT and, to the extent relevant, the General Interpretative Note to Annex 1A of the WTO Agreement.

8.54 The ordinary meaning of the term application can be described as "bringing of a general or figurative statement, a theory, principle, etc., to bear upon a matter"; "[the] applicability in a particular case", "relevance", "the bringing of something to bear practically in a matter", "put into practical operation".<sup>461</sup> These descriptions of the ordinary meaning of application imply that bringing the theory or principle, i.e., safeguard measures in the meaning of Article XIX, into practical operation, requires compliance with and implementation of the detailed rules and procedures of the Safeguard Agreement when introducing or maintaining safeguard measures.

8.55 We note in this respect that Article 1 of the Safeguards Agreement does not refer to the application of Article XIX as such. Rather, it refers to the application of safeguard measures, which are then defined as those measures provided for in Article XIX. However, Article 11 makes clear that "such [emergency] action" has to conform with Article XIX "applied in accordance with this [Safeguards] Agreement". In our view, this indicates that the application of safeguard measures in the meaning of Article XIX requires - since the entry into force of the Safeguards Agreement - conformity with the requirements and conditions of the latter agreement. Although all the provisions of Article XIX of GATT continue to legally co-exist with the Safeguards Agreement in the framework of the single undertaking of the Uruguay Round agreements, any implementation of safeguard measures in the meaning of Article XIX presupposes the application of and thus compliance with the provisions of the Safeguards Agreement.

8.56 To put it differently, we believe that the choice of the word *application* appears to imply that rules for the imposition of safeguard measures provided for in Article XIX of GATT and the rules for the imposition of safeguard measures deriving from the Safeguards Agreement have to be read in conjunction and have become intrinsically linked, if not inseparable from one another since the entry into force of the WTO Agreement. While the Safeguards Agreement does not supersede or replace Article XIX, which continues to remain in force as part of the GATT, the original conditions contained in Article XIX have to be read in the light of the subsequently negotiated and much more

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<sup>461</sup> The New Shorter Oxford English Dictionary on Historical Principles, Oxford (1993) p.100.

specific provisions of the Safeguards Agreement. Those provisions of the Safeguards Agreement place the original rule of Article XIX within the entire package of the new WTO legal system and make it operational in practice.

8.57 In this regard, we recall that the *Brazil - Desiccated Coconut* case focused on the relationship between Article VI of GATT and the Agreement on Subsidies and Countervailing Measures (SCM Agreement) as bases for the imposition of countervailing duties. In other words, that case concerned a situation which is analogous to the present dispute. In *Brazil - Desiccated Coconut*,<sup>462</sup> the Appellate Body noted that

"the relationship between the GATT of 1994 and the other goods agreements in Annex 1A is complex and must be examined on a case-by-case basis. Although the provisions of the GATT of 1947 were incorporated into, and became part of the GATT 1994, they are *not the sum total of the rights and obligations of WTO Members concerning a particular matter*. For example with respect to subsidies on agricultural products, Articles III, VI, XVI of the GATT 1994 alone do not represent the total rights and obligations of WTO Members. The *Agreement on Agriculture and the SCM Agreement reflect the latest statement of WTO Members as to their rights and obligations concerning agricultural subsidies*.<sup>463</sup>" (emphasis added).

The Appellate Body in *Brazil - Desiccated Coconut* also endorsed the panel's statement that:

"the SCM Agreements<sup>464</sup> *do not merely impose additional substantive and procedural obligations* on a potential user of countervailing measures. Rather, the SCM Agreements and Article VI *together define, clarify and in some cases modify the whole package of rights and obligations* of a potential user of countervailing measures."<sup>465</sup> (emphasis added).

8.58 Given the reasoning developed by the panel and the Appellate Body in the *Brazil - Desiccated Coconut* case, it is our view that Article XIX of GATT and the Safeguards Agreement must *a fortiori* be read as representing an *inseparable package* of rights and disciplines which have to be considered in conjunction. Therefore, we conclude that Article XIX of GATT cannot be understood to represent the total rights and obligations of WTO Members, but that rather the Safeguards Agreement as applying the disciplines of Article XIX of GATT, reflects the latest statement of WTO Members concerning their rights and obligations concerning safeguards. Thus the Safeguards Agreement should be understood as *defining, clarifying, and in some cases modifying* the whole package of rights and obligations of Members with respect to safeguard measures as they currently exist. By the same token, and in the light of the principle of effective treaty interpretation, the *express omission* of the criterion of unforeseen developments in the new agreement (which otherwise transposes, reflects and refines in great detail the essential conditions for the imposition of safeguard measures provided for in Article XIX of GATT) must, in our view, have meaning.

8.59 We find support for this interpretation of Articles 1 and 11 of the Safeguards Agreement also in the immediate context of these provisions. Article 10 defines the temporal delimitation of the applicability of Article XIX of GATT 1947 and the new Safeguards Agreement, providing that:

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<sup>462</sup> Appellate Body Report on *Brazil - Measures Affecting Desiccated Coconut*, AB-1996-4, WT/DS22/AB/R, adopted on 20 March 1997, p. 14.

<sup>463</sup> Panel Report on *Brazil - Measures Affecting Desiccated Coconut*, WT/DS22/R, adopted on 20 March 1997, para. 227.

<sup>464</sup> The plural means the Tokyo Round Subsidies Agreement and the Uruguay Round SCM Agreement.

<sup>465</sup> Panel Report on *Brazil - Desiccated Coconut*, para. 246.

"Members shall terminate all safeguard measures taken pursuant to Article XIX of GATT 1947 that were in existence on the date of entry into force of the WTO Agreement not later than eight years after the date on which they were first applied or five years after the date of entry into force of the WTO Agreement, whichever comes later."

8.60 This provision read in conjunction with Articles 1 and 11 of the Safeguards Agreement reinforces, in our view, the interpretation that safeguard measures under Article XIX of GATT - which is identical in wording with Article XIX of GATT 1947 - cannot be *applied*, i.e., made operational or put into practice, unless they are in *conformity*, i.e., in compliance with the requirements and conditions of the Safeguards Agreement.

8.61 Concerning the object and purpose of the Safeguards Agreement, we note that its preamble recognises as the object of the Safeguards Agreement "the need to *clarify* and *reinforce* the disciplines of GATT, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products)," as well as the purpose: "to *re-establish multilateral control* over safeguards and eliminate measures that escape such control,"<sup>466</sup> and that, therefore, "a *comprehensive agreement*, applicable to all Members and based on the basic principles of GATT, is called for".<sup>467</sup>

8.62 Accordingly, the object of the Safeguards Agreement is to "clarify and reinforce" the disciplines of Article XIX.<sup>468</sup> It is the very point of a new agreement clarifying existing disciplines that it implies some degree of refinement or modification, such as in this case, in respect of the express omission of the *unforeseen developments* criterion.

8.63 The preamble further reflects as one of the primary purposes of the Safeguards Agreement the need to "re-establish multilateral control over safeguards and eliminate measures that escape such control". This recital highlights the wide-ranging lack of discipline on safeguard measures in the pre-Uruguay Round international trade relations. Such a re-establishment of multilateral control implies a new balance of rights and obligations that in some cases modifies the whole package of rights and obligations resulting from the Uruguay Round negotiations. On the one hand, new, clearer and more stringent conditions for the imposition of safeguard measures apply and explicit prohibitions of grey-area measures are provided for in order to contain acts of circumvention. On the other hand, there are provisions that allow for more flexible conditions, such as Article 8.3 of the Safeguards Agreement, which provides for an explicit derogation postponing the right of affected Members to suspend equivalent concessions after the imposition of a safeguard measure. The express omission of the unforeseen development criterion in the new Safeguards Agreement would arguably fit in the latter category.

8.64 One could argue that such an interpretation of the purpose of the Safeguards Agreement, particularly with respect to the omission of the criterion of unforeseen developments, simply reflects the state-of-the-art in dispute settlement practice concerning safeguard measures with respect to this criterion since the *Hatters Fur* case of 1951.<sup>469</sup> The members of the Working Party (except for the United States) in that case agreed from a general perspective:

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<sup>466</sup> Recital 2.

<sup>467</sup> Recital 4.

<sup>468</sup> The term *clarify* may be understood as meaning "make clear or plain to the understanding, remove complexity, ambiguity or obscurity, remove ignorance, misconception or error from, become transparent" The New Shorter Oxford English Dictionary on Historical Principles, Oxford (1993) p. 411.

<sup>469</sup> Working Party Report on *Withdrawal by the United States of a Tariff Concession under Article XIX of the GATT*, GATT/CP/106, adopted on 22 October 1951.

"that the term 'unforeseen developments' should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated."

However, that same Working Party concluded with respect to the particular case before it that:

"the fact that hat styles had changed did not constitute an 'unforeseen development' within the meaning of Article XIX, but that the effects of the special circumstances of this case, and particularly the degree to which the change in fashion affected the competitive situation, could not have reasonably be expected to have been foreseen by the US authorities in 1947 and that the condition of Article XIX that the increase in imports must be due to unforeseen developments and to the effect of the tariff concessions can therefore be considered to have been fulfilled."

8.65 It is probably fair to say that the interpretation of 'unforeseen developments' in that case made it easier for user governments of safeguard measures to meet this condition. Therefore, it has been argued that the *Hatters Fur* case essentially read the unforeseen developments condition out of the text of Article XIX:1(a) of GATT 1947.<sup>470</sup> While this statement has some explanatory value, it is of course not entirely accurate from a legal perspective since dispute settlement practice cannot add to or diminish the rights and obligations of the signatories of an international treaty. It would be wrong to proceed from the assumption that a single working party report from the early years of GATT 1947 could have a legal impact upon the wording of Article XIX of GATT. This principle was true under GATT 1947 and has been explicitly embodied in the framework of the WTO agreements, e.g., in Article 19.2 of the DSU. Therefore, one cannot assume that the prevailing practice of non-enforcement of the unforeseen developments condition in safeguard investigations in the decades since the adoption of the *Hatters Fur* Working Party report could have had the effect of modifying the rights and obligations of Contracting Parties to the GATT 1947 or changing the text of GATT as it forms part of the WTO agreements.

8.66 It would be unrealistic to assume that the practice of non-enforcement of the unforeseen developments condition was unknown when the new Safeguards Agreement was negotiated during the Uruguay Round. If it had been the object and purpose of the Safeguards Agreement to clarify and reinforce the disciplines of Article XIX and to re-establish multilateral control over safeguard measures also with respect to the unforeseen developments condition, the need for clear rules, detailed definitions and refined procedures regarding this condition would have been of particular importance. To put it differently, if the reinforcement of the unforeseen developments condition had been one of the objectives of the new Safeguards Agreement, one would expect to find detailed provisions concerning it in the new agreement, rather than an express omission of that criterion. In this regard, we recall that the fourth recital of the preamble to the Safeguards Agreement recognises the purpose to create:

"a comprehensive agreement, applicable to all Members and based on the basic principles of GATT 1994 ...".

8.67 It appears that the negotiators intended the new Safeguard Agreement to comprehensively cover the field of the application of safeguard measures and deliberately chose not to include the unforeseen developments criterion in that new comprehensive agreement. As a result, since we must give meaning to the fact that the new Safeguards Agreement does not in so many words make a single reference to the unforeseen developments condition, conformity with the explicit requirements and conditions embodied in the Safeguards Agreement must be sufficient for the application of safeguard measures within the meaning of Article XIX of GATT.

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<sup>470</sup> Jackson, John H., *World Trade and the Law of GATT*, Indianapolis (1969), pp. 560 *et seq.*

8.68 In arriving at this conclusion, we wish to emphasise that the issue before this Panel is not really whether the criterion of unforeseen developments of Article XIX is in outright conflict<sup>471</sup> - in the sense of being mutually exclusive or mutually inconsistent, *quod non*, with Article 2.1 or any other provision of the Safeguards Agreement. In this respect, we recall the statement of the *Indonesia - Automobiles* panel that in international law there is a presumption against conflict.<sup>472</sup> Nevertheless, if we were to assume that a conflict exists, the General Interpretative Note to Annex 1A to the Agreement Establishing the WTO would resolve the issue in the sense that the provisions of the Safeguards Agreement would prevail over Article XIX of GATT to the extent of that conflict.<sup>473</sup>

8.69 In the light of these considerations, it is our conclusion that safeguard investigations conducted and safeguard measures imposed after the entry into force of the WTO agreements which meet the requirements of the new Safeguards Agreement satisfy the requirements of Article XIX of GATT. Therefore, we see no basis to address the EC's claims under Article XIX of GATT separately and in isolation from those under the Safeguards Agreement.

#### E. CLAIMS UNDER THE SAFEGUARDS AGREEMENT

8.70 In the following sections we discuss the claims under Articles 2, 4, 5, 6 and 12 of the Safeguards Agreement. In examining the claims under Articles 2 and 4, we will discuss, *inter alia*: (i) whether Article 2 (and the footnote to Article 2.1) permit including MERCOSUR imports in the investigation, while imposing the safeguard measure exclusively against non-MERCOSUR imports, (ii) the scope of the domestic industry and the products covered by the investigation, (iii) the appropriate standard of review by this Panel, (iv) whether there were imports in increased quantities in absolute or relative terms, (v) the review of Argentina's injury analysis, and (vi) the review of Argentina's causation analysis.

8.71 We will then address (i) the claim concerning the application of the safeguard measures within the meaning of Article 5, (ii) the imposition of provisional safeguard measures within the meaning of Article 6 and (iii) the claims concerning the notification requirements foreseen in Article 12.

#### 1. The imposition of safeguard measures in the case of a customs union

8.72 One of the EC's core allegations against Argentina's safeguard investigation is that the Argentine authorities conducted an analysis of imports, injury and causation on the basis of statistics for all imports, i.e., from MERCOSUR countries as well as from third countries, and then applied the

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<sup>471</sup> The most recent Appellate Body report to address the concept of "*conflict*" is the *Guatemala - Cement* case. However, in the *Guatemala - Cement* case the Appellate Body dealt with the question of the relationship between the special or additional dispute settlement provisions of the Anti-dumping Agreement as contained in Annex 1A to the *WTO Agreement* and the DSU as incorporated in Annex 2 to the *WTO Agreement*, whereas the present dispute concerns the relationship between the substantive provisions of an Annex 1A agreement and the GATT 1994.

<sup>472</sup> The Panel on *Indonesia - Certain Measures Affecting the Automobiles Industry* (WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R), adopted on 23 July 1998, para. 14.28: "... In international law for a conflict to exist between two treaties, three conditions have to be satisfied. First, the treaties concerned must have the same parties. Second, the treaties must cover the same substantive subject-matter. Were it otherwise, there would be no possibility for conflict. Third, the provisions must conflict, in the sense that the provisions must impose mutually exclusive obligations. ... The presumption against conflict is especially reinforced in cases where separate agreements are concluded between the same parties, since it can be presumed that they are meant to be consistent with themselves, failing evidence to the contrary."

<sup>473</sup> General Interpretative Note: "In the event of *conflict* between a provision of the GATT 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the WTO ..., the provisions of the other agreement shall *prevail* to the extent of the conflict."

safeguard measure only against imports from non-MERCOSUR third countries. The European Communities does not in principle challenge the exclusion of MERCOSUR imports from the application of the safeguard measure, provided, however, that MERCOSUR imports also are excluded from the "increased imports", "serious injury" and "causality" analyses. The European Communities contends that Argentina cannot, consistently with the Safeguards Agreement, include MERCOSUR imports in the injury and causation analyses and then exclude these imports from application of the resulting safeguard measures.<sup>474</sup>

8.73 Argentina responds that the European Communities suggests a methodology for the injury and causation analyses in the case of a customs union which reads obligations into the Safeguards Agreement that it does not explicitly contain. In Argentina's view, public international law allows a sovereign country to adopt one of several possible interpretations within the latitude that the wording of a treaty provision permits. Argentina relies in its argumentation concerning the interpretation of treaty law on the Appellate Body Reports in the *European Communities - Computer Equipment*<sup>475</sup> case and the *India - Patents* case.<sup>476</sup>

8.74 In particular, Argentina takes the position that Articles 2 and 4 of the Safeguards Agreement only refer to the concept of "imports" without any further limitation or clarification and that the footnote to Article 2 emphasises the lack of a common understanding concerning the application of safeguard measures in the case of a customs union. Argentina reads the third sentence of the footnote<sup>477</sup> to mean that only the "conditions" existing within that member State of the customs union should matter for the safeguard investigation. For Argentina this implies that all imports from intra- and extra-regional sources may be taken into consideration when assessing the "conditions in that member State" because the footnote does not explicitly prohibit the inclusion of imports from within the customs union in the injury or causation analyses.

8.75 In considering issues relating to the imposition of safeguard measures in the case of a customs union, in the dispute before us the essential question is whether Argentina was permitted under the Safeguards Agreement to take MERCOSUR imports into account in the analysis of injury factors and of a causal link between increased imports and the alleged (threat of) serious injury, and was at the same time permitted to exclude MERCOSUR countries from the application of the safeguard measure imposed.

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<sup>474</sup> MERCOSUR imports accounted, e.g., in 1991 only for 1.90 million pairs of 8.86 million total imports (i.e., 21.4 per cent) and in 1995, for roughly one fourth of total imports, i.e., 5.83 of 19.84 million pairs. However, in 1996 MERCOSUR supplied the largest percentage (55.7 per cent) of total imports of 13.47 million pairs, i.e., 7.5 million pairs (as opposed to 5.97 million pairs from third countries).

<sup>475</sup> "The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined "expectations" of *one* of the parties to a treaty." Appellate Body Report on *European Communities - Customs Classification of Certain Computer Equipment*, (WT/DS62, 67, 68/AB/R), para. 84.

<sup>476</sup> The Appellate Body also affirmed "The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended." Appellate Body Report on *India - Patent Protection for Pharmaceuticals and Agricultural Chemical Products*, (WT/DS/50/AB/R), para 45.

<sup>477</sup> i.e., where a safeguard "is applied on behalf of a customs union's member State, all requirements for the determination of serious injury shall be based on the conditions existing in that member State and the measure shall be limited to that state".

(a) Article 2 and the footnote to Article 2.1

8.76 We note that Article 2 of the Safeguards Agreement sets out the basic requirements for the application of safeguard measures:

"Article 2  
Conditions

1. A Member<sup>1</sup> may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.
2. Safeguard measures shall be applied to a product being imported irrespective of its source."

Footnote 1 to Article 2.1 of the Safeguards Agreement provides that:

"A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole. *When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State.* Nothing in this Agreement prejudices the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.(emphasis added)."

8.77 We address first Argentina's argument concerning the footnote to Article 2.1, specifically that the footnote emphasises the lack of understanding among Members regarding the application of safeguard measures in the case of a customs union, and that the footnote's reference to "conditions in that member State and the measure shall be limited to that member State" does not explicitly prohibit the inclusion in the injury or causation analyses of imports from within a customs union. We consider this argument in accordance with the ordinary meaning of Article 2 and its footnote, as well as their context and in the light of their object and purpose.

8.78 According to the ordinary meaning of the text of the footnote to Article 2.1, in the case of measures imposed by a customs union there are two options for imposing safeguard measures, i.e., (i) as a single unit or (ii) on behalf of a member State. In the latter case, when a safeguard measure is imposed on behalf of a member State, the footnote's third sentence sets out two conditions, i.e., (i) "all requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State" and (ii) "the measure shall be limited to that member State".

8.79 Accordingly, the footnote also offers two options for conducting safeguard *investigations* in the case of measures to be applied by a customs union, i.e., (i) on a customs union-wide basis, or (ii) on a member State-specific basis. This dispute clearly centres around the second option. Argentina correctly points out that, as a result, the requirements for determining increased imports, serious injury and causation should be based on the "conditions existing in that member State". We agree with Argentina that this phrase would not appear to prevent the investigating authority of that member State from including imports from other member States of the customs union in question in its injury

and causation analyses. Thus the second option certainly permits Argentina to take imports from all sources, including those from within MERCOSUR, into consideration in its safeguard investigation.

8.80 The EC's argument is rather that if a safeguard measure is imposed only on imports from non-MERCOSUR sources, injury and causation analyses should be limited to non-MERCOSUR imports, too. In other words, in the EC's view, there should be a *parallelism* between, on the one hand, the *investigation* leading to and, on the other hand, the *application* of safeguard measures.

8.81 Thus, the next question is whether the ordinary meaning of the text of the footnote provides any guidance regarding *to whom*<sup>478</sup> a safeguard measure may be applied. We note that the first part of the footnote's third sentence ties the "conditions existing in that member State" to the examination of the "requirements" for the determination of serious injury or the threat thereof. Therefore, the first part of the footnote's third sentence addresses explicitly only *by whom*, and on the basis of which conditions, safeguard measures may be imposed, but not *to whom* such measures may be applied. Thus, the first part of this sentence leaves this question open.

8.82 The last phrase of the footnote's third sentence provides that "the measure shall be limited to that member State". In our view, the requirement to limit the measure "to that member State" makes it clear that, based on a member-State-specific investigation, the customs union may impose safeguard measures only on behalf of that member State, but not as if the causation of serious injury had been established for the entire customs union. In that case, the provisions of the footnote's second sentence would apply. In other words, the last phrase of the footnote's third sentence means that the only market that can be protected by a safeguard measure is the market that was the subject of the underlying investigation. Hence, this phrase concerns only *by whom*, and not *to whom* a safeguard measure may be imposed. Therefore, this provision as well leaves open the question of whether there is a requirement to impose such safeguard measures either (i) against all sources of supply including the other member States of a customs union, or (ii) exclusively against third-country suppliers.

8.83 Thus, based on the analysis of the ordinary meaning of the text of the footnote to Article 2.1, we conclude that that footnote does not concern *to whom* but rather *by whom* a safeguard measure may be applied. Therefore, the ordinary meaning of that footnote does not clarify the question of whether the safeguard measure must be applied to all imports or may be applied solely to imports from third countries.

8.84 We next consider whether the context of the footnote indicates that a Member would be permitted to include imports from within a customs union in its injury and causation analyses while excluding such imports from the application of the safeguard measure. The immediate context of Article 2.1 and the footnote thereto is Article 2.2 which provides that "[s]afeguard measures shall be applied to a product being imported irrespective of its source," i.e., on the basis of the most-favoured-nation treatment principle. The ordinary meaning of Article 2.2 would appear to imply that, as a result of a member-State-specific investigation, safeguard measures have to be imposed on a non-discriminatory basis against products from all sources of supply, regardless of whether they originate from within or from outside of the customs union. Argentina has submitted that footnote 1 to Article 2.1 should be interpreted also to derogate from Article 2.2 and that, accordingly, customs unions should be deemed exempted from that MFN requirement. However, we are mindful of the fact that the footnote was inserted after the word "Member" in the first paragraph of Article 2. It therefore clearly refers solely to the question of who can impose a measure, and not to the supplier countries that might be affected by it. For the footnote to have a broader meaning, the drafters would have had to place it after the title of Article 2, or in both paragraphs of that article. The fact that they did not do so must have meaning and has to be taken into account in our interpretation.

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<sup>478</sup> For ease of discussion, we use the term "to whom" to mean "to imports from which sources of supply".



8.85 We do not, therefore, share Argentina's view that the relationship between Article 2.2 and the footnote to Article 2.1 is one of a general provision and an exception. Consequently, we conclude that the footnote does not derogate from the MFN principle embodied in Article 2.2. In this regard, we note that where the Safeguards Agreement provides for an exception it does so in clear and explicit terms. For example, Article 9 exempts, subject to certain thresholds and limitations, imports from developing country Members from the imposition of safeguard measures where the injury and causation fully reflect the effects of those imports from developing countries.<sup>479</sup>

8.86 If a customs union imposes safeguard measures based on a customs-union-wide investigation as a single unit against third countries (the situation captured by the footnote's second sentence), the measure would necessarily be imposed only on third country suppliers, as all other suppliers would be part of the domestic industry. By contrast, in the situation captured by the footnote's third sentence, where the investigation was limited to one member State, and where it was determined that serious injury or threat thereof was caused by imports from intra-regional as well as extra-regional sources, we see nothing that would prevent a customs union from imposing a safeguard measure on imports from all of those sources in accordance with Article 2.2, i.e., not only imports from third countries, but also intra-regional imports from the other member States of the customs union.

8.87 This result supports the interpretation that the two options offered by the footnote to Article 2.1 read in conjunction with Article 2.2 imply a *parallelism* between the scope of a safeguard *investigation* and the scope of the *application* of safeguard measures. Thus, in the light of the context of the footnote to Article 2.1, a member-state-specific investigation in which serious injury or threat thereof is found based on imports from all sources could only lead to the imposition of safeguard measures on a MFN-basis against all sources of intra-regional as well as extra-regional supply of a customs union. By the same token, a customs-union-wide investigation could only lead to the application of safeguard measures to all sources of extra-regional supply and could not justify the application of safeguard measures against some or all sources of intra-regional supply, as these would be part of the domestic industry in that context.

8.88 Finally, we consider these provisions in the light of the object and purpose of the Safeguards Agreement. We recall that the preamble to the Agreement<sup>480</sup> recognises, *inter alia*, as the object of the Safeguards Agreement the need to clarify and reinforce the disciplines of GATT (including those of Article XIX). It also underscores that it is the purpose of that agreement to re-establish multilateral control over safeguards and to eliminate measures that escape such control. In our view, in order to give this object and purpose meaning, a strict interpretation and implementation of the disciplines provided for in the Safeguard Agreement is needed. Otherwise, the reinforcement of disciplines, re-establishment of multilateral control and elimination of so-called "grey-area" measures could not be achieved. The preamble<sup>481</sup> further recognises that a "comprehensive agreement, applicable to all Members and based on the basic principles of GATT, is called for". We believe that these "basic principles" also include the most-favoured nation principle which, pursuant to Article 2.2, governs the imposition of safeguard measures on products from all sources of supply.

8.89 If we were to follow Argentina's position regarding the interpretation of Article 2 and the footnote to Article 2.1, in our view, the objectives of reinforcing disciplines concerning safeguard measures, re-establishing multilateral control and eliminating measures that escape such control may not be met for the following reasons. If, on the one hand, on the basis of an investigation taking into account third-country imports that cause (or threaten) serious injury to the domestic industry in the

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<sup>479</sup> The exception of Article 9 is a qualified one. It only applies to developing country Members whose share in the importing Member's market does not exceed 3 per cent, provided that such developing country Members collectively account for not more than 9 per cent of the total imports of the product concerned.

<sup>480</sup> Recital 2.

<sup>481</sup> Recital 4.

customs union in its entirety, a customs union decided to impose safeguard measures as a single unit, in accordance with the footnote's second sentence, such an investigation would lead to the imposition of safeguard measures against third-country imports only. If, on the other hand, a national safeguard authority were to conduct a member-State-specific investigation, taking into account serious injury caused or threatened by imports from other member States of a customs union as well as third-country imports, but the Members of the customs union had agreed not to apply safeguard measures amongst themselves, under Argentina's methodology such an investigation again would lead to the imposition of essentially identical safeguard measures against third-country imports only. We are not persuaded that, given the Safeguards Agreement's detailed rules on, e.g., increased imports, serious injury, causation and level of permissible safeguard measures, two substantially different safeguard investigations, i.e., one customs-union-wide and the other member-State-specific, could properly yield essentially the same outcome, i.e., the imposition of safeguard measures exclusively against third-country imports.

8.90 We believe that our reading of Articles 2.1 and the footnote thereto in conjunction with Article 2.2 and the object and purpose of the Safeguards Agreement gives meaning to all the parts of these provisions and does not reduce any of them to redundancy or inutility.

8.91 Thus, in applying Article 31 of the Vienna Convention we have interpreted Article 2 (and footnote to Article 2.1) in the light of their ordinary meaning, their context, and the object and purpose of the Safeguards Agreement, with a view to determining the scope and the nature of the obligations pertaining to the use of safeguard measures in the case of a customs union. On the basis of this analysis, we conclude that a member-state-specific investigation that finds serious injury or threat thereof caused by imports from all sources cannot serve as a basis for imposing a safeguard measure on imports only from third-country sources of supply.

8.92 We arrive at this conclusion regarding Article 2 and the footnote to Article 2.1 without having considered yet the possible implications of Article XXIV of GATT. We will turn to these issues next.

(b) Article XXIV of GATT

8.93 Argentina emphasises that the last sentence of the footnote to Article 2.1 explicitly states that an agreed understanding on the relationship between Articles XIX and XXIV of GATT does not exist. Argentina claims that it could not impose safeguard measures against imports from other MERCOSUR countries because Article XXIV of GATT as well as secondary MERCOSUR legislation prohibit it from doing so. With respect to Article XXIV of GATT, Argentina emphasises that Article XIX of GATT is not listed in Article XXIV:8(a)(i) or (b) of GATT among the exceptions from the requirement to abolish all duties and other restrictive regulations of commerce on substantially all trade between the constituent territories of a customs union or a free-trade area. Therefore, it is, in Argentina's view, incompatible with the purpose of Article XXIV:8 of GATT to impose safeguard measures within the MERCOSUR customs union.

8.94 The European Communities contends that Article XXIV:8 of GATT does not prohibit the maintenance of the possibility to impose safeguard measures within customs unions or free-trade areas, either during the transitional period leading to their formation, or after their completion. The European Communities argues that safeguard measures are an exceptional emergency instrument of a temporary nature and are limited to a specific product, and that safeguard measures do not as such affect the establishment and the nature of a customs union or a free-trade area. Article XXIV of GATT permits the members of a customs union or free-trade area to decide whether, when applying a safeguard measure pursuant to Article XIX of GATT 1994 and the Agreement on Safeguards, to exempt other members of the customs union or free-trade area from the measure.

8.95 We recall in this regard that the last sentence of the footnote to Article 2.1 provides that:

"Nothing in the [Safeguards] Agreement prejudices the interpretation of the relationship between Article XIX and paragraph 8 of the Article XXIV of GATT 1994."

8.96 In addressing this issue we note that Article XXIV:8<sup>482</sup> of GATT on "Customs Unions and Free-Trade Areas" defines that, for purposes of GATT, a customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories. Articles XXIV:8(a)(i)(ii) and (b) provide that - within the group of customs territories forming a customs union or a free-trade area - duties and other restrictive regulations of commerce are to be eliminated (except for those permitted under Articles XI, XII, XIV, XV and XX) with respect to *substantially all trade* between the constituent territories. These exceptions from the prohibition of "other restrictive regulations of commerce" do not include Article XIX. Practice of the Contracting Parties to the GATT of 1947 and of WTO Members is inconclusive on the issue of the imposition or maintenance of safeguard measures between the constituent territories of a customs union or a free-trade area. It is a matter of fact that many agreements establishing free-trade areas or customs unions allow for the possibility to impose safeguard measures on intra-regional trade, while few regional integration agreements explicitly prohibit the imposition of intra-regional safeguard measures once the formation of such an integration area is completed.

8.97 Although the list of exceptions in Article XXIV:8 of GATT clearly does not include Article XIX, in our view, that paragraph itself does not necessarily prohibit the imposition of safeguard measures between the constituent territories of a customs union or free-trade area during their formation or after their completion. A frequently advanced justification for the maintenance or introduction of safeguards clauses within regional integration areas is the argument that the obligation of Article XXIV:8 to eliminate all duties and other restrictions of commerce applies only to "*substantially all*" but not necessarily to "*all*" trade between the constituent territories. It could be argued that for all practical purposes the application of safeguard measures to particular categories of like or directly competitive products is unlikely to affect a trade volume that could put the liberalisation of "*substantially all trade*" between the constituent territories of a customs union into question. But the persuasiveness of this argument depends mainly on the extent to which safeguard measures are actually imposed. Thus we do not exclude the possibility that extensive use of safeguard measures within regional integration areas for prolonged periods could run counter to the requirement to liberalise "*substantially all trade*" within a regional integration area. In our view, the express omission of Article XIX of GATT from the lists of exceptions in Article XXIV:8 of GATT read in combination with the requirement to eliminate all duties or other restrictions of commerce on "*substantially all trade*" within a customs union, leaves both options open, i.e., abolition of the possibility to impose safeguard measure between the member States of a customs union as well as the maintenance thereof.

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<sup>482</sup> "For the purposes of this Agreement:

- (a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that
  - (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,
  - (ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;
- (b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories."

8.98 In the alternative, even if one were to presume that the maintenance of intra-regional safeguards clauses between the member States of customs unions or free-trade areas is difficult to reconcile with the wording of Article XXIV:8 of GATT (i.e., the omission of Article XIX from the exemption list), we recall that Article XXIV of GATT does not require the immediate completion of a customs union or free-trade area with full integration of intra-regional trade and immediate compliance with all the requirements foreseen in Article XXIV of GATT. For a "reasonable period" of normally not more than ten years,<sup>483</sup> interim agreements leading to the *gradual* formation of a customs union or a free-trade area are permissible under Article XXIV. In the case of the MERCOSUR treaty, the temporary lack of full integration of "substantially all trade" due to the maintenance of intra-regional safeguards clauses would still be justifiable with this *transitional* status of the customs union. Accordingly, pending the completion of integration within MERCOSUR, the requirements of Article XXIV would not force Argentina to apply safeguard measures exclusively against third countries.

8.99 There is also no doubt in our minds that the letter and spirit of Article XXIV:8 of GATT permit member States of a customs union to agree on the elimination of the possibility to impose safeguard measures between the constituent territories. The Safeguards Agreement as well leaves each Member free to agree with other Members in the framework of a customs union to renounce the possibility to impose safeguard measures between the constituent territories with a view to completing the substitution of a single customs territory for two or more customs territories as envisaged by Article XXIV:8 of GATT. However, even if we accept the common understanding of the parties that the imposition of safeguard measures between member States of MERCOSUR is prohibited,<sup>484</sup> Argentina and MERCOSUR are not left without recourse. Indeed, where a customs union such as MERCOSUR has elected as a matter of policy not to use safeguard measures internally, that customs union retains the option of imposing safeguard measures by the customs union as a single unit. Therefore, our interpretation of Article XXIV, read in conjunction with Article 2 and the footnote to Article 2.1 would by no means deprive a customs union of its right to impose safeguard measures as a single unit.

8.100 Argentina further submits that it is US practice under the escape clause of Section 202 of the US Trade Act of 1974 to make injury determinations on the basis of global imports, while it is possible, according to Article 802 of NAFTA, to exclude, subject to certain conditions, imports from other NAFTA-countries from the application of safeguard measures.<sup>485</sup> We note that it is not within our terms of reference to make any determinations concerning the consistency or inconsistency with WTO law of the safeguard provisions of NAFTA, or of individual safeguard determinations based thereon. We recall, however, that MERCOSUR is a customs union, whereas NAFTA is a free-trade agreement, and that the footnote to Article 2.1 of the Safeguards Agreement concerns only regional integration in the form of a customs union. In these circumstances, we consider that arguments concerning Chapter 8 of the NAFTA Treaty in general and the *Wheat Gluten* case in particular have no bearing on the present dispute.

8.101 In the light of these considerations, we do not agree with the argument that in the case before us Argentina is prevented by Article XXIV:8 of GATT from applying safeguard measures to all sources of supply, i.e., third countries as well as other member States of MERCOSUR.

8.102 Therefore, in the light of Article 2 of the Safeguards Agreement and Article XXIV of GATT, we conclude that in the case of a customs union the imposition of a safeguard measure only on third-country sources of supply cannot be justified on the basis of a member-state-specific investigation that finds serious injury or threat thereof caused by imports from all sources of supply from within and outside a customs union.

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<sup>483</sup> Understanding on Article XXIV of GATT 1994, para. 3.

<sup>484</sup> EC answer to question 1 by the Panel, see descriptive part, para. 5.132.

<sup>485</sup> Argentina mentions specifically the *Wheat Gluten* case, see descriptive part, para. 5.97.

8.103 We continue our analysis of the EC's claims because, without fully considering Argentina's investigation, it would not be possible to ascertain whether it provides the legal basis for the imposition of a safeguard measure. In the following sections we thus examine whether the safeguard investigation has established the essential conditions under the Safeguards Agreement for imposing a safeguard measure, i.e., (i) imports in such increased quantities, (ii) serious injury or threat thereof and (iii) the existence of a causal link between these two criteria, even if imports from all sources of supply are taken into account.

## 2. Background to the investigation

### (a) The domestic industry

8.104 Argentina's report on its investigation indicates that the Argentine footwear industry is composed of a large number of large, medium and small manufacturers.<sup>486</sup> According to Argentina, three principal manufacturers account for 35 per cent of domestic production while the other 65 per cent is spread over some 1,500 footwear makers. Widespread use of subcontracting in certain stages of production is typical of Argentina's footwear industry. There are also licensing or supply agreements or contracts with foreign firms to produce footwear with international marks for the domestic market.

8.105 The Argentine domestic industry, represented by the Chamber of the Footwear Industry (Cámara de la Industria del Calzado or "CIC"), lodged a request for a safeguard investigation on 26 October 1996 pursuant to the provisions of the Decree 1059/96 which implements the WTO Safeguards Agreement in the Argentine legal system. The Chamber for the Production of and International Trade in Footwear and Related Products (Cámara de Producción y Comercio Internacional de Calzado y Afines or "CAPCICA") which represents the producer-importers and importers opposed the request for the application of safeguard measures.<sup>487</sup>

8.106 We recall that Argentina submits that the CIC represents more than 71 per cent of the domestic footwear industry.<sup>488</sup> We also note that the European Communities has not contested these figures and that it has not questioned that the petitioners in Argentina's safeguard investigation represent *a major proportion* of the domestic footwear industry<sup>489</sup> in the meaning of Article 4.1(c) of the Safeguards Agreement.<sup>490</sup>

8.107 For purposes of information collection through questionnaires, the National Foreign Trade Commission (Comisión Nacional del Comercio Exterior or "CNCE") divided the domestic industry into three categories according to the number of workers employed, i.e., (a) large companies (more than 100 workers), (b) medium-sized companies (between 41 and 100 workers) and (c) small companies (fewer than 41 workers). Importers were classified into categories according to the value of their imports,<sup>491</sup> i.e., (a) large importers (more than US\$1,000,000), and (b) medium-sized and

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<sup>486</sup> G/SG/N/8/ARG/1, p.12 *et seq.*

<sup>487</sup> G/SG/N/8/ARG/1, p.3; Nike Argentina S.A. and RBK Argentina S.A. also came forward in their capacity as importers.

<sup>488</sup> The CIC noted that, together with its equivalents in the provinces of Córdoba and Santa Fé, it makes up the Argentine Federation of the Footwear and Related Products Industry (Federación Argentina de la Industria del Calzado y Afines, FAICA), thus representing 85 per cent of the domestic industry.

<sup>489</sup> The other association at issue, i.e., CAPCICA, represents importers or producer-importers.

<sup>490</sup> Article 4.1(c): "... a 'domestic industry' shall be understood to mean the producers as a whole of the like or directly competitive products operating within a Member's territory, or whose collective output of these products constitutes a *major proportion* of the total domestic production of those products." (emphasis added).

<sup>491</sup> During the period from January to November 1996, the period for which at that point importers had information available. (See, G/SG/N/8/ARG/1, p. 6).

small (between US\$100,000 and US\$1,000,000). Sixty questionnaires were returned by national producers<sup>492</sup> and 69 by importers.<sup>493</sup> Argentina indicates that the results were verified by the CNCE.

(b) The footwear products

8.108 Argentina's safeguard investigation, as well as the provisional and definitive safeguard measures covered footwear products categorised in the following tariff headings of the MERCOSUR Common Tariff Nomenclature: 6401.10.00, 6401.91.00, 6401.92.00, 6401.99.00, 6402.12.00, 6402.19.00, 6402.20.00, 6402.30.00, 6402.91.00, 6402.99.00, 6403.12.00, 6403.19.00, 6403.20.00, 6403.30.00, 6403.40.00, 6403.51.00, 6403.59.00, 6403.91.00, 6403.99.00, 6404.11.00, 6404.19.00, 6404.20.00, 6405.10.10, 6405.10.20, 6405.10.90, 6405.20.00, 6405.90.00. For the description of these tariff lines, see Annex [I], *infra*.

8.109 The weighted average tariff level<sup>494</sup> for these product categories in 1995 was 28 per cent for footwear from non-MERCOSUR third countries,<sup>495</sup> and 12 per cent for footwear from within MERCOSUR countries.<sup>496</sup>

8.110 In the investigation, the Chamber of the Footwear Industry (CIC) argued "that there is only one product, namely footwear" because of a high degree of substitutability, in terms of both supply and demand, which would tend to confirm the need to analyse the sector as a whole.<sup>497</sup> On the supply side, the producers argued that any producer could, if necessary, vary the type of footwear it manufactured and that the Argentine industry, taken as a whole, produced almost every kind of footwear.

8.111 The importers, however, argued that brand name and product image are the most important characteristics, at least for "high-tech" performance sport footwear. Thus, the importers argued, there were no domestically manufactured products at all which could be deemed "like or directly competitive" to imported brand-name performance footwear, e.g., Nike or Reebok footwear (except for the production of local subsidiaries). In the alternative, the importers suggested that the CNCE break down footwear products on the basis of the customs nomenclature into very narrow product categories.

8.112 The CNCE, in its data collection, took account of the fact that in the highly heterogeneous footwear market certain series of types of footwear "were more or less homogeneous from the standpoint of competitive conditions, this is to say, for which within each group there was greater substitutability of both supply and demand than between products from different groups", noting as well that there was evidence of a certain degree of specialisation in different types of footwear by the enterprises that made up the industry. Thus the CNCE recognised the usefulness to break down the market for the purposes of the investigation: "Even within a unitary investigation it was necessary to establish the extent to which different segments of the industry may be affected by imports". The five categories with respect to which the CNCE collected data were:

- (i) performance sportswear;
- (ii) non-performance sportswear;

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<sup>492</sup> 24 by large and medium-sized companies and 36 by small companies in simplified multiple-choice format.

<sup>493</sup> Acta No. 338 de la CNCE, Determinación Final de la Existencia de Daño de la CNCE, Exhibit ARG-2, p.5.

<sup>494</sup> G/SG/N/8/ARG/1, p.9.

<sup>495</sup> At a tariff headings level, five headings corresponded to 20 per cent, 3 to 28 per cent and the other 17 to 29 per cent.

<sup>496</sup> The duty rates were 0 per cent for 13 headings, which in 1995, represented 39 per cent of the total imports from Brazil, Paraguay and Uruguay, the other 61 per cent paid duty at 20 per cent.

<sup>497</sup> G/SG/N/8/ARG/1, p.10.

- (iii) exclusively women's footwear;
- (iv) town and/or casual footwear;
- (v) other.<sup>498</sup>

8.113 Eventually, however, the CNCE concluded that there was a single category of like or directly competitive products – all footwear (excluding ski boots) – due to a sufficient degree of substitutability among products on the supply<sup>499</sup> and the demand<sup>500</sup> side.

8.114 The European Communities does not challenge this determination of "like or directly competitive products" as such. The European Communities argues, rather, that, having adopted an approach of product segmentation for purposes of data collection, Argentina was obliged to follow it consistently through its injury analysis and to prove serious injury in all segments in which safeguards were to be imposed.

8.115 Argentina responds that the CNCE used in the product segmentation approach for purposes of collecting pertinent information and then conducted the injury analysis for the footwear industry in its entirety. Consequently, there was no need for a disaggregated consideration of all the different injury factors with respect to the five product categories.

8.116 We address the issue of whether Argentina should have conducted its injury and causation analysis on an aggregated or on an disaggregated basis, *infra*, in section E.4.(a). Given the absence of a challenge by the European Communities to Argentina's determination of the like or directly competitive product, we do not need to address whether this determination met the requirement of Article 2.1 in the sense that there was a sufficient degree of competition between the product groups across the range of footwear products at issue in this dispute.<sup>501</sup>

### 3. Standard of review

- (a) No *de novo* review

8.117 Before considering the specifics of the claims concerning Argentina's injury and causation findings, we must consider the standard of review that we will apply. In our view, we have no mandate to conduct a *de novo* review of the safeguard investigation conducted by the national authority. Rather, we must determine whether Argentina has abided by its multilateral obligations

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<sup>498</sup> i.e., all other footwear not included in the previous categories such as espadrilles, work boots, gum boots, slippers, sea boots, riding boots, fishing boots, and men's and unisex sandals.

<sup>499</sup> "On the demand side, the Commission concluded that there is a broad range of footwear types, prices, qualities, uses and marks which although not in strong competition at the various extremes, do create competition between adjacent groups; therefore, although the definition of footwear as a 'protective foot covering' is a simplification, it acquires great significance when the substitutability between different kinds of footwear is taken into account". (G/SG/N/8/ARG/1, page 11).

<sup>500</sup> "On the supply side, the Commission concluded that the concept of a 'footwear industry' is also significant, since although it is well known that manufacturers specialize in different segments of the market, they share various critical factors that make possible the reallocation of resources, re-specialization and significant competitive shifts. Thus, it is easy to reallocate labour between different product lines, and this also applies to much of the equipment and many of the raw materials." (G/SG/N/8/ARG/1, page 11).

<sup>501</sup> We note that the question whether foreign products are "like or directly competitive" for purposes of WTO law has to be made on a case-specific and provision-specific basis. In this regard we consider as relevant the demand-side and supply-side criteria relied on by Argentina, e.g., physical or technical descriptions, consumer use, perception of consumers and manufacturers, production process, production plants and workforce, commercial marks, quality, commercial channels, substitutability between different kinds of footwear, possibility of reallocation of resources, re-specialization and significant competitive shifts.

under the Agreement on Safeguards, as we discuss in paras. 8.205-8.207, in reaching its affirmative finding of injury and causation in the footwear investigation.

8.118 This approach is consistent with the reports of panels reviewing national investigations in the context of the Tokyo Round *Agreement on Implementation of Article VI of GATT* ("Anti-dumping Agreement") and the Tokyo Round *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of GATT* ("Subsidies Agreement") and the *WTO Agreement on Textiles and Clothing* ("ATC"). The panel on *New Zealand - Imports of Electrical Transformers from Finland*<sup>502</sup> panel took the view that, while the responsibility to make an anti-dumping determination rested in the first place with the authorities of the importing country, such determinations were subject to scrutiny by a panel if they were challenged by another country.<sup>503</sup> The panel on *United States - Anti-dumping Duties on Import of Salmon from Norway* concluded that it should not engage in a *de novo* review of the evidence examined by the national investigating authority.<sup>504</sup>

8.119 The panel on *United States - Underwear*<sup>505</sup> followed this approach by noting, however, that it did not see its

"review as a substitute for the proceedings conducted by national investigating authorities or by the Textiles Monitoring Body (TMB). Rather ... the Panel's function should be to assess objectively the review conducted by the national investigating authority, in this case the CITA. We draw particular attention to the fact that a series of panel reports in the anti-dumping and subsidies/countervailing duties context have made it clear that it is *not the role of panels to engage in a de novo* review.<sup>506</sup> In our view, the same is true for panels operating in the context of the ATC, since they would be called upon, as in the cases dealing with anti-dumping and/or subsidies/countervailing duties, to review the consistency of a determination by a national investigating authority imposing a restriction under the relevant provisions of the relevant WTO legal instruments, in this case the ATC. ..."<sup>507</sup> (emphasis added).

Accordingly, the panel on *United States - Underwear* decided,

"in accordance with Article 11 of the DSU, to make an objective assessment of the Statement issued by the US authorities ... which, as the parties to the dispute agreed, constitutes the scope of the matter properly before the Panel without, however, engaging in a *de novo* review. ... an objective assessment would entail an examination of whether the CITA had examined all relevant facts before it (including facts which might detract from an affirmative determination in accordance with the second sentence of Article 6.2 of the ATC), whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the

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<sup>502</sup> Panel Report on *New Zealand - Imports of Electrical Transformers from Finland*, adopted on 18 July 1985, BISD 32S/55.

<sup>503</sup> Panel Report on *New Zealand - Transformers*.

<sup>504</sup> Panel Report on *United States - Imposition of Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, dated 30 November 1992, para. 494, p. 186f.

<sup>505</sup> Panel Report on *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, adopted on 25 February 1997 (WT/DS24/R).

<sup>506</sup> See, *inter alia*, *Korea - Anti-dumping Duties on Imports of Polyacetal Resins from the United States*, adopted on 27 April 1993, BISD 40S/205; *United States - Imposition of Anti-dumping duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, adopted on 27 April 1994; *United States - Initiation of a Countervailing Duty Investigation into Softwood Lumber Products from Canada*, adopted on 3 June 1987, BISD 34S/194.

<sup>507</sup> *United States - Underwear*, *op.cit.*, para. 7.12.



determination made was consistent with the international obligations of the United States.<sup>508</sup>

8.120 The panel on *United States - Shirts and Blouses* also stated that

"This is not to say that the Panel interprets the ATC as imposing on the importing Member any specific method either for collecting data or for considering and weighing all the relevant economic factors upon which the importing Member will decide whether there is need for a safeguard restraint. The relative importance of particular factors including those listed in Article 6.3 of the ATC is for each Member to assess in the light of the circumstances of each case."<sup>509</sup>

8.121 These past GATT and WTO panel reports make it clear that panels examining national investigations in the context of the application of anti-dumping and countervailing duties, as well as safeguards under the ATC, have refrained from engaging in a *de novo* review of the evidence examined by the national authority.

(b) Consideration of "all relevant factors"

8.122 Argentina argues that the requirement of Article 4.2(a) to evaluate "all relevant factors of an objective and quantifiable nature having a bearing on the industry" implies an obligation to evaluate factors only to the extent that they are *relevant*, but not an obligation to *examine each and every* factor. In this respect, Argentina contests the reliance on past precedents in cases involving the review of a determination made by a national authority (e.g., *United States - Underwear*, *United States - Shirts and Blouses*, *New Zealand - Transformers*, *United States - Antidumping Duties on Salmon from Norway*) under the Tokyo Round Agreements on Anti-dumping as well as Subsidies and the WTO Agreement on Textiles and Clothing (ATC) on the grounds that these cases did not concern the review of safeguard investigations under the Safeguards Agreement. The European Communities contends that Article 4.2(a) implies a requirement for the national authority to investigate at the least all factors listed in that article.

8.123 We note, first, that the text of Article 4.2(a) of the Safeguards Agreement explicitly requires the evaluation of "all relevant factors", in particular those listed in that article. Second, Article 6.4 of the ATC<sup>510</sup> contains no such express requirement and recognises that "none of these factors ... can necessarily give decisive guidance. Nonetheless, the panels on *United States - Underwear* and *United States - Shirts and Blouses* ruled that each and every injury factor mentioned in Article 6.4 of the ATC has to be considered by the national authority. With regard to the obligation to evaluate "all relevant factors" we consider these past panel reports relevant. Consequently, in accordance with the text of the Safeguards Agreement and past practice, we consider that an evaluation of all factors listed in Article 4.2(a) is required.

8.124 In the light of the fact that the parties agree that *de novo* review is not appropriate, and appear also to generally share our view of the appropriate standard of review,<sup>511</sup> we, too, will not engage in a

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<sup>508</sup> *United States - Underwear*, *op.cit.*, para. 7.13.

<sup>509</sup> Panel Report on *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, 6 June 1997, WT/DS33/R, para. 7.52.

<sup>510</sup> Article 6.4 of the ATC: "... The Member or Members to whom serious damage, or actual threat thereof ... is attributed, shall be determined on the basis of a sharp and substantial increase in imports, actual or imminent, from such a Member or Members individually, and on the basis of the level of imports as compared with imports from other commercial transaction; *none of these factors, either alone or combined with other factors, can necessarily give decisive guidance.* ...".

<sup>511</sup> For the EC's view, see, descriptive part, para. 5.136 - 5.140. For Argentina's view, see, descriptive part, para. 5.141.- 5.143

*de novo* review of the evidence examined by the national authorities of Argentina. Therefore, our review will be limited to an objective assessment, pursuant to Article 11 of the DSU, of whether the domestic authority has considered all relevant facts, including an examination of each factor listed in Article 4.2(a), of whether the published report on the investigation contains adequate explanation of how the facts support the determination made, and consequently of whether the determination made is consistent with Argentina's obligations under the Safeguards Agreement. We note that this was the standard of review applied by the Panel in *United States – Underwear*, with which we agree.

(c) Argentina's report on the "detailed analysis of the case" setting forth its "findings and reasoned conclusions"

8.125 During the course of these proceedings, Argentina submitted to the Panel an exhibit containing the entire 10,000-plus page record of its investigation. Argentina indicated that it considered this documentation of fundamental importance to the Panel's reaching a decision regarding the consistency of the determination with the WTO rules. Argentina states that without the complete record of the investigation, the Panel would not have at its disposal all of the pertinent elements on which to decide the dispute. Argentina also submitted a list indicating those portions of the entire record which it considers to be of particular relevance for this dispute.

8.126 In our view, under the above standard of review as applied to the facts of this particular dispute, it is the published "detailed analysis of the case under investigation" and the published "report setting forth [the] findings and reasoned conclusions", provided for respectively in Article 4.2(c) and Article 3.1, rather than the full record of the investigation<sup>512</sup>, that must be the focus of our

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<sup>512</sup> In response to a request from the EC at the second substantive meeting to identify the most relevant pages of the investigation record that had not previously been submitted to the Panel, Argentina submitted an annotated list of pages pertaining to specific issues or factors. We note that the pages of the record identified in that list contain essentially raw data, either in uncompiled or compiled form. In keeping with our standard of review, we find these pages of secondary relevance to our consideration of Argentina's injury and causation *analysis and explanation* in its investigation.

Argentina identified the following pages of the entire investigation record as relevant for particular issues:

*Increased imports:* Act 338, p. 5329; Informe técnico previo a la determinación final, Anexo 5, Cuadros 15-21, pp. 5477-5490; información de los productores respecto a las importaciones, pp. 44-48; aranceles y preferencias correspondientes, pp. 173-177; información sobre importaciones fuente INDEC, pp. 250-251; información de las cámaras sectoriales sobre el índice de agresión de las importaciones, pp. 401-411; Acta 266 e Informe técnico previo a la apertura de la investigación, pp. 602-607; presentación de la demandante con posterioridad a la Audiencia Pública, pp. 5176-5179;

*Employment:* Technical Report , p. 5639; presentación del sector respecto al cierre de empresas, pp. 197-226 (or 193-223); *idem* respecto a despidos y suspensiones de personal, pp. 414-418; Acta 266 e informe técnico previo a la apertura de la investigación, pp. 569-592; Anexo estadístico del informe técnico previo a la apertura de la investigación, pp. 629-701; presentación de la unión de trabajadores posterior a la Audiencia Pública, pp. 5148-5168; informe técnico previo a la determinación final, Anexo 2, Cuadro 17, p. 5583, (pp. 5564-5583); Anexo 3, Cuadros 45-47, , pp. 5638-5640, pp. 5641-5643; presentación de la Cámara de importadores con cifras de desempleo, pp. 5073-5075;

*Imports relative to domestic production and consumption:* Informe técnico previo a la apertura de la investigación, pp. 574-575; respuestas a los formularios de las encuestas a productores, pp. 1176-2920; sistemizada en el informe técnico previo a la determinación final, Anexo 2, pp. 5578-5584, Anexo 3, pp. 5585-5646, Anexo 4, pp. 5647-5716; respuestas de los importadores, pp. 1197-2721, pp. 4586-4651; información de la Cámara peticionante sobre el consume aparente, pp. 4803-4804; información de la CAPCICA sobre el consume aparente, pp. 5064-5067; informe técnico previo a la determinación final, pp. 5498-5507;

*Sales:* información de los productores, pp. 1176-2920, sistemizada en el informe técnico previo a la determinación final, Anexo 2, pp. 5578-5584; información verificada, en fojas varias de pp. 4421 à 5017; Informe técnico previo a la determinación final, Anexo 3, pp. 5585-5646, Anexo 4, pp. 5647-5716; Acta 266 e Informe técnico previo a la apertura de la investigación, , pp. 592-601, 629-701; Informe técnico previo a la determinación final, Anexo 3, pp. 5603-5611, 5321-5323, Acta 338, pp. 5344-5346;

*Profits and losses:* Acta 266 e informe técnico previo a la apertura de la investigación, pp. 592-601, 660-671, Cuadros 28-29, pp. 669-670, Gráfico 5, p.668; información de los productores, pp. 1176-2920;

review. This is because the European Communities does not challenge the data generated and relied upon in the investigation as such, but rather Argentina's analysis and interpretation of those data. If the European Communities had claimed that Argentina's compilation of the data for one or another injury factor were incorrect, it might have been necessary for us to consider the raw information (e.g., questionnaire responses) from which those data were compiled. However, because the European Communities accepts the aggregated data as presented by Argentina in its various documents concerning the results of the investigation, but challenges rather the reasoning based thereon, consideration of the underlying raw information is of secondary importance. If we were to conduct our own assessment of the underlying evidence as contained in the entire record of Argentina's investigation, we believe that we would effectively be engaging in a *de novo* review, which we and both parties agree would be inappropriate. Nonetheless, we have reviewed and taken note of those portions of the entire record of the investigation which Argentina has identified in the above-mentioned list as being the most relevant for, *inter alia*, the injury and causation analyses.

8.127 In considering which document or documents constitute the published report(s) referred to in Article 3.1 and Article 4.2(c), we recall that annexed to its first submission, Argentina submitted among other documents both Act 338 and the "Technical Report Prior to the Final Determination" ("Technical Report") of the investigation prepared by the CNCE. We further recall that we sought clarification from Argentina, in a written question, concerning which of the documents submitted to the Panel constituted the published report referred to in Article 3.1 of the Agreement. Argentina replied that Act 338 is the published report of the CNCE's findings regarding serious injury, and that it incorporates by reference the Technical Report. According to Argentina, the Technical Report provides a detailed summary of all of the factual data gathered during the investigation.<sup>513</sup> Argentina further stated that all interested parties had access to the complete record of the investigation except the information therein designated as confidential, and were provided with additional information in connection with the hearings held during the investigation. Argentina also stated in response to a question from the Panel that Act 338 addresses the relevance of each factor considered (as required under Article 4.2(c)), on the basis of the detailed information contained in the Technical Report.

8.128 We conclude from the foregoing that Act 338 constitutes both the published report "setting forth [the] findings and reasoned conclusions reached on all pertinent issues of fact and law" referred to in Article 3.1 of the Safeguards Agreement, and the published document containing the "detailed analysis of the case under investigation" and the "demonstration of the relevance of the factors examined" referred to in Article 4.2(c). Thus, we will base our review in the first instance on Act 338. We note, however, that Act 338 is based on and summarises information that is set forth in more detail in the Technical Report. Thus, while Act 338 is the most relevant document, the Technical Report also forms an integral part of the record of the investigation and is closely related to Act 338.

#### **4. Claims under Articles 2 and 4 of the Agreement on Safeguards regarding Argentina's investigation, and findings of serious injury, threat of serious injury and causation**

8.129 The European Communities raises a number of claims under Articles 2 and 4 concerning Argentina's investigation and findings of serious injury, threat of serious injury and causation. In particular, the European Communities argues that the investigation was flawed in a number of ways that violate these articles, and that the findings of serious injury, threat and causation also violated these articles.

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verificaciones realizadas por el CNCE a la información precedente, en fojas varias de pp. 4421 à 5017; sistemizada en el informe técnico previo a la determinación final, Anexos 2, pp. 5578-5584, Anexo 3, pp. 5585-5646, Anexo 4, pp. 5647-5716; balances de las empreseas, pp. 464, 560, 2886, 4222-4223, 5060, 5082; Acta 338, pp. 5326-5327, 5465-5474, Anexo 2, pp. 5582-5583, Anexo 3, pp. 5631-5633;

<sup>513</sup> See descriptive part, para. 5.251.

8.130 In examining the claims under Articles 2 and 4, we address first the product segmentation in Argentina's investigation.

8.131 With respect to the existence of increased imports, we address (i) increases in absolute terms; (ii) increases relative to domestic production; (iii) end-point-to-end-point comparison of imports; and (iv) the selection of the relevant investigation period.

8.132 Regarding the existence of serious injury, we examine (i) Argentina's consideration of the injury factors production, sales, productivity, capacity utilisation, profits/losses and employment; (ii) Argentina's consideration of other injury indicators such as stocks, costs, domestic prices, investment and exports; (iii) whether all injury factors listed in the Safeguards Agreement were considered in the investigation, and (iv) whether the findings and conclusions of the investigation are supported by the evidence.

8.133 As to the existence of a causal link between increases in imports and serious injury, we consider (i) whether there was a coincidence of trends in the relevant data, (ii) whether imports occurred "under such conditions" as to cause serious injury, and (iii) whether factors other than increased imports caused or threatened to cause serious injury.

8.134 In a final section, we summarise our considerations and conclusions and make a finding concerning Articles 2 and 4.

(a) Product segments

8.135 Regarding Argentina's segmentation of footwear into five product groups in its investigation (performance sports footwear, non-performance sports footwear, exclusively women's footwear, town and/or casual footwear, and other) (paras. 8.112), the European Communities argues that having adopted this segmented approach, Argentina was obliged to follow it consistently through its injury analysis and to prove serious injury in all segments in which safeguards were to be imposed. The European Communities claims that "serious injury" was not proven in any of the selected five segments, and that Argentina merely used data of one or another sector as it considered appropriate for its purpose. The European Communities argues in particular that factors relating to import trends, market share, profits and losses and employment were not investigated for each market segment. At the same time, however, the European Communities states that it does not challenge Argentina's definition of a single category of like or directly competitive products, namely all footwear.

8.136 Argentina responds that the European Communities is confusing the CNCE's injury analysis of the whole of the footwear industry with the product categories that the CNCE used in the questionnaires for purposes of collecting pertinent information. In Argentina's view, a *single* "like or directly competitive" product and a *single* national industry are at issue in this case because there is sufficient elasticity of substitution on the supply and demand sides between all different segments of one single footwear market. Therefore, Argentina argues, the CNCE conducted an injury analysis regarding the footwear industry in its entirety. Consequently, there was no need for a disaggregated consideration of all the different injury factors with respect to the five product categories.

8.137 We disagree with the European Communities that Argentina was required to conduct its injury and causation analysis on a disaggregated basis. In our view, since in this case the definition of the like or directly competitive product is not challenged, it is this definition that controls the definition of the "domestic industry" in the sense of Article 4.1(c) as well as the manner in which the data must be analysed in an investigation. While Argentina could have considered the data on a disaggregated basis (and in fact did so in some instances), in our view, it was not required to do so. Rather, given the undisputed definition of the like or directly competitive product as all footwear, Argentina was

required at a minimum to consider each injury factor with respect to all footwear.<sup>514</sup> By the same token the European Communities, having accepted Argentina's aggregate like product definition, has no basis to insist on a disaggregated analysis in which injury and causation must be proven with respect to each individual product segment.<sup>515</sup> Thus, in our review of the injury finding, we will consider the analysis and conclusions pertaining to the footwear industry in its entirety.

(b) Are there "increased" imports in the sense of Article 2.1 and Article 4.2(a) of the Agreement?

8.138 The Agreement on Safeguards requires an increase in imports as a basic prerequisite for the application of a safeguard measure. The relevant provisions are in Articles 2.1 and 4.2(a).

8.139 Article 2.1, which sets forth the conditions for the application of a safeguard measure, reads as follows:

"A Member (footnote omitted) may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces the like or directly competitive products."

8.140 Article 4.2 sets forth the operational requirements for determining whether the conditions identified in Article 2.1 exist. Regarding increased imports, Article 4.2(a) requires in relevant part that:

"[I]n the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate...the rate and amount of the increase in imports of the product concerned in absolute and relative terms..."

8.141 Thus, to determine whether imports have increased in "such quantities" for purposes of applying a safeguard measure, these two provisions require an analysis of the rate and amount of the increase in imports, in absolute terms and as a percentage of domestic production.

8.142 As discussed in detail in the following sections, the European Communities claims that there was neither an absolute nor a relative increase in imports, and that Argentina therefore violated Articles 2.1 and 4.2(a).<sup>516</sup> The European Communities argues in this context not only that the analysis of imports was incorrect as it included MERCOSUR imports, but also that regardless of whether MERCOSUR imports are included or excluded, no increase in imports occurred.

8.143 Argentina maintains that there was both an absolute and a relative increase in imports, and that the requirements of Articles 2.1 and 4.2(a) therefore were satisfied.

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<sup>514</sup> Or, to the extent that Argentina relied on data for particular product segments as the basis for conclusions pertaining to the entire industry, it was required to explain how its analysis regarding those segments related to or was representative of the industry as a whole.

<sup>515</sup> We note that in any case, only if serious injury or a threat thereof exists with respect to the product market segments accounting for the bulk of the industry's output will injury be evident with respect to the industry as a whole. The European Communities appears to acknowledge this, in indicating that the share of a given product category of the total industry is relevant for the injury analysis of the entire industry. See descriptive part, note 201.

<sup>516</sup> The European Communities also argues that Argentina's evaluation of "increased imports", because it compared end-points of the investigation period and did not consider intervening trends, violated Article 4.2(c)'s requirement that the "relevance" of those trends be explained. See descriptive part, para. 5.155.

(i) *Imports in absolute terms*

8.144 The data on the absolute levels of imports relied upon by Argentina in its investigation, and relied upon by both parties in their arguments before the Panel, are set forth in the table below. We note that both parties accept the accuracy of these data.

Total Imports of Footwear into Argentina, 1991-1996

	Quantity (million pairs)	Value (US\$ millions)
1991	8.86	44.41
1992	16.63	110.87
1993	21.78	128.76
1994	19.84	141.48
1995	15.07	114.22
1996	13.47	116.61

8.145 The parties disagree on whether these data show an increase in the absolute level of imports consistent with the Agreement's requirement. In its investigation, and in its arguments before the Panel, Argentina compares the 1991 level of Argentina's total imports of footwear (8.86 million pairs) to the 1995 level (15.07 million pairs), and also compares the 1991 value of total imports (US\$44.41 million) to the 1995 value (US\$114.22 million). On this basis, Argentina concludes that there has been an absolute increase in imports, and that the Agreement's requirement for increased imports therefore has been satisfied. In Resolution 987/97 applying the definitive safeguard measure, Argentina also refers to the level of imports in 1996, stating in the fourth recital of the resolution that imports "increased during the period 1991-1996".

8.146 The European Communities argues, in part, that Argentina's analysis, which is based on an end-point-to-end-point comparison, fails to satisfy the Agreement's requirement of increased imports because it ignores intervening, declining trends over the period considered. The European Communities argues that there must be an increasing trend (in its first submission, the European Communities argues a "sharply" increasing trend) at the time the safeguard measure is imposed, citing the Agreement's language that the "product *is being imported* ... in such increased quantities...". For the European Communities, therefore, the existence of a sustained downward trend over the most recent years of the period of investigation is fatal to Argentina's conclusion that there was an increase in imports. In this regard, the European Communities argues specifically that the level of imports began to decline in 1994 and that this decline continued steadily through 1996, the latest period for which data were gathered in Argentina's investigation. Thus, for the European Communities, Argentina's finding of an absolute increase in imports violates Article 2.1.

8.147 In connection with these arguments, the European Communities also appears in its first submission to criticise the five-year period of investigation chosen by Argentina, arguing regarding Argentina's comparison of 1995 to 1991 import levels that "the nature of safeguards as 'emergency' measures makes clear that their use is not appropriate in the case of a long-term increase in imports".<sup>517</sup> In its first oral statement,<sup>518</sup> the European Communities clarifies its argument on this point, stating that while the European Communities does not contest the fact that an investigation is carried out over a five year period, figures relating to a period five years in the past are of only limited

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<sup>517</sup> See descriptive part, para. 5.149.

<sup>518</sup> See descriptive part, para. 5.197.

relevance, and the increase of the imports still has to be relevant at the time the decision is made to apply the measure.<sup>519</sup>

8.148 Argentina's response is two-fold. First, Argentina argues that the Spanish version of Article 2.1's requirement for increased imports is in the past tense (i.e., "*han aumentado*"). Thus, it appears that for Argentina, a past increase in imports, whenever during the period of investigation it takes place, satisfies the Agreement's requirement of increased imports, even where there is an intervening decline. Second, Argentina argues that the Agreement also is silent with regard to how, specifically, an increase in imports is to be measured, thus permitting an end-point-to-end-point comparison, and that it also is silent with regard to how long and how recent a period of investigation must be. Regarding the latter point, Argentina argues that its domestic legislation requires the investigation period to be defined as the most recent five full calendar years prior to the date of the filing of the petition for a safeguard measure. For Argentina, over the 1991-1995 investigation period thus established, an end-point-to-end-point comparison of the import data shows an increase, and thus the Agreement's requirement of increased imports is satisfied. In addition, Argentina explains that 1991 was particularly relevant, as this was the year in which Argentina's market opening started to take effect.

(ii) *Imports Relative to Domestic Production*

8.149 Act 338<sup>520</sup>, in which the findings and conclusions of Argentina's injury investigation were published (and which also constituted Argentina's notification under Article 12.1(c)), briefly addresses the question of whether imports increased relative to domestic production. No data table is provided in this respect in Act 338, however.

8.150 The Panel, seeking clarification, asked Argentina to identify where in the record of the investigation the analysis of imports relative to domestic production could be found, and also asked Argentina to clarify which production figures (total production, or total own production<sup>521</sup>, and whether inclusive or exclusive of exports) had been used for this analysis. Argentina replied that total production, including exports, should be used and was used for this purpose, and referred the Panel to sheets 5429 et. seq. of the Technical Report, which Argentina states explain the estimation of production in pairs and pesos. In the tables in those pages (in particular sheets 5501 and 5505) ratios of imports to domestic production are calculated by volume and value, and a footnote to these ratios indicates that they are calculated not on the basis of production for the domestic market (shown in the table), but rather total production (not shown in the table). These ratios are referred to in the text of Section VIII.2 of Act 338.

8.151 The following are the ratios of imports to domestic production taken from sheets 5501 and 5505 of the Technical Report:

Total imports/production

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<sup>519</sup> As indicated above, we note that the European Communities also argues, regarding the question of an absolute increase in imports, that imports from MERCOSUR countries were solely responsible for any increase in imports, and that the imports to which the measure applies (i.e., non-MERCOSUR countries) declined over the relevant period. Argentina responds that under the Agreement, a determination regarding increased imports can only be based on total imports, and that there is no possibility under the Agreement for considering only a portion of the imports. We address the general question of MERCOSUR in section E.1., *supra*, and the question of the treatment of MERCOSUR imports in the investigation in section E.4.d.iv, *infra*. In this section, we confine our consideration to total imports.

<sup>520</sup> WTO document G/SG/N/8/ARG/1 (Exhibit EC-16).

<sup>521</sup> "Own production" as used by Argentina, refers to total production exclusive of production under contract and for joint ventures.

	by volume	by value
1991	12%	11%
1992	22%	24%
1993	33%	34%
1994	28%	36%
1995	25%	34%
1996	19%	28%

On the basis of these data, Argentina argues that imports increased relative to domestic production between 1991 and 1995 (on the basis of an end-point-to-end-point comparison).<sup>522</sup>

(iii) *Evaluation by the Panel*

8.152 Before evaluating whether Argentina's finding of increased imports was in accordance with the requirements of Article 2.1 and 4.2(a), we note, first, that both parties have referred to data on both the quantity and the value of imports in connection with this requirement. The Agreement is clear that it is the data on import quantities both in absolute terms and relative to (the quantity of) domestic production that are relevant in this context, in that the Agreement refers to imports "in such increased *quantities*" (emphasis added). Therefore, our evaluation will focus on the data on import quantities<sup>523</sup>.

a. End-point-to-end-point comparison

8.153 In order to address the European Communities' argument that an end-point-to-end-point analysis does not satisfy the requirements of the Agreement (para. 8.146), we consider first Argentina's argument that because imports in 1995 were higher than those in 1991, in both absolute and relative terms, the Agreement's requirement of an increase in imports is satisfied. With respect to the absolute import volumes, while there was as Argentina points out an end-point-to-end-point increase between 1991 and 1995 in total imports, there also was, as the European Communities points out, a decrease in 1994 and 1995, which continued in 1996. Thus, during the most recent two years of the 1991-1995 investigation period as defined by Argentina, as well as in the following year, total imports declined in absolute terms.

8.154 Given these mixed trends in the data, we note that the choice of base year has a decisive influence on whether an end-point-to-end-point comparison shows an increase or a decrease. In particular, if the base year is taken as 1992 rather than 1991, total imports declined even based on an end-point-to-end-point comparison for 1992-1995 and 1992-1996. Thus, only if 1991 is the base year is any absolute increase in total import volume apparent.

8.155 The trend in the ratio of imports to domestic production is quite similar. That is, this ratio increased in 1992 and 1993, compared to 1991, then fell steadily in 1994, 1995 and 1996. We note that the declines in the ratio of imports to production since 1993 were continuous. While the 1995 ratio was considerably higher than the 1991 ratio, a comparison of 1992 and 1995 shows only a 3 percentage point increase, and a comparison of 1992 and 1996 shows a decline. This is explained by the steady declines in imports starting in 1994 which nearly halved the ratio of imports to production between 1993 and 1996. In fact, the 1996 ratio was lower than in any preceding year of the period *except* 1991. Thus, as with the absolute volume data, the outcome of an end-point-to-end-point comparison very much depends on which years are used as the end points, as even a one-year shift can reverse the result.

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<sup>522</sup> See, e.g., descriptive part, para. 5.159.

<sup>523</sup> We note that the trends in the data on import values generally confirm those on import quantities.



8.156 We believe that in assessing whether an end-point-to-end-point increase in imports satisfies the increased imports requirement of Article 2.1, the sensitivity of the comparison to the specific years used as the end-points is important as it might confirm or reverse the apparent initial conclusion. If changing the starting-point and/or ending-point of the investigation period by just one year means that the comparison shows a decline in imports rather than an increase, this necessarily signifies an intervening decrease in imports at least equal to the initial increase, thus calling into question the conclusion that there are increased imports.

8.157 In other words, if an increase in imports in fact is present, this should be evident both in an end-point-to-end-point comparison and in an analysis of intervening trends over the period. That is, the two analyses should be mutually reinforcing. Where as here their results diverge, this at least raises doubts as to whether imports have increased in the sense of Article 2.1.

8.158 We note as well that both parties appear to consider relevant the question of whether any reversal of an increase in imports during the period considered is “temporary”. In particular, the European Communities notes the US statement<sup>524</sup> that there may be reasons why imports may show a decreasing trend, including the timing of shipments, seasonality of the product, or importer concerns about the investigation. The European Communities agrees with the United States that in deciding whether the requirements of Article 2.1 are satisfied, the relevance of such trends, as well as possible others, should be carefully considered (see note 141). Thus it appears that for the European Communities, a “temporary” decrease in imports during the course of an investigation would not necessarily invalidate a finding of increased imports. Similarly, Argentina argues that it should not be impossible to make an injury and causation finding when an increase in imports has “temporarily stopped”<sup>525</sup> (emphasis added).

8.159 We too believe that the question of whether any decline in imports is “temporary” is relevant in assessing whether the “increased imports” requirement of Article 2.1 has been met. In this context, we recall Article 4.2(a)’s requirement that “the rate and amount of the increase in imports” be evaluated.<sup>526</sup> In our view this constitutes a requirement that the intervening *trends* of imports over the period of investigation be analysed. We note that the term “rate” connotes both speed and direction, and thus intervening trends (up or down) must be fully taken into consideration. Where these trends are mixed over a period of investigation, this may be decisive in determining whether an increase in imports in the sense of Article 2.1 has occurred. In practical terms, we consider that the best way to assess the significance of any such mixed trends in imports is by evaluating whether any downturn in imports is simply temporary, or instead reflects a longer-term change.

8.160 Applying this approach to imports during the investigation period defined by Argentina, we note that total imports of footwear into Argentina declined continuously after 1993. In particular, the absolute volume of imports declined by 9 per cent between 1993 and 1994, and by 24 per cent between 1994 and 1995, for a cumulative decline of 31 per cent between 1993 and 1995. Similarly, the ratio of imports to domestic production in 1994 was 5 percentage points lower than in 1993, and the ratio in 1995 was 3 percentage points lower than in 1994 (a cumulative reduction of 8 percentage points between 1993 and 1995). The data for 1996 (which Argentina collected and analysed, but which it did not treat formally as within the period of investigation) confirm the declining trend in

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<sup>524</sup> See descriptive part, para. 6.39.

<sup>525</sup> See descriptive part, para. 5.163.

<sup>526</sup> We recognise that Article 4.2(a) makes this reference in the specific context of the causation analysis, which in our view is inseparable from the requirement of imports in “*such* increased quantities” (emphasis added). Thus, we consider that in the context of both the requirement that imports have increased, and the analysis to determine whether these imports have caused or threaten to cause serious injury, the Agreement requires consideration not just of data for the end-points of an investigation period, but for the entirety of that period.

imports. In particular, the 1996 import volume was 11 percent below the 1995 level, and the ratio of imports to production was 6 percentage points lower than in 1995.<sup>527</sup> Thus, between 1993 and 1996, the absolute volume of imports declined by 38 percent, and the ratio of imports to production was nearly halved, from 33 per cent to 19 per cent. Declines of this magnitude, taking place consistently over the most recent three years of the period for which data were collected can only be seen as a long-term change; such declines cannot be characterised as “temporary” reversals of an overall increase in imports.

8.161 In this context, we recall that the Agreement requires not just an increase (i.e., any increase) in imports, but an increase in “such...quantities” as to cause or threaten to cause serious injury. The Agreement provides no numerical guidance as to how this is to be judged, nor in our view could it do so. But this does not mean that this requirement is meaningless. To the contrary, we believe that it means that the increase in imports must be judged in its full context, in particular with regard to its “rate and amount” as required by Article 4.2(a). Thus, considering the changes in import levels over the entire period of investigation, as discussed above, seems unavoidable when making a determination of whether there has been an increase in imports “in such quantities” in the sense of Article 2.1.

8.162 We are thus unpersuaded that Argentina’s end-point-to-end-point comparison for the period 1991-1995 is sufficient demonstration of “increased imports” in the sense of the Agreement. Where, as here, the volume of imports has declined continuously and significantly during each of the most recent years of the period, more than a “temporary” reversal of an increase has taken place (as reflected as well in the sensitivity of the outcome of the comparison to a one-year shift of its start or end year). In this regard, we recall the quite restrictive nature of the safeguard remedy, which is justified by the purpose of that remedy, namely to address urgent situations where a domestic industry needs temporary “breathing room” to adjust to altered conditions of competition brought about by increased imports. We cannot reconcile this purpose with a situation in which the increasing trend in imports reversed several years before the investigation began.

8.163 Finally, we note the statements concerning imports in the Preliminary Report of the Under Secretary of Foreign Trade concerning the decision to open the investigation and to apply a provisional safeguard measure<sup>528</sup>. In particular, regarding imports, that Resolution refers exclusively to an *anticipated* increase in imports following the removal of the DIEMs on footwear. Section seven and the conclusions of the Preliminary Report state that:

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<sup>527</sup> Regarding the period examined by Argentina, Argentina argues that “complete” data were not available for 1996 at the time it initiated the investigation, which led it to use 1995 as the end-point of its period of investigation, and to count backward five full years as is, according to Argentina, required by its domestic law. We note, however, that data for 1996 were requested and collected in the CNCE’s questionnaires, and are referred to throughout Act 338 and the Technical Report, demonstrating that in fact these data were fully available. See footnote 540, *infra*, for details on the availability of 1996 data.

<sup>528</sup> Exhibit ARG-1 at Section 7, and section on “Conclusions”.

"Act 266 of 10 December 1996 found that the petitioners' allegations that the absolute increase in imports of footwear would have caused serious injury to the domestic industry correspond to the evidence presented *when imports are estimated* under the hypothesis of elimination of the DIEMS; thus, the Commission finds preliminarily that there exists in the petition and in the report clear evidence that the *potential* increase in imports threatens to cause serious injury, justifying the opening of an investigation.

...

Regarding the circumstances necessary to make possible the application of provisional safeguard measures, *these would be recreated* only in the absence of the DIEMs." (emphasis added.)

We note that the import data considered in making this assessment covered the same products and period as those used in Argentina's definitive finding (i.e., total imports of footwear during 1991-1995)<sup>529</sup>.

8.164 In sum, we find highly significant that the absolute volume of footwear imports and the ratio of those imports to domestic production, increased only until 1993, i.e., during the first two years of the period for which Argentina collected data, and declined continuously thereafter. We also find significant that these decreases were of such a magnitude that a one-year change in base year of the data series on the volume of imports transforms the increase relied upon by Argentina into a decline, and that the resolution applying the provisional measure refers only to anticipated increases in imports, showing that at that time, no increase in imports was present. For these reasons, we find that Argentina's investigation of footwear did not demonstrate increased imports in "such ... quantities" in absolute or relative terms, as required by Article 2.1 and Article 4.2(a) of the Agreement.

8.165 We are not persuaded, however, by the argument advanced by the European Communities in its first submission that only a "sharply increasing" trend in imports at the end of the investigation period can satisfy this requirement. In our view, each situation is different, and the Agreement certainly does not identify a unique pattern of importation that satisfies the "increased imports" requirement. Depending on the particular case, there might indeed be a *temporary* downturn in imports during an investigation period which would nevertheless not invalidate a finding of increased imports.

#### b. Relevant period

8.166 We note the EC's criticisms of the period covered by the import data in the investigation, both that it was too long and that it ended too far in the past, and Argentina's response, in part, that the Agreement is silent regarding the investigation period, and that the Spanish text "*han aumentado*" is in the past tense, connoting a past increase in imports.<sup>530</sup> We agree with Argentina that the Agreement

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<sup>529</sup> We note as well that Act 338, at folio 5350 (Exhibit EC-16 at 37), also refers to and confirms the decreases in imports starting in 1993, attributing these decreases to the DIEMs.

<sup>530</sup> In this context, we note that unlike the Spanish text, the English text of Article 2.1 authorizes the application of safeguard measures only where the product at issue "*is being imported* in such increased quantities ... so as to cause or threaten to cause serious injury" which would seem to indicate that, whatever the starting-point of an investigation period, it has to end no later than the very recent past. The French text conveys the same meaning as it is in the present tense "*ce produit est importé* sur son territoire en quantités tellement accrues". The Spanish text is more ambiguous, as the phrase "*que las importaciones de ese producto en su territorio han aumentado en tal cantidad*" unequivocally means that imports have increased in the past, but it does not clearly imply that imports which have started to increase in the past necessarily also have to continue to increase at least through the recent past.

is silent regarding the period of investigation, and we also consider that it can be quite useful to an investigating authority to have five years of historical data to refer to in making its determinations. Nevertheless, we find problematic that Argentina, where it collected data for 1996, did not take them into account in its assessment of whether there were increased imports; as discussed above, the decline in imports in 1996 confirms the more than temporary nature of the decline in imports after 1993.

(c) Serious injury

8.167 In keeping with the standard of review enunciated in section E.3. (paras 8.117 - 8.121) above, we view our task in considering Argentina's serious injury analysis and determination as, in the first instance, to consider whether all injury factors listed in Article 4.2(a) - i.e., production, changes in the level of sales, productivity, capacity utilisation, profits and losses, and employment - have been considered by Argentina's national authorities, and whether an analysis of the data pertaining to those factors has been carried out. Second, we must evaluate the reasoning set forth by Argentina in its findings and conclusions to determine whether they were adequately explained and are supported by the evidence.

8.168 In its investigation, Argentina found that the domestic footwear industry was both seriously injured and threatened with serious injury caused by increased imports. In reaching this finding, Argentina primarily relied upon a comparison of data for 1991 and 1995, although it collected and analysed data for 1996 as well. We will consider first Argentina's analyses of serious injury and causation, and then separately consider Argentina's analysis of threat of serious injury. In considering the injury analysis, we will consider in turn Argentina's analysis of each factor identified in the Agreement, as well as any additional factors examined by Argentina.

(i) Production

8.169 Argentina, on the basis of a comparison of data for 1995 and 1991, concluded in its investigation that production declined, constituting evidence of serious injury to the domestic industry. Argentina considered data both for so-called "own production" (i.e., excluding production under contract and for joint ventures) and for own production plus production under contract and for joint ventures. Argentina notes that the data were estimated for the industry as a whole on the basis of macroeconomic statistics. Argentina also states, as indicated in Act 338, that there was a 7.7 per cent increase in the value of production between 1991 and 1995, which Argentina states was the result of a "change in product mix following a decision to concentrate on products with a higher unit value".

8.170 The European Communities disagrees that production declined, in view of Act 338's indication that the value of production did not decrease, but increased by 7.7 percent, between 1991 and 1995. The European Communities asserts that Argentina "discarded" this positive figure by stating that the industry shifted production to higher-unit-value products. The European Communities argues that Argentina was unable to explain in response to a Panel question on this point how this

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Nonetheless, we do not share Argentina's view that in the light of the ambiguous meaning of the Spanish version of Article 2.1 of the Safeguards Agreement, WTO Members whose official language is Spanish should on that basis enjoy a greater latitude in choosing and analysing investigation periods for purposes of safeguard investigations. In this regard, we recall that Article 33.1 of the Vienna Convention on the Law of Treaties recognizes that treaties authenticated in several languages are equally authoritative in each of these languages, while Article 33.3 provides that the terms of a treaty are presumed to have the same meaning in each authentic text. Where treaty texts in different languages disclose differences in meaning which the general rules on treaty interpretation do not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty should be adopted pursuant to Article 33.4 of the Vienna Convention. In this regard, we would note that the object and purpose of the Agreement (i.e., emergency action to prevent or remedy serious injury caused by increased imports) would seem to imply rapid action with respect to an ongoing (or at least quite recent) situation.

move toward higher-valued products was indicative of serious injury. The European Communities also questions the representativeness of the sample reflected in the questionnaire responses.

8.171 We note that, as shown below, the data provided in the questionnaire responses accounted for only one-third to one-half of the total estimated level of production.

Production

(volume in million pairs; value in million US dollars)

	Estimated data for industry as a whole		Questionnaire data
	Total production		Own production
	Volume	Value	Volume
1991	71.4	861	29.14
1992	76.9	1,036	29.29
1993	65.1	914	26.44
1994	70.3	1,001	28.80
1995	60.8	927	22.61
1996	70.7	1,097	22.07

8.172 Regarding the estimated data on total production volume, we note that on the basis of an end-point-to-end-point comparison, total production declined between 1991 and 1995 (by 14.8 percent), between 1991 and 1996 (by only one percent), and between 1992 and 1996 (by 8 percent). We also note, however, the mixed trends over the period, in particular the significant decrease between 1994 and 1995, followed by the rebound between 1995 and 1996 to slightly more than the 1994 level. Regarding the value of production, we note the 7.7 percent increase between 1991 and 1995, as well as the further increase in 1996.

8.173 The questionnaire data on the volume of own production (which represent no more than 40 percent of estimated data for the industry) show somewhat different trends. Namely, except for 1994, these data show declines throughout the period of investigation. No questionnaire data are available on the value of production.

(ii) *Sales*

8.174 Regarding sales, the European Communities argues that the industry's total sales were stable. The European Communities points as well to increases in the sales of women's and town and casual footwear, in spite of which, the European Communities argues, the safeguard measure was applied with respect to these categories.

8.175 Although Argentina submitted to the Panel estimated sales volume and value for the industry as a whole (used in the investigation to calculate apparent consumption – see below), its analysis of the injury factor "sales", as reflected in the discussion in Act 338 and the Technical Report, relies on the data for the sample of large and medium-sized companies from which it collected data through questionnaires. For "sales", Argentina used data on sales of own production for the domestic market, i.e., exclusive of exports, and exclusive of contract and joint venture production/sales.

8.176 The text of Act 338 states that domestic sales volume as reflected in questionnaire responses for large and medium-sized firms declined 27 percent by volume and 15 percent by value between

1991 and 1995. The text of Act 338 further indicates that volume declined in 1992, 1993, 1995 and 1996, and that value showed "a similar decline" except for 1992 when value increased by 13 percent.

8.177 The data on sales from questionnaire responses, below, are as they appear in Act 338, except those for 1996 which are taken from the Technical Report. (We note that although the text of Act 338 refers to 1996 data, the relevant data tables of Act 338 end in 1995.) The estimated data for the industry as a whole, below, were provided by Argentina in its 21 December 1998 response to Panel question 36. In that question, the Panel asked Argentina to provide inter alia questionnaire data as well as estimated data for the industry as a whole on the quantity and value of sales. The estimated data also appear in the Technical Report, at folios 5501 and 5505, where they are identified as "production destined for the domestic market", and are used in the calculation of apparent domestic consumption and import penetration. In addition, data identified as "sales for domestic market – own production" in tables on pages 50 and 53 (pairs), and 59 and 62 (pesos) of Argentina's notification of a finding of serious injury and causation (Exhibit EC-16) (Technical Report, folios 5501-5503 and 5505-5507, Exhibit ARG-3), which are broken out between performance sports footwear and other footwear, reconcile with the estimated data for the entire industry, shown below<sup>531</sup>.

Own production for domestic sales

(volume in million pairs; value in million dollars)

	Questionnaire data		Data estimated for entire industry	
	Volume	Value	Volume	Value
1991	26.82	345.30	65.3	824.8
1992	27.21	410.45	74.0	1,010.2
1993	25.30	395.94	62.6	883.2
1994	25.58	433.39	66.6	967.0
1995	20.46	324.70	56.2	858.6
1996	19.63	311.52	67.3	1,048.6

8.178 We note first of all that the percentage changes in the sales data cited in the text of Act 338 do not correspond in all cases to those calculated from the above questionnaire data, although that text indicates that it is based on those data. Specifically, the 1991-1995 decrease in sales volume was 24 percent rather than 27 percent, while that in value was 6 percent rather than 13 percent. Sales volume increased in 1992 rather than decreasing, and sales value increased in both 1992 and 1994, rather than just in 1994. Moreover, the 1992 increase in value was 19 percent, not 13 percent.

8.179 The trends in the estimated data on own production for domestic sales differ from those in the questionnaire data. There is an increase between 1991 and 1996 in volume (3.1 per cent), and a decrease between 1992 and 1996 (9.1 per cent), and between 1991 and 1995 (13.9 per cent). Again, the trends are mixed over the period, and again there is a decrease between 1994 and 1995, followed by an increase between 1995 and 1996. On a value basis, there are increases between 1991 and 1995, 1991 and 1996, 1992 and 1996, and 1995 and 1996.

8.180 As in the case of production, the data estimated for the industry as a whole on own production for domestic sales are twice to three times higher than those compiled from questionnaire responses, and show different trends, as well. In response to a question from the Panel regarding how the questionnaire data were reconciled by Argentina with the higher figures that it estimated for the industry as a whole, Argentina stated that it conducted a detailed analysis of a sample of footwear-producing enterprises representing 50 percent of domestic production, and that the estimate for the

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<sup>531</sup> The value data reconcile exactly except for 1996, where they differ by \$1.6 million, and the quantity data reconcile closely.

industry as a whole was made for calculating apparent consumption and import market share. Argentina further stated that the CNCE also gathered qualitative information from small firms. Argentina did not respond regarding the reconciliation of the differences in the two sets of data<sup>532</sup>.

8.181 Argentina, which as indicated had presented the estimated data, above, to the Panel as sales data in response to a question, and had discussed them as such in response to a follow-up question, at the interim review stage criticised the Panel for identifying them as sales data. Specifically, in its interim review comments, Argentina argued for the first time that the data are production data rather than sales data, that as such they are not comparable to the sales data derived from the questionnaire responses, and that the CNCE did not claim them to be comparable. Given Argentina's own representation to the Panel of these data as sales data throughout the proceedings, this criticism at the interim review stage of the Panel's use of these data is surprising, particularly given that these data reconcile to data labelled as "sales" in tables in the record of the investigation, as indicated above. Argentina's belated criticism thus raises questions about the data used in the investigation, and in particular calls into question the representativeness of the sales data from questionnaire responses that were relied upon by Argentina in its analysis of sales.

(iii) *Productivity*

8.182 The European Communities argues that this factor is not specifically addressed "in a separate heading in its investigation", but that the "Centro de Estudios para la Producción", in a study submitted to the Panel by the European Communities<sup>533</sup>, found an increase in productivity in the footwear industry of 24 to 29 per cent between 1991 and 1996. We note that neither Act 338 nor the Technical Report makes specific reference to the injury factor productivity. A data series on percentage changes in productivity from the Institute for Industrial Development of the Argentine Industrial Union is included in the Final Report of the Under Secretary of Foreign Trade,<sup>534</sup> but no discussion or analysis of productivity appears in that report.

8.183 In answer to a Panel question regarding where in the record of the investigation an analysis of productivity can be found, Argentina stated only that the information on employment and production gathered in the questionnaire responses showed no increase in productivity between 1991 and 1995. At the interim review stage, however, Argentina pointed to a contradictory representation by the domestic industry (i.e., the petitioner, the CIC), reflected in Act 338, that productivity had increased due to investments in new equipment:

"...these investments had made possible the transformation of the sector with improvements in productivity and product quality to enable it to compete on the domestic and foreign markets. It is important to note, however, that according to the CIC, these investments were basically directed towards improving productivity and the quality of domestic footwear."<sup>535</sup>

(iv) *Capacity Utilisation*

8.184 Regarding capacity utilisation, the European Communities notes that installed capacity increased over the period of investigation, and that Argentina seemed not to have provided statistics on capacity utilisation.

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<sup>532</sup> Argentina's 15 February 1999 response to Panel question 3.

<sup>533</sup> Exhibit EC-29.

<sup>534</sup> Exhibit ARG-5.

<sup>535</sup> Exhibit EC-16, Section VI.6, at 18.

8.185 We note that Act 338 refers to representations by the petitioners to the CNCE regarding declines in capacity utilisation, but does not indicate whether these data were evaluated by the CNCE during the course of the investigation.<sup>536</sup> Act 338 does discuss the data gathered by the CNCE on installed capacity for various segments of the industry, which indicate among other things an increase between 1991 and 1995, and a further increase in 1996, in capacity to produce performance sports footwear. (Act 338's discussion on capacity utilisation and installed capacity is repeated in the Technical Report.) However, we note that the data on the industry's total capacity do not appear to have been aggregated or considered in the investigation; the relevant table of the Technical Report containing capacity data shows the data broken out by market segment, but not in total for all segments. The data on installed capacity, as set forth in the Technical Report, are as follows:

Installed Capacity

(thousand pairs)

	Performance sports	Non-performance sports	Women's	Town and casual	Other
1991	14,813	15,280	294	857	12,797
1992	15,317	15,513	340	1,266	12,753
1993	17,368	15,747	628	2,096	2,966
1994	17,038	14,649	725	2,277	3,028
1995	18,675	15,309	801	1,874	2,945
1996	19,799	15,192	448	2,205	2,945

There is no corresponding table in Act 338 or the Technical Report, however, concerning the *utilisation* of installed capacity.

8.186 We note that Argentina attaches as an exhibit to its first submission a graph showing changes in capacity utilisation for the industry as a whole between 1991 and 1995. In the text of that submission, Argentina states that to examine capacity utilisation, it is necessary to analyse production and capacity, and in this regard refers to data obtained in questionnaire responses. The submission goes on to state that "on the basis of the analysis of the installed capacity and production figures" (presumably from the questionnaire data), "the CNCE reached the conclusion" that capacity utilisation had decreased between 1991 and 1995. In answer to a Panel question, Argentina provided a data series on capacity utilisation. In answer to a further Panel question regarding where in the record of the investigation these data and the analysis on capacity utilisation could be found, Argentina indicated that the data were derived from the data tables in the Technical Report on capacity and production.

(v) *Profits and losses*

8.187 The European Communities argues that the evidence gathered in the investigation concerning profit-and-loss was insufficient to demonstrate serious injury or threat, and that the methodology was questionable because it was based on global financial data for the responding companies, and because different subsets of companies were used for different indicators. The European Communities argues that although Act 338 refers to sales below breakeven point, the profit-and-loss data contained therein do not show any losses.

8.188 Act 338 discusses and contains data on a range of financial indicators, including gross margin/sales; operating profit(loss)/sales; net margin/sales; net margin/assets; net margin/equity;

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<sup>536</sup> Exhibit EC-16, Section VI.6, at 17.



average cost of commercial and financial debt; interest coverage; current ratio; acid test ratio; and total indebtedness, *inter alia*. The data and discussion in Act 338 on these financial indicators also appear in the Technical Report. A summary of the data from Act 338 and the Technical Report on financial indicators is set forth below:

Accounting Data

	Total enterprises		Exclusively footwear mfg.	
	1991	1995	1991	1995
<u>Gross margin/sales</u>				
mean	32%	27%	48%	27%
median	30%	26%	48%	26%
<u>Operating profit (loss) sales</u>				
mean	14%	4%	26%	10%
median	12%	6%	26%	10%
<u>Net margin/sales</u>				
mean	15%	1%	24%	6%
median	13%	4%	24%	6%
<u>Net margin/assets</u>				
mean	18%	3%	33%	13%
median	13%	4%	33%	13%
<u>Net margin/equity</u>				
mean	27%	2%	57%	23%
median	25%	6%	57%	23%
<u>Average cost of commercial and financial debt</u>				
mean	9% (1993)	14%	4% (1993)	6%
median	8% (1993)	12%	5% (1993)	8%
<u>Interest coverage</u> (times interest earned)				
mean	3.92 (1993)	3.10	4.32 (1993)	3.64
median	4.02 (1993)	0.68	4.32 (1993)	3.64
<u>Current ratio</u>				
mean	727%	178%	190%	225%
median	190%	183%	190%	250%
<u>Acid test ratio</u>				
mean	446%	107%	118%	141%
median	95%	89%	118%	129%
<u>Total indebtedness</u>				
mean	70%	136%	74%	91%
median	74%	80%	74%	72%

Sales/Breakeven Point for Footwear Operations of Multi-Product Firms  
(questionnaire data)

1991	19.80%
1992	33.70%
1993	6.57%
1994	8.42%
1995	-34.16%
1996	-24.51%

8.189 Argentina indicates that the data on various profit margins (gross profit, operating profit and net profit) were taken from the accounting statements of six large and six medium-sized companies responding to questionnaires. Four of the medium-sized companies produced only footwear, and their accounting data were broken out separately. In response to a question from the Panel at the second meeting, Argentina indicated orally, with respect to the responding companies producing other products along with footwear (i.e., the "multi-product" companies), that footwear accounted for at least 70 percent of each of those companies' total operations. Argentina also indicates that it gathered through questionnaires financial data specifically on the footwear operations of ten responding companies, from which it calculated a "break-even point", that is, the "point at which average income on sales covers the variable costs of the pairs sold and the fixed costs of the pairs produced."

8.190 We note that the profit-and-loss data above show that the operating profit of the footwear-only enterprises declined from 26 percent to 10 percent of sales between 1991 and 1995, while the net profit of these companies, declined from 24 percent to 6 percent. We also note that both groups of companies remained profitable at the end of the investigation period. By contrast, the breakeven analysis for footwear operations shows that sales revenue was 34.2 percent below the breakeven point in 1995 and 24.5 percent below breakeven in 1996, down from 19.8 percent above breakeven in 1991. In response to a Panel question regarding the substantial differences between these two sets of data, Argentina responded in part that both data series, in spite of differences in how they were calculated, show negative trends.

(vi) *Employment*

8.191 The European Communities argues that the data on employment show relative stability, contrary to Argentina's characterisation that employment declined over the period of investigation. In support of this argument, the European Communities notes Act 338's reference to a five percent decline in employment between 1991 and 1995 based on questionnaires; the European Communities refers as well to employment data contained in the document from the Centro de Estudios Para la Produccion<sup>537</sup>.

8.192 Argentina states that Act 338, on the basis of questionnaire responses, indicates a 5 percent decline in employment between 1991 and 1995. Act 338 also indicates that the petitioner, CIC, argued that employment in the footwear industry had declined from 42,317 to 27,896 between 1991 and 1995, or by 34 per cent. The questionnaire data set forth in Act 338 are show in the table below.

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<sup>537</sup> Exhibit EC-29

Total Number of Employees of Responding Companies  
(questionnaire data)

	Operations Related to footwear production	Total
1991	10,797	13,995
1992	11,493	15,338
1993	11,258	14,863
1994	11,040	14,468
1995	10,237	13,160
1996	10,098	12,818
1991-1995	-5%	-5%

8.193 The panel asked Argentina where in the record of the investigation it had discussed and reconciled the very different levels and trends in the data from the CIC and the questionnaire responses. Argentina replied that the questionnaires had provided a "representative sample" of enterprises, which had "confirmed the downward trend in employment", a trend that also was confirmed by the Final Report of the Under Secretary of Foreign Trade<sup>538</sup> which showed a 21 percent decline based on information from the Industrial Development Institute of the Argentine Industrial Union. Furthermore, although Act 338 indicates that the questionnaires showed a 5 per cent decline in employment, Argentina stated in answer to a Panel question that the questionnaire data show a 13 per cent decline. At the second meeting of the Panel, Argentina indicated that the 13 percent decline was the decline in employment for firms that reported data for both 1991 and 1995. The five percent decline represented the decline in employment for all firms reporting in 1991 and all firms reporting in 1995, whether or not those individual firms reported data in both years. Argentina accounts for the difference by indicating that some new firms entered the footwear industry between 1991 and 1995. In Argentina's view, the 13 percent decline is the more representative figure, because it comes from a consistent sample of companies.

(vii) *Other injury indicators considered*

a. Stocks (inventories)

8.194 The data collected in the questionnaires are presented separately for the five product segments. The data show increases in inventories between 1991 and 1995 and 1996 for all product lines except women's shoes (which is a very small part of the total). The reasons for the inventory build-up are presented separately, and are reviewed in the Technical Report firm by firm. Most of the firms indicate that an increase in imports was the cause. A footnote to this section of the report indicates that the sample of companies responding varied considerably from year to year, rendering non-representative a comparison of data for different years.

8.195 The European Communities makes no specific argument with respect to this factor.

b. Costs

8.196 Argentina indicates that on average, producers responding to the questionnaire reported increased costs over the period (a mean increase of 17 per cent and a median increase of 12 percent). A variety of domestic and imported input materials whose costs had increased are identified in Act 338.

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<sup>538</sup> Exhibit ARG-5.

8.197 The European Communities makes no specific argument with respect to this factor.

c. Domestic prices

8.198 In Act 338 Argentina noted wholesale and retail price index data published in INDEC, which in general show increases between 1991 and 1995. Argentina attributed these increases to increased costs and to the change in product mix, noting that indices have difficulty reflecting product mix changes, and thus must be used with caution. There does not appear to be any other data specifically regarding domestic producers' prices in Argentina's reports concerning the investigation.

8.199 The European Communities argues that domestic price is often one of the more significant indicators to establish whether a given sector has suffered damage as a consequence of imports. According to the European Communities, the official statistics cited in Act 338 regarding domestic prices show no reduction in price between 1991 and 1995, and show an increase between 1991 and 1996. Despite these trends, the European Communities maintains, Argentina found it necessary to impose safeguard measures.

d. Investment

8.200 Significant levels of investment were reported during the period investigated, although on a year-to-year basis they showed a somewhat declining trend. Act 338 indicates that in the early part of the period, investment was in new machines, then subsequently in marks and plants; and that the CIC stated in the petition that the investment had been to improve competitiveness through new technology, closing inefficient plants and developing new product lines.

8.201 The European Communities argues that Argentina in Act 338 notes the industry's substantive efforts to improve productivity, and specifically indicates that 168 million pesos were invested during 1991-1995, with a further 17 million pesos in 1996. For the European Communities, these positive statements hardly support an impression of an industry which suffers "significant overall impairment", but on the contrary an optimistic industry.

8.202 Argentina disagrees with the European Communities that the investments made in the sector were an indicator of good health. According to Argentina, the change in consumer patterns made it necessary to change the domestic product mix in order to adapt to the new conditions, and this called for investments, particularly in machinery, equipment and tooling, both domestic and imported, that were independent from the economic results and represented the only way of remaining in the market.

e. Exports

8.203 The following data on exports (from questionnaire responses from medium and large companies; and compiled by CNCE from official statistics from INDEC) were compiled during the investigation:

Exports  
(in thousands of pairs)

	Own production (Questionnaire data)			INDEC Data
	Total	Mercosur	Other	Total
1991	199	124	75	N/A
1992	1,461	730	731	2,670
1993	2,158	1,592	567	3,470
1994	2,472	1,713	758	3,040
1995	2,913	2,360	553	4,510
1996	3,148	2,791	358	3,240

Act 338 emphasises specifically the growth in exports to Mercosur countries, and notes the fluctuating trend in exports to other destinations. Act 338 draws no conclusion about exports.

8.204 The European Communities makes no specific arguments regarding Argentina's exports of footwear.

*(viii) Evaluation by the Panel*

8.205 Articles 4.2(a) and (b), and 4.2(c) which includes by cross-reference Article 3, respectively set forth the Agreement's requirements concerning the investigation regarding serious injury and concerning the report(s) containing the investigation's results. Article 4.2(a) requires that during the investigation, the competent authority shall "evaluate all relevant factors of an objective and quantifiable nature". It appears that to satisfy this requirement, the authority should first conduct an appraisal of the data, including confirmation or verification of their accuracy and representativeness. Second, Article 4.2(a) and (b) require full analysis and evaluation of those data, and 4.2(c) including by cross-reference Article 3, requires written presentation of a detailed analysis of the case, including the findings and reasoned conclusions reached on all pertinent issues of fact and law, and a demonstration of the relevance of the factors examined.

8.206 In the light of these requirements, we must consider, first, whether all injury factors listed in the Agreement were considered by Argentina, as the text of Article 4.2(a) of the Agreement ("all relevant factors...including ...changes in the level of sales, production, productivity, capacity utilisation, profits and losses, and employment") is unambiguous that at a minimum each of the factors listed, in addition to all other factors that are "relevant", must be considered (see paras. 8.122-8.124).

8.207 Second, in accordance with Articles 4.2(c)/3 and 4.2(a) and (b), we must consider whether Argentina's findings and conclusions, as set forth in the reports containing the results of the investigation, are supported by the evidence, i.e., whether the explanations and discussion in the reports convincingly demonstrate the link between the investigation's findings and conclusions and the evidence relied upon.

a. Consideration in the investigation of the injury factors listed in the Agreement

8.208 Turning to the first question, we note as discussed above that the analysis by the CNCE includes consideration of the following factors: sales, production, profits and losses and employment.

8.209 Regarding *capacity utilisation*, in the investigation the data on installed capacity appear to have been collected and discussed only on a disaggregated basis by market segment; the discussion in the texts of Act 338 and the Technical Report also refers to changes in installed capacity (but not

capacity utilisation) on a firm-by-firm basis for ten firms responding to the questionnaire. The only reference to capacity utilisation in Act 338 and the Technical Report is to a representation by the petitioners. There is no indication in those texts that this representation was either confirmed or relied upon by CNCE, nor is there any discussion or explanation of how the information for individual firms was related to the situation of the industry as a whole. In addition, Argentina's submissions in this dispute, which present calculations of capacity utilisation based on questionnaire responses, show different rates of capacity utilisation from those submitted by the petitioners quoted in Act 338 and the Technical Report, confirming that the CNCE did not rely on the petitioners' representations regarding capacity utilisation.

8.210 Thus, although Argentina's submissions in this dispute contain data and discussion of this factor, there is no evidence that it was fully considered in the injury investigation. To the contrary, it appears that this analysis was conducted specifically for this dispute settlement proceeding.

8.211 The situation with respect to *productivity* is similar. As noted above, while the Final Report of the Under Secretary of Foreign Trade<sup>539</sup> contains an index of changes in the productivity of the Argentine footwear industry from the Institute of Industrial Development of the Argentine Industrial Union, there is no analysis of changes in productivity either in this document or in the text of Act 338 or the Technical Report. Moreover, given that this document postdates the completion of the CNCE's investigation and the forwarding of its conclusions, it is clear that the statistical information contained therein was not considered by the CNCE in reaching its finding of serious injury. Further, regarding the representation by the petitioners that productivity increased, there is no indication in the Technical Report that this was confirmed or relied upon by the CNCE. In fact, Argentina's answer to a Panel question indicates that the employment and production data show no increase in productivity.

b. Whether the findings and conclusions of the investigation are supported by the evidence

8.212 Moving to the second question, i.e., whether the findings and conclusions of the investigation are supported by the evidence, we find a number of aspects of the investigation to be problematic. Our primary concerns are (1) the treatment of the data for 1996; (2) the almost exclusive reliance on end-point-to-end-point analysis; and (3) the lack of apparent support in the evidence considered and reasoning applied for various of the conclusions related to injury, in part due to unreconciled differences in some of the data series relied upon.

i. Treatment of 1996 data

8.213 Regarding the treatment of the 1996 data, we note that although these data were gathered during the normal course of the investigation<sup>540</sup>, in most instances Argentina's evaluation and

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<sup>539</sup> Exhibit ARG-5.

<sup>540</sup> As noted above, the questionnaires sent by the CNCE requested data on the period 1991-1996. In its interim review comments, Argentina stated, particularly regarding the financial data, that the 1996 data were incomplete and therefore would skew any trend analysis. A review of the Technical Report shows that data for 1996 are contained in essentially all of the tables included in the Technical Report concerning the situation of the Argentine industry; and the Technical Report does not indicate any problem of incompleteness of the 1996 data or lack of comparability with the data for the earlier years. Although, as Argentina points out, and as explained below, the tables on the financial data show that, for certain indicators, the sample size in 1996 was smaller than in some of the earlier years, these data are included in all of the graphs on financial ratios, with no disclaimers as to their reliability or comparability, and some of the 1996 data also are referred to in the Technical Report's discussions, again with no disclaimers. The details of the periods covered by the data in the Technical Report are as follows:

**Body of Technical Report (folios 5353-5523):** Except where specifically indicated otherwise, all tables and graphs contain 1996 data, with no indication of any issues of incompleteness or lack of comparability -- Tables 1-5 -- undated company-specific qualitative information including on the conduct of the investigation, as

conclusions regarding the different injury factors were based only on data through 1995. We recall here Article 4.2(a)'s requirement that "all relevant factors" must be considered. In our view, in the context of a safeguard investigation, the most *relevant* information is certainly the most *recent*. We must emphasise here that we do not find that an investigating authority must continuously update the data in its investigation. Such a requirement would be unnecessarily burdensome and difficult to administer. Rather we believe that in requiring consideration of all "relevant" information, the Agreement requires consideration of the most *recent* information available at the time the investigation is conducted. Where, as here, such data are available, we believe that they must be fully taken into consideration in the investigation; in the absence of adequate explanation by the investigating authority, they cannot simply be disregarded.

8.214 In this regard, while of course the data for 1995 are highly relevant in the context of Argentina's investigation, the data for 1996 are as well. We note in particular that the data for 1996 for some injury factors -- notably estimated data on production and sales (or production for the domestic market) -- show upturns from the 1995 levels. We do not consider that such upturns would necessarily foreclose the possibility that serious injury could be found. Nevertheless, their existence certainly would put an extra demand on the investigating authority to explain why, despite the apparent improvement, serious injury was still present or imminent. Argentina, while acknowledging

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well as undated information on tariff classification and on the DIEMs; Tables 6 and 7 (and accompanying graphs) -- comparison of value added in footwear sector with other economic indicators; Tables 8-11 -- financial data for 1991 and 1995 only (extracted from 1991-1996 data series contained in Annex 4 -- see below); Table 12 -- breakeven analysis (table contains 1996 data, which text refers to and uses, with no indication of any lack of comparability with earlier years' data); Tables 13-15 -- import and export and trade balance data; Tables 16-18 -- imports by country of origin; Table 19 -- ranking of importers; Tables 20a-c and 21a-c -- apparent consumption and import market share.

Annex 2 (folios 5578-5584) -- qualitative information from small enterprises covering the period 1991-1996, inclusive.

Annex 3 (folios 5585-5646) -- questionnaire data from medium and large enterprises. Except where specifically noted, all tables and graphs contain 1996 data: Tables 1-11 -- undated qualitative information on plant locations, types of shoes produced, etc.; Tables 12-15 -- own production; Table 16 -- contractor and joint venture production; Table 18 -- total production; Tables 18.I-III, 19.I-III, 20.I-III -- domestic sales of own production; Table 21 -- undated qualitative information on firms' exporting activity; Tables 22-30 and 31.a-c -- exports of own production; Tables 32-34 -- inventories (notes indicate variability in sample size over the period, not affecting 1996 data); Tables 35a-b, 36a-b, 37a-b -- purchases of inputs; Tables 38-40 set forth 1991-1995 end-point-to-end-point percent changes in costs and prices and in use of different input materials; Tables 41-43 -- installed capacity (notes indicate variability in sample size over the period, not affecting 1996 data); Tables 44a-b -- investment; Tables 45-47 -- employment (notes indicate variability in sample size over the period, not affecting 1996 data); Tables 48-50 -- total salaries (notes indicate variability in sample size over the period, not affecting 1996 data); Tables 51-52 -- undated qualitative information on materials and technology of footwear imported by producers.

Annex 4 (folios 5647-5716) -- equity and financial situation of medium and large enterprises: All tables and charts contain 1996 data. The tables indicate the number of firms responding in each year, and for most indicators show a smaller number of responses in 1996 than in most other years surveyed. Neither the methodological notes in Annex 4 (folio 5648), nor the text in the body of the Technical Report concerning the financial data (folios 5465-5474) as noted above, makes any reference to a lack of comparability of the 1996 financial data with data for the other years. The graphs in Annex 4 also all cover the period 1991-1996, again with no disclaimer concerning the 1996 data.

Annex 5 (folios 5717-5749) -- INDEC data on exports and imports: All tables and charts contain 1996 data.

Note that the question of 1996 data is not relevant for Annex 1 (folios 5524-5577), which concerns the international footwear industry, i.e., in countries other than Argentina, and which draws its statistical data from a study entitled "World Footwear Markets 1997" conducted by SATRA, a British footwear technology centre (see folio 5408, footnote 23). Nor is this issue relevant for Annex 6 (folios 5750-5823), which summarises the parties' arguments in the investigation and contains no statistical data.

that such upturns took place, has not provided the necessary explanation and context to demonstrate that upturns in 1996 would not affect the conclusions reached on the basis of 1991-1995 data.

8.215 In this context, we note Argentina's argument that its domestic safeguard legislation required the period of investigation to be 1991-1995 (i.e., the five full calendar years preceding the date on which the petition was filed). As a factual matter, the only reference that we find in the law<sup>541</sup> to any time period is in the section outlining the requirements for safeguard *petitions*, which specifies that any *petition* for a safeguard measure must contain *import statistics* covering the most recent five full calendar years prior to the submission of the petition. (The law is silent regarding the period to be covered by the data for the remaining injury factors to be included in a petition.) While a basis of five years of historical data in a petition clearly can be useful to an authority in deciding whether to initiate an investigation, this certainly does not and should not preclude the analysis of additional and more recent available information in the investigation.

8.216 Regarding the investigation's almost exclusive reliance on end-point-to-end-point comparisons in its analysis of the changes in the situation of the industry, we have the same concerns as were noted above with regard to the "increased imports" analysis. Here we note in particular that if intervening trends are not systematically considered and factored into the analysis, the competent authorities are not fulfilling Article 4.2(a)'s requirement to analyse "all relevant factors", and in addition, the situation of the domestic industry is not ascertained in full. For example, the situation of an industry whose production drops drastically in one year, but then recovers steadily thereafter, although to a level still somewhat below the starting level, arguably would be quite different from the situation of an industry whose production drops continuously over an extended period. An end-point-to-end-point analysis might be quite similar in the two cases, whereas consideration of the year-to-year changes and trends might lead to entirely opposite conclusions.

8.217 We believe that consideration of changes over the course of the investigation period in the various injury factors is indispensable for determining whether an industry is seriously injured or imminently threatened with serious injury. An end-point-to-end-point comparison, without consideration of intervening trends, is very unlikely to provide a full evaluation of all relevant factors as required<sup>542</sup>.

#### ii. Differences in data

8.218 We have certain concerns over how the data were analysed in the investigation. While we acknowledge the challenging task of gathering comprehensive information due to the scope of the product definition, in a number of cases, the data relied on show discrepancies which were not explained or reconciled in Act 338 or the Technical Report, and in addition no explanations were offered regarding why one set of data was used in preference to another. In the absence of such explanations, the findings and conclusions reached on the basis of such data are not "reasoned" in the sense of Article 3.1/4.2(c), and therefore are not supported by the evidence.

8.219 Regarding the lack of explanation over the derivation and representativeness of, and the differences between, the multiple data series on some of the factors, we note that for a number of factors, the CNCE developed multiple data series. Some of these were based on questionnaire responses compiled by the CNCE, some were estimated by the CNCE from macroeconomic, census or other published data, and some represented different methods for calculating similar indicators (for example, in the case of employment and profit and loss data). We recognise and appreciate the CNCE's efforts to conduct a thorough investigation and to consider as much data in as many forms as possible. What we find problematic, however, is that the CNCE's findings fail to make clear in some

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<sup>541</sup> WTO document G/SG/N/1/ARG/3, submitted as Exhibit EC-10.

<sup>542</sup> We note that our concerns over the near-exclusive use of an end-point-to-end-point analysis are heightened by the treatment of 1996 data as set forth in the preceding section.



cases the basis on which the different data series were developed, which ones are the most representative and how the sometimes significant differences between them can be reconciled.

8.220 For example, on employment, Act 338 refers to a representation by the petitioners that employment declined by 34 percent between 1991 and 1995, but also indicates that questionnaire results reflected a 5 percent decline. In response to a Panel question, Argentina stated that the questionnaire data showed a 13 percent decline, and referred as well to employment data from the Argentine Industrial Union showing a 21 percent decline. Upon questioning by the Panel as to how these different data could be reconciled, Argentina replied that all of the data showed declines, and only then provided the explanation noted above as to the different compositions of the questionnaire responses included in the calculations of the 5 percent and 13 percent declines.

8.221 We must take issue with Argentina's failure to explain or to put into context these figures. In determining whether serious injury exists or is threatened, we believe that the size of a decline is indeed important, and that there must be sufficient explanation (as required under Article 4.2(c)) of the "relevance" of the decline. That is, there should be a full explanation of why one set of data is more representative and reliable than the others, and why, for example, an employment decline of a given percentage supports a finding of serious injury or threat to the particular industry being considered.

8.222 The data presented on production and sales (or production for the domestic market) present similar issues. As noted, the CNCE gathered data on these injury factors through questionnaire responses, and then used these data in some, but not all, contexts. Rather, the CNCE used as well its own estimates of total data for the industry as a whole. Although the questionnaire data accounted for only 40 percent or less of the estimates for the industry as a whole, there is no systematic explanation reconciling these estimates to the questionnaire responses, particularly where their trends diverge. Nor is there an explanation in Act 338 or the Technical Report of why the questionnaire data are used in one context and the estimated data in another. In response to a question from the Panel on this point, Argentina stated that the estimated data were used to calculate apparent consumption and import market share. We do not find this to provide sufficient explanation or reconciliation of the different data sets. First, it was provided only in response to a Panel question, and did not form part of the CNCE's analysis and report on the investigation. Second, this response does not reflect the fact that in Act 338 it is the estimated data that are used in the discussion of changes in production. Moreover, regarding the questionnaire data on sales, we recall the unexplained discrepancies between the percentage changes referred to in the text of Act 338 and those that are calculated from the data tables on which the text relies. Such discrepancies further call into question the conclusions drawn from the data.

8.223 We note that similar issues surround the data on various financial indicators. Argentina has explained that the data on gross profitability, operating profitability and net profitability were derived from the accounting statements of the reporting firms, and that four of these companies produced only footwear while the other eight produced other products as well. Also according to Argentina, footwear accounted for at least 70 percent of the multi-product firms' operations. While the data from accounting statements show that for both sets of companies, gross profits, operating profits and net profits all declined as a percentage of sales between 1991 and 1995, we note that footwear-only companies performed better than the multi-product firms during this period. In particular, the 1995 profitability ratios were higher for the footwear-only companies than for the multi-product firms. We also note that for both groups of companies, all measures of profitability remained positive in 1995.

8.224 The "break-even" analysis performed by Argentina on the basis of questionnaire data exclusively for footwear operations of multi-product firms shows that sales fell short of the break-even point by approximately 34 percent in 1995, whereas in 1991 sales had exceeded break-even by 20 percent. We note that footwear accounted for the large majority of the operations of the firms

providing financial data, and that breakeven analysis is another method for calculating net profit<sup>543</sup>; and although there were downward trends in both sets of data, the significant divergence between the results of the net profit analysis based on accounting data for all firms and the results of the breakeven analysis for the subset of multi-product firms raises questions.

iii. Conclusions unsupported by data

8.225 Our concern regarding conclusions unsupported by reasoning and/or statistical evidence is partly based on the problems outlined above. That is, where several sets of data are identified, but their differences are not explained or reconciled (as is the case, for example, with employment and profit and loss data), the conclusion drawn is not in our view properly supported by the evidence. More generally, it is not sufficient to only present data (whether in one or several series), and then state a conclusion. Rather, there is a need for a reasoned explanation *linking* the data to the conclusion.

8.226 We note this problem *inter alia* in connection with production. Act 338 and the Technical Report indicate that the data on production estimated for the industry as a whole support a finding of serious injury, noting that production volume declined between 1991 and 1995. These documents also point out, however, that the value of production increased. The explanation provided for the increase in value is that domestic producers had chosen to shift toward production of higher-valued footwear. Similarly, Act 338's references to domestic producers' prices indicate an increasing price trend, which Act 338 attributes to the same shift in product mix. While Act 338's implication clearly is that such a shift is evidence of serious injury, Argentina does not explain this counterintuitive proposition. Thus, while it is not impossible that such a shift might occur in the context of serious injury, if so it requires a detailed explanation based on objective factual evidence. We find neither such an explanation nor such evidence in the materials cited by Argentina in connection with the analysis of production in the investigation.

8.227 Another example of this problem is with respect to the data on sales. As discussed, although during the panel proceedings Argentina identified to the Panel certain data in the record as estimated sales data for the industry as a whole, at the interim review stage Argentina criticised the Panel for having relied on these data as such. Whether these are sales data in the strict sense or data on production destined for the domestic market, we note that they were used by Argentina in its investigation at a minimum as a proxy for industry-wide sales (i.e., as the domestic industry's contribution to domestic consumption), and they are more than twice the level of the sales data from the questionnaires, and show different trends, including in 1996. If as Argentina argued at the interim review stage, these data are simply not comparable to the questionnaire data on sales, then it is not clear on what basis the representativeness of the questionnaire data could have been judged during the investigation. This calls into the question the reliability of the CNCE's conclusions as to sales trends for the industry as a whole. We note in this regard in addition that Argentina's criticism of the Panel's use of the industry-wide data refers in part to the fact that as production data, they would include inventories. While this may be the case, we note that there appear to be no consistent data in the record regarding inventories which could have been used by Argentina to adjust the data on production destined for the domestic market. In fact, the Technical Report states concerning the data on inventories that the sample of responding companies varied considerably from year to year, rendering non-representative a comparison of inventory data for different years<sup>544</sup>.

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<sup>543</sup> The breakeven point is the point at which net profit exactly equals zero, i.e., where sales revenues exactly cover fixed and variable costs. See, e.g., C. Horngren and G. Sundem, *Introduction to Management Accounting*, 7<sup>th</sup> ed., Prentice-Hall, 1987, p. 30-43.

<sup>544</sup> Exhibit ARG-3, folio 5453, footnote 36.

(d) Causation

8.228 We consider next Argentina's finding that increased imports had caused serious injury to the domestic industry. In keeping with our standard of review, we will base our judgement on whether this finding was adequately explained and supported by the evidence of record in the investigation. In this regard, we recall the relevant provisions of the Safeguards Agreement, namely subparagraphs (a - c) of Article 4.2:

"2.(a) In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of the Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales production, productivity, capacity utilisation, profits and losses and employment.

(b) The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

(c) The competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined."

8.229 Applying our standard of review, we will consider whether Argentina's causation analysis meets these requirements on the basis of (i) whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether a reasoned explanation is provided as to why nevertheless the data show causation; (ii) whether the conditions of competition in the Argentine footwear market between imported and domestic footwear as analysed demonstrate, on the basis of objective evidence, a causal link of the imports to any injury; and (iii) whether other relevant factors have been analysed and whether it is established that injury caused by factors other than imports has not been attributed to imports.

(i) *Summary of parties' arguments*

8.230 The European Communities argues that Argentina's analysis of causation is inadequate. The European Communities cites a number of passages from the notification of the decision to apply a safeguard measure (which are repeated in Act 338's findings on imports and causation), describing the changes in imports levels and market share between 1991 and 1995, and the conclusion that imports increased during that period. The European Communities cites additional passages from the notification of the decision to apply a safeguard measure, (which also are repeated in Act 338) on "the effects of imports on domestic production", in particular the conclusion that domestic production declined between 1991 and 1995, and was "replaced by imports, essentially cheap imports". In the EC's view, these passages constitute Argentina's analysis of causation.

8.231 Argentina also indicates that the analysis and basis for its conclusion that there was a causal link is contained in the same passages cited by the European Communities from the notification of the decision to apply a safeguard measure/Act 338. In this regard, Argentina argues that it "correlated" the increase in imports with increases in import market share, declines in domestic production and

employment, increases in domestic production costs, declines in profitability, etc. In addition, in response to a question from the Panel, Argentina states that the causal relationship “is developed throughout the 10,000 pages making up the file”, and “arises logically” from the interaction between “the rapid growth of imports and the deteriorating employment situation in the footwear industry which led to the replacement of domestic production by imports”. In other words, Argentina argues, the causal relationship “emerges from the analysis of each one of the relevant parts of the file” of the investigation. In addition Argentina argues that the CNCE determined that the contribution of the footwear industry to GDP fell between 1992 and 1993, showing a relative deterioration in that industry compared with production in the economy as a whole, and that this deterioration was correlated with the faster growth of footwear imports than total imports between 1991 and 1992<sup>545</sup>.

8.232 The passages from the notification/Act 338 cited by both parties as the relevant ones concerning imports are as follows:

- "(a) Imports: the increase in imports, both in absolute terms and relative to domestic production, is of the kind covered by the Agreement on Safeguards. There is an increase such as to cause significant impairment to the domestic industry. This conclusion is based on the following facts:
- The c.i.f. value of imports increased by 157 per cent between 1991 and 1995, and by 163 per cent between 1991 and 1996 (Section VII.1).
  - The quantity of pairs imported increased by 70 per cent between 1991 and 1995, and by 52 per cent between 1991 and 1996 (Section VII.1).
  - The domestic market share of imports also increased substantially. For all types of footwear, the share of imports in apparent consumption, measured at current prices (pesos), increased from 10 per cent in 1991 to 27 per cent in 1995, while measured in numbers of pairs it rose from 12 per cent in 1991 to 21 per cent in 1995, reaching a peak of 25 per cent in 1997 (Section VIII.1 and VIII.2).
  - The growth of imports was greater in the performance sports shoe segment than for other types of footwear (Section VIII.2).
  - Owing to their lower price, imports exerted strong pressure on the industry, significantly affecting results (Section XIII.1).
  - The international picture shows a strong growth of imports of footwear and major restructuring processes, together with many cases of government action to restrict such imports (Section IX).

Thus, an absolute growth of imports between 1991 and 1995 has been found to exist. Furthermore, this increase has also taken place relative to domestic production and the domestic market."

8.233 The passages from the notification/Act 338 cited by both parties as the relevant ones concerning the effects of imports are the following:

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<sup>545</sup> Exhibit ARG-3, Tables 6 and 7 (folios 5431 and 5432), Charts 7 and 8 (folios 5434 and 5435), and Exhibit EC-16 (Act 338), Table 1.

- "(b) Effects of imports on domestic production: increased imports are causing serious injury to the domestic industry and there is a further threat of injury in the absence of safeguard measures, according to the factual findings of the investigation:
- During the period under investigation, the volume of output declined both overall and for the domestic market. The decline was greater for the sample of enterprises surveyed than for estimated total output based on macroeconomic statistics (Section VI.1).
  - The performance of production measured at current prices was different from that of production in physical terms, showing a growth of 7.7 per cent between 1991 and 1995. This is accounted for by the fact that the industry shifted production to higher unit-value products in response to demand factors and the need to compete in the international footwear trade within the constraints of the Argentine rules of the game (Section VI.1).
  - This decline in output was replaced by imports, essentially cheap imports, as the investigation shows a growth in apparent consumption, both in current pesos and in pairs, with the sole exception of the latter estimate for the year 1995, which showed a significant drop due to the economic recession (Section XIII.1).
  - Production for the domestic market declined proportionally more than total output, as exports increased significantly over the period 1991-1995 (Section VI.2 and VI.3).
  - Although the effect of the special minimum import duties (DIEMs) began in 1994 and increased between 1995 and 1996, the industry's condition has deteriorated, with a demonstrated reduction in employment, rising inventories and worsening of the economic and financial situation of companies (Section VI).<sup>546</sup>

8.234 In the view of the European Communities, most of the explanations of causal link contained in the above passages are in reality simple juxtapositions of statements about increased imports and injury, and thus are not sufficient to satisfy the requirements of Article 4.2. The European Communities recalls the statement of the Panel in *Brazil – Milk Powder* that it was not sufficient for an authority to refer to the evidence it considered and then state its conclusion, but rather that “[i]t was incumbent upon the investigating authorities to provide a reasoned opinion explaining how such facts and arguments had led to their finding”.<sup>547</sup>

8.235 The European Communities further argues that only in the statements in Act 338 concerning the prices of imports is there any reference to the relationship between the situation of the domestic industry and the imports, but in the EC's view, these statements are unsupported by any evidence because no analysis of the price of imports was conducted during the investigation. The statements referred to by the European Communities in this regard are:

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<sup>546</sup> See Exhibit EC-17, document G/SG/N/10/ARG/1, G/SG/N/11/ARG/1 of 15 September 1997, pp. 2-3. The same reasons are also given in the injury notification of 25 July 1997, Exhibit EC-16, document G/SG/N/8/ARG/1, pp. 37 and 38. See also Exhibit EC-20, document G/SG/N/10/ARG/1/Suppl. 1, G/SG/N/11/ARG/1, Suppl. 1, p. 2.

<sup>547</sup> Panel Report on *Brazil – Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the EEC*, adopted on 28 April 1994, BISD 41S/467, 550, para. 286.

“Owing to their lower price, imports exerted strong pressure on the industry, significantly affecting results”; and

“This decline in output was replaced by imports, essentially cheap imports”.

The European Communities submits that given the absence of an analysis of the prices of imports, there is no basis to even start to examine whether import prices might have “exerted pressure” on the domestic industry.

8.236 Argentina maintains that it did conduct a price analysis in its investigation, but notes that price indices and any sort of price series for footwear are not easily constructed and tend to be unreliable given changes in styles and product mix over time. Argentina also, in answer to a Panel question concerning price analysis in the investigation, refers to “the growing share” of imports in the market, and states that this had an impact on sales prices of domestic products, which according to Argentina is reflected in the shortfall of revenue below the break-even point. In answer to the same Panel question, Argentina also states that the CNCE “observed a decline in the price/cost ratio, indicating that the prices of outside competitors were exerting pressure on domestic prices”.

(ii) *Coincidence of trends*

8.237 In making our assessment of the causation analysis and finding, we note in the first instance that Article 4.2(a) requires the authority to consider the “rate” (i.e., direction and speed) and “amount” of the increase in imports and the share of the market taken by imports, as well as the “changes” in the injury factors (sales, production, productivity, capacity utilisation, profits and losses, and employment) in reaching a conclusion as to injury and causation. As noted above we consider that this language means that the *trends* -- in both the injury factors and the imports -- matter as much as their absolute levels. In the particular context of a causation analysis, we also believe that this provision means that it is the *relationship* between the movements in imports (volume and market share) and the movements in injury factors that must be central to a causation analysis and determination.

8.238 In practical terms, we believe therefore that this provision means that if causation is present, an increase in imports normally should coincide with a decline in the relevant injury factors. While such a coincidence by itself cannot *prove* causation (because, *inter alia*, Article 3 requires an explanation – i.e., “findings and reasoned conclusions”), its absence would create serious doubts as to the existence of a causal link, and would require a *very* compelling analysis of why causation still is present.

a. Market share of imports

8.239 We begin our assessment of the question of coincidence of trends by considering first the data on the market share of imports. Argentina maintains in Act 338 and its submissions (in part on the basis of these data) that imports displaced domestic production.

8.240 The European Communities argues that the market share data do not support Argentina’s determinations. The European Communities notes that Act 338 states both that the market share of imports increased substantially, and that the market share of all footwear imports decreased in 1996. The European Communities quotes Act 338 as stating that “[t]he market share of imports increased from 10 percent in 1991 to 20 percent in 1992, 26 percent in 1993, 27 percent in 1994 and 1995, and 23 percent in 1996”.

8.241 Argentina calculates the market share of imports by first adding estimates of production for the domestic market to imports to derive estimated apparent domestic consumption, then dividing

imports by apparent consumption. The market shares thus calculated, and referred to by Argentina in this context in Act 338, are as follows:

Import Market Share

	(in pairs)	(in pesos)
1991	12%	10%
1992	18%	20%
1993	25%	26%
1994	23%	27%
1995	21%	27%
1996	16%	22%

As shown, the market share of imports, by volume, increased on an end-point-to-end-point basis between 1991 and 1995, and between 1991 and 1996, but decreased between 1992 and 1996. The market share by value, on an end-point-to-end-point basis increased between 1991 and 1995, 1991 and 1996, and 1992 and 1996.

8.242 When examining the trends over the period, we note that the import market share by volume and value largely track the data on the absolute volumes and values of imports. In particular, import market share by volume decreased steadily between 1993 and 1996, during which period it was reduced by one-third, from 25 per cent to 16 per cent. A slightly different pattern is evident in the data on market share by value: while the import market share by value in 1991 was lower than that by volume (10 percent compared to 12 percent), beginning in 1992 this relationship was reversed. In addition, while import market share by volume declined between 1993 and 1994 and further between 1994 and 1995, by value it increased slightly between 1993 and 1994, and remained constant through 1995. The declines in market share by volume and value in 1996 were identical in absolute terms (5 percentage points), but the 1996 import market share in value terms (22 percent) was significantly above that in volume terms (16 percent).

b. Situation in 1995

8.243 We note Argentina's reliance, in both its report and its arguments before the Panel, on the comparison of data for 1995 with that for 1991, both regarding imports and the situation of the industry. Thus, it appears that Argentina effectively bases its injury and causation analysis on the relationship between imports and the situation of the domestic industry in 1995. For the reasons discussed above, we find such an end-point-to-end-point analysis to be insufficient. Even on this basis, however, we fail to see the expected coincidence of trends in imports and the four injury factors that were fully analysed in the investigation (i.e., production, sales, employment, and profit-and-loss). We note in particular that during 1995, production fell to its lowest level during the 1991-1995 period relied on by Argentina<sup>548</sup>; the volume and value of sales<sup>549</sup> in 1995 declined sharply from their levels during the preceding years (volume to its lowest level during the period); the data on employment also show a decline in 1995 from their levels during the preceding years; and the data on profit-and-loss and break-even also show a decline in 1995 from their 1991 levels<sup>550</sup>. At the same time, however, *imports from all sources also dropped*, continuing their multi-year decline and falling to their lowest

<sup>548</sup> Based on the data estimated by Argentina for the industry as a whole.

<sup>549</sup> Based on the data (production destined for the domestic market) estimated by Argentina for the industry as a whole, as well as on the data from questionnaire responses.

<sup>550</sup> Moreover, as noted above, the financial data are equivocal, in that the profitability data show that footwear-only companies outperformed multi-product companies, and in that the results of the break-even analysis for the subset of multi-product firms diverge significantly from the profit-and-loss data for total operations of all firms.

level of the period other than 1991. In other words, these indicators of the health of the domestic industry were declining when imports were declining. This suggests that factors other than imports were having an effect on the industry.

8.244 Theoretically it may be possible, even in the absence of coincidence in the most recent trends in imports and injury factors, that a causal link exists. Such a counterintuitive situation would highlight the need for the authorities to investigate the situation, and to convincingly explain such a conclusion.

8.245 In this regard, we note that Argentina in several instances states that in spite of the decreases in imports since 1993, imports remained high relative to their 1991 levels, and therefore continued to cause injury to the domestic industry in spite of having declined. For example, in Act 338, Argentina states that:

"[a]lthough the minimum specific duties began to bite in 1994 and their effect increased between 1995 and 1996, the industry's condition has continued to deteriorate..."<sup>551</sup>

In its arguments before the Panel, Argentina states that:

"In spite of the effects of the DIEMs, which managed to keep imports below 1993 levels, the effects of imports continued to cause serious injury"; and

"The European Communities is mistaken in concluding that import levels no longer caused injury following the application of the DIEMs. The Commission simply found that imports had decreased to a certain extent, but its complete analysis confirms (paragraph 98)<sup>552</sup> that the injury continued and that there was an additional threat of injury in the absence of the DIEMs which were to be withdrawn".

8.246 In our view, these statements do not provide the sort of detailed and reasoned explanation that would be necessary to reconcile the consistently and significantly declining trend in imports with a finding of current serious injury caused by increased imports. Moreover, the latter two statements were only made in the context of the Panel process, and are not found in the reports and other documentation concerning the conclusions of the investigation. We note as well the EC's argument concerning the above quotes that they do not demonstrate the required causal link, but rather the opposite. The European Communities states that the Agreement requires that increased imports cause serious injury, and that it is impossible to conclude, while respecting the Agreement, that there was serious injury caused by increased imports when in fact imports had decreased. For the European Communities, if it is true that there is injury, this simply proves that there must be some cause other than increased imports. We consider that there is no convincing explanation of how, in spite of their *declining* trend, imports nevertheless were causing serious injury in 1995.

(iii) "*Under such conditions*"

8.247 We next address the EC's claim regarding "under such conditions" in Article 2.1 of the Agreement. In the EC's view, Argentina failed to meet its obligations under the Agreement by not conducting a separate analysis related to this reference. For the European Communities, the reference to "under such conditions" in Article 2.1 refers especially (although not necessarily exclusively) to

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<sup>551</sup> Exhibit EC-16, at 38. In its interim review comments, Argentina stated that as of 1995, the market share of imports was more than 20 per cent.

<sup>552</sup> It is not clear to what the citation to "paragraph 98" in this passage refers. Paragraph 98 of the document in which this passage appears (Argentina's first written submission), see descriptive part, para. 5.301 refers not to the CNCE's analysis of injury, but rather to tariff classification categories for footwear.



price analysis. The European Communities argues that it is through price that imports compete with like or directly competitive domestic products, and that therefore a price analysis (i.e., a comparison of imported to domestic prices) is required under the Agreement. For the European Communities, “under such conditions” thus constitutes a separate analytical requirement from the injury and causation analysis required under Article 4.2 (a) and (b). That is, in the EC’s view, there must be affirmative findings of increased imports, injury, causation and imports “under such conditions” (i.e., at such prices) before a safeguard measure is permitted.

8.248 Argentina responds that a price analysis is not legally required under the Agreement, as it is not listed as one of the factors in Article 4.2(a). For Argentina, the phrase “under such conditions” connotes the characteristics of the imports (e.g., quantity, quality, composition, specific nature, end use, degree of substitutability for domestic products, technology, consumer taste, influence of brand names in marketing, and price), as well as the totality of the circumstances under which the increase in imports has taken place. In this respect, Argentina views the “rate and amount” of the increase in imports, and imports’ share of the domestic market, as particularly relevant. While Argentina concedes that a price analysis may be relevant, and even necessary in a particular investigation, this does not mean that it is *per se* legally required in every investigation. In any case, Argentina argues, the point is moot in the present dispute as Argentina did conduct a price analysis.<sup>553</sup>

8.249 In our view, the phrase “under such conditions” does not constitute a specific legal requirement for a price analysis, in the sense of an analysis separate and apart from the increased import, injury and causation analyses provided for in Article 4.2. We consider that Article 2.1 sets forth the fundamental legal requirements (i.e., the conditions) for application of a safeguard measure, and that Article 4.2 then further develops the operational aspects of these requirements. We find no textual support in the Safeguards Agreement for the EC’s argument that price analysis as such is required.

8.250 We believe that the phrase “under such conditions” would indicate the need to analyse the *conditions of competition* between the imported product and the domestic like or directly competitive products *in the importing country’s market*. That is, it is these “conditions of competition” in the importing country’s market that will determine whether increased imports cause or threaten to cause serious injury to the domestic industry. The text of Article 2.1 supports this interpretation, as the relevant phrase in its entirety reads “under such conditions *as to cause* or threaten to cause serious injury” (emphasis added). Seen another way, for a safeguard measure to be permitted, the investigation must demonstrate that conditions of competition in the importing country’s market are *such* that the increased imports can and do cause or threaten to cause serious injury. Article 4.2(a) confirms this interpretation, in requiring that the competent authorities “evaluate all relevant factors of an objective and quantifiable nature *having a bearing* on the situation of that industry”, which is further reinforced by Article 4.2(b)’s requirement that the analysis be conducted on the basis of “objective evidence”. In our view, these provisions give meaning to the phrase “under such conditions”, and support as well our view that for an analysis to demonstrate causation, it must

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<sup>553</sup> In this regard, Argentina points to various references in Act 338 and the Technical Report to domestic producers’ prices, to the difficulties (due to changes in product mix) in constructing multi-year price indices or time-series for footwear, whether for product groups or individual products, and to the difficulties that the CNCE encountered in obtaining data on the prices of imports from importers. In the latter regard, Act 338 indicates that the CNCE found that the importers did not cooperate in providing the data requested by the CNCE, and that therefore the CNCE concluded (as “best information”) that the price of imports must be below that of the domestic products. In answer to a question regarding whether the CNCE in its investigation had considered any secondary sources of information (for example, the average unit value of imports) to confirm its conclusions regarding the prices of imports relative to domestic products, Argentina responded by providing such a comparison. Argentina, although asked by the Panel, provided no citation to the record of the investigation where this analysis could be found, and the Panel in reviewing that record finds no evidence that any such analysis was performed during the investigation.

address specifically the nature of the interaction between the imported and domestic products in the domestic market of the importing country. That is, we believe that the phrase "under such conditions" in fact refers to the *substance* of the causation analysis that must be performed under Article 4.2(a) and (b).

8.251 We note in this regard that there are different ways in which products can compete. Sales price clearly is one of these, but it is certainly not the only one, and indeed may be irrelevant or only marginally relevant in any given case. Other bases on which products may compete include physical characteristics (e.g., technical standards or other performance-related aspects, appearance, style or fashion), quality, service, delivery, technological developments consumer tastes, and other supply and demand factors in the market. In any given case, other factors that affect the conditions of competition between the imported and domestic products may be relevant as well. It is these sorts of factors that must be analysed on the basis of objective evidence in a causation analysis to establish the effect of the imports on the domestic industry.

8.252 Therefore, in the present dispute, while the phrase "under such conditions" does not require a price analysis *per se*, it nevertheless has an implication for the nature and content of a causation analysis, which may logically necessitate a price analysis in a given case. Moreover, the absence of an analysis of the conditions of competition in the domestic market for the product in question, in which the interaction of the imported with the domestic product is explained in the report on the investigation (including *inter alia* a price analysis where relevant), results in an incomplete analysis of the causal link.

8.253 We note in this regard the passages cited in paras. 8.232-8.233, above which both parties indicate constitute the relevant explanations in the published reports of the analysis of the causal link, and which Argentina indicates also constitute the analysis of the "relevance" of each factor as required by the Agreement. We also note Argentina's implicit suggestion that it is for the Panel to peruse the entire 10,000-page record of the investigation -- from which "arises" the causal link -- to find for itself the specific basis in fact for Argentina's conclusion that that link exists. As noted above, however, if the Panel were to engage in such an exercise, this would constitute the very *de novo* review that neither party (nor we ourselves) considers to be within our mandate. The language of the Agreement is clear -- it is the investigating authority that must conduct this analysis and publish a report explaining it in detail.

8.254 We agree with the European Communities that the passages cited in paras. 8.232 - 8.233 are essentially a juxtaposition of statistics on imports and injury factors. Such a juxtaposition does not constitute an analysis of the conditions of competition between the imports and the domestic product. Moreover, we note that the *only* references in those passages that seem to link imports to injury are the statements concerning the prices of imports (i.e., the references to "cheap imports"). As stated above, in our view, the Safeguards Agreement does not require a price analysis *per se*. However, because the statements about the prices of imports relative to domestic products were central to Argentina's causation finding, the question of price is of particular importance to the analysis. That is, the allegedly low prices of imports, and their asserted effects on the domestic industry, appears to have been the only "condition of competition" between imports and domestic products on which Argentina's causation finding was based. Thus, we will focus our assessment of this analysis primarily on whether there is support in the record for Argentina's conclusions about import prices and their effect on the domestic industry.

8.255 We recall the EC's assertion that these statements about price are unsupported by any factual evidence in the record of the investigation. The European Communities states, first, that Argentina relied upon best information available concerning import prices to draw an inference that imports were cheaper than domestic products, on the basis of alleged non-cooperation by the importers. The European Communities asserts that the "non-cooperation" in question was the inability of the importers to provide in their questionnaire responses the requested data on the basis of the five

product categories used in the investigation, and states that they provided instead data on the basis of tariff classifications. The European Communities argues that nowhere does Argentina indicate that the importers refused to provide data, and that given the eventual definition of the domestic industry as that producing footwear as a whole, the lack of the import price data broken out as initially requested was no longer relevant, and the submitted data therefore should have been used. The European Communities also argues that there is no evidence that in the investigation, Argentina conducted the comparison of unit values of domestic and imported footwear that it provided in answer to the specific question from the Panel. Finally, the European Communities notes Argentina's statement<sup>554</sup> that the references to "cheap imports" had more to do with under-invoicing than with the market price of the imports. For the European Communities, a safeguard measure is not an appropriate remedy for underinvoicing.

8.256 Argentina, while maintaining that it did conduct a price analysis, also states that price indices and any sort of price series for footwear are either impossible to construct or unreliable given the effects of changes in styles and product mix. In answer to Panel questions, Argentina also confirms that the product mix of the domestic industry shifted to higher-unit-value goods during the period of investigation, as did the product mix of imports.<sup>555</sup>

8.257 The shift in imports to higher-valued products is evident from the different trends between the volume-based and value-based import market share data.<sup>556</sup> In particular, the fact that the market shares by value are higher in absolute terms, and show smaller declines in the latter part of the period than in volume terms, implies that the average value of the imported footwear was increasing, which would signify either that the product mix of imports was shifting to higher-valued goods, or that the price of imported footwear was increasing, or both.

8.258 In the light of the above data, the Panel asked Argentina to reconcile the apparent upward trend in the unit value of imports with its conclusions in Act 338 that "cheap imports" had undercut the price of the domestic product, thereby causing injury. Argentina's response noted first that the impossibility of competing with imported goods owing to their low prices constitutes a negative factor for domestic producers. Argentina went on to acknowledge, however, a "change in the behaviour of imports", which Argentina attributes to the application of the DIEMs, specifically, that "the DIEMs cause the value of imports to grow faster than the volume and at the same time change the composition of those imports towards footwear with a higher unit value that are not affected by the DIEMs. Added to which, there is no longer any possibility of under-invoicing". When the Panel asked how these trends demonstrate injury and causation, and how the shift in the imports to higher-valued products could be reconciled with the statements about "cheap imports", Argentina referred to the Technical Report and the Preliminary Report of the Department of Foreign Trade, and indicated that the shift in the composition of imports was attributable to the application of the DIEMs.

8.259 We can find no evidence in the record to support the statements that the imports were cheaper than the domestic goods. In particular, there is no evidence that any price comparisons of imported and domestic footwear were made in the investigation, including on the basis of average unit values of all imports and all domestic products. Indeed, the answer provided by Argentina to the Panel's question on this point confirms this, as the source given for the comparison provided in that answer is the pages in the Technical Report where the underlying data for the comparison (but not the comparison itself) are set forth. Without such price comparisons, there is no factual basis for the statements regarding lower-priced imports.

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<sup>554</sup> See para. 8.258, *infra*.

<sup>555</sup> See descriptive part, note 181.

<sup>556</sup> See paras. 8.241 - 8.242, *supra*.

8.260 In this connection, we note in addition Argentina's statements that the references to "cheap imports" had mostly to do with a problem of customs valuation (underinvoicing), and that the composition of imports shifted to higher-valued goods following the 1993 imposition of the DIEMs. In our view, these statements are inconsistent with the implication of the causation finding that *as of 1995*, imports were undercutting domestic prices so as to cause the asserted serious injury to the domestic industry.

8.261 Moreover, we find no basis in the investigation or arguments of Argentina to indicate that any such lower-priced imports had any injurious effect on the domestic industry. In particular, the report on the investigation contains no evidence to indicate that the effect of the prices of imported footwear on domestic producers' prices, production, etc., was specifically analysed, in spite of the fact that the causation finding was fundamentally based on price considerations. Rather, aggregate trends in broad statistical indicators were compared and conclusory statements made (e.g., that "the decline in output was replaced by imports, essentially cheap imports"). This is not an analysis of the conditions of competition that is called for by Articles 2 and 4.2.<sup>557</sup> (Indeed, as indicated above, the information on the shift in the product mix of imports toward higher-valued goods at least on its face would appear inconsistent with a finding of causation based on "cheap imports".)

8.262 Thus, in our view, Argentina in its investigation did not demonstrate either (i) that imports were lower priced than comparable domestic goods, or (ii) that any such lower-priced imports had an injurious effect on the domestic industry.

8.263 Further, regarding Article 4.2's requirement that the "relevance" of each factor be considered, we note Argentina's reference, in answer to a Panel question on this point, to the same pages in Act 338 and the Technical Report that it indicates contain the causation analysis. We consider that these statements are juxtapositions of data on imports and data on injury factors, rather than an analysis of causation. As such, we do not consider that they constitute a demonstration of the "relevance" of factors examined as required by Article 4.2.

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<sup>557</sup> We note in this regard that there would seem to be a relationship between the depth of detail and degree of specificity required in a causation analysis and the breadth and heterogeneity of the like or directly competitive product definition. Where as here a very broad product definition is used, within which there is considerable heterogeneity, the analysis of the conditions of competition must go considerably beyond mere statistical comparisons for imports and the industry as a whole, as given their breadth, the statistics for the industry and the imports as a whole will only show averages, and therefore will not be able to provide sufficiently specific information on the locus of competition in the market. With regard to the present case, we do not disagree that a quite detailed investigation of the industry was conducted, in which a great deal of statistical and other information was amassed. What in our view was missing was a detailed analysis, on the basis of objective evidence, of the imports and of how in concrete terms those imports caused the injury found to exist in 1995. In this regard, we note that Act 338 contains a section entitled "Conditions of competition between the domestic products and imports". This section does not contain such a detailed analysis, however, but rather summarizes questionnaire responses from domestic producers about their strategies for "fending off foreign competition", and from importers and domestic producers concerning "the sales mix" of domestic products and imports, including their overall views about quality and other issues concerning domestic and imported footwear, with the importers stressing the benefits of imports. This summary of subjective statements by questionnaire respondents does not constitute an analysis of the "conditions of competition" by the authority on the basis of objective evidence.

(iv) *Other factors*

8.264 The third element of a causation analysis is the consideration of whether factors other than increased imports are causing or threatening to cause serious injury to the domestic industry. If so, Article 4.2(b) requires that such injury not be attributed to increased imports.

8.265 The European Communities argues in this regard that Act 338 refers to several elements which the European Communities views as "other factors" that in fact were responsible for any injury suffered by the Argentine footwear industry. These factors were (i) the "tequila effect", i.e., the domestic recession in Argentina brought on by the collapse of the Mexican peso; (ii) imports under the Industrial Specialisation Regime;<sup>558</sup> and (iii) imports from Mercosur countries. The European Communities claims that Argentina did not sufficiently examine these factors, and that it therefore wrongly attributed injury caused by them to imports.

8.266 Argentina argues that it did examine the only other factor it considered relevant to the injury, the tequila effect, and that it ensured that the injury caused by that factor was not attributed to the increased imports. Argentina does not specify explicitly how this was done in its investigation. In its arguments to the Panel, Argentina makes comparisons of the macroeconomic indicators (GDP) for the footwear sector and for the economy as a whole, and concludes that the decline in footwear in 1995 was sharper than for the economy overall, implying that imports were responsible, beyond the effects of the recession.

8.267 We recall that Article 4.2(b) requires that "[w]hen factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports." Thus, as part of the causation analysis, a sufficient consideration of "other factors" operating in the market at the same time must be conducted, so that any injury caused by such other factors can be identified and properly attributed.

a. The "tequila effect"

8.268 Regarding the so-called "tequila effect", we note that Act 338 and the Technical Report make a number of references to the "tequila effect" as such as well as to the domestic recession in 1995. For example, in its discussion of production, Act 338<sup>559</sup> notes the decline in production in 1995, and states that in that year, "domestic consumption was much affected by the recession ('tequila effect')". Act 338 makes a similar reference to a "sharp drop" in consumption in 1995 in its discussion of the effects of imports on domestic production. Similarly, in discussing the trends in imports, Argentina acknowledges that imports decreased in 1995, when "irrespective of any trade policy developments [i.e., the DIEMs], the Argentine economy experienced a severe recession with negative effects on all imports". We note further that Argentina, in answer to a Panel question, states that during the investigation the CNCE considered the possible impact of the tequila effect as a cause of injury to the footwear industry, and that this analysis "verified that even in a context of depressed macroeconomic conditions, imports in themselves continued to cause injury to domestic production". Argentina makes a similar statement in its first written submission.

8.269 In our view, the comparison of the macroeconomic indicators for footwear and for the economy as a whole is not a sufficient consideration of the potential injury from the "tequila effect" to the domestic industry. Particularly given Argentina's several acknowledgements that the domestic recession significantly depressed *both* imports and domestic consumption (and certainly thereby the

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<sup>558</sup> The Industrial Specialization Regime, which terminated in 1996, allowed footwear producers to import duty-free a certain volume of footwear to round out their production lines, based on the volume of their footwear exports.

<sup>559</sup> Exhibit EC-16, p.14.

production and other performance indicators of the domestic industry), an analysis separating the effects of the recession from those of imports would have been necessary.

b. The Industrial Specialisation Regime

8.270 Regarding the Industrial Specialisation Regime, Argentina argues that because imports under this programme were never more than 10 percent of total imports in any one year, they were found to be insignificant as a potential cause of injury.

8.271 Although we note that the consideration in Act 338 of the Industrial Specialisation Regime is relatively cursory, the low volume of the imports under this programme supports Argentina's conclusion regarding their insignificance as a potential cause of injury.

c. Imports from other MERCOSUR countries

8.272 As regards imports from other MERCOSUR countries, the European Communities argues that even if it were correct to include the volume of imports from MERCOSUR countries in total imports, and even if Argentina had been able to show a causal link between these increased total imports and serious injury, it would still have been necessary to examine whether and to what extent the MERCOSUR imports had been causing injury and so as not to attribute this injury to the third-country imports given that any safeguard measure would not apply to MERCOSUR imports. In the EC's view, MERCOSUR imports, which increased throughout the investigation period and which were exempted from the application of the safeguard measure, were responsible for any import-related injury to the Argentine footwear industry.

8.273 Argentina, while contesting that imports from MERCOSUR caused injury, nevertheless states that the conditions of footwear imports had an important MERCOSUR component that could not be ignored. Act 338 states that it was appropriate to consider the imports from MERCOSUR countries on equal terms with other imports, as in the absence of the DIEMs or protective measures, there would have been at least an equal flow of imports from the rest of the world into Argentina.

Import volumes:<sup>560</sup>

(in million of pairs)	1991	1992	1993	1994	1995	1996
Total imports	8.86	16.63	21.78	19.84	15.07	13.47
MERCOSUR	1.90	3.97	5.08	5.83	4.99	7.50
Third countries	6.96	12.66	16.70	14.01	10.07	5.97

Import values:<sup>561</sup>

(million US\$ c.i.f.)	1991	1992	1993	1994	1995	1996
Total imports	44.41	110.87	128.76	141.48	114.22	116.61
MERCOSUR	4.66	18.30	16.87	25.59	24.84	47.48
Third countries	39.75	92.58	111.89	115.89	89.39	69.09

8.274 We note that the import statistics in Act 338 and the Technical Report indicate that after 1993, imports from MERCOSUR member countries were the sole source of growth in footwear imports into Argentina. While imports from MERCOSUR countries increased steadily and significantly in every year between 1991-1996 except 1995, imports from all other countries steadily declined after 1993.

<sup>560</sup> See document G/SG/N/8/ARG/1, submitted as Exhibit EC-16, p.21.

<sup>561</sup> *Ibid.*

As a result, by 1996, MERCOSUR countries accounted for one-half of total footwear imports, up from less than one-fifth in 1991.

(v) *Summary regarding the claims under Articles 2 and 4*

8.275 As discussed above, we have considered all three major elements of Argentina's safeguard investigation and determination – the existence of (i) increased imports, (ii) serious injury, and (iii) a causal link - which the European Communities challenges as inconsistent with the requirements of Articles 2 and 4 of the Safeguards Agreement.

8.276 Regarding increased imports, we note that to meet Article 2 and 4's requirements regarding increased imports, it is necessary to consider the trends in imports over the entire period of investigation (rather than just comparing the end points), and that a decline in imports that is more than only "temporary" calls into question a finding that imports have increased. In this case, Argentina did not adequately consider the intervening trends in imports, in particular the steady and significant declines in imports beginning in 1994, as well as the sensitivity of the analysis to the particular end points of the investigation period used.

8.277 Regarding the serious injury investigation and determination, we consider that Argentina did not evaluate all of the listed factors (in particular, capacity utilisation and productivity); and that by not considering the available data for 1996 in its investigation and determination (in spite of having gathered those data along with data for 1991-1995 in its questionnaire), Argentina did not consider "all relevant factors...having a bearing on the situation of [the] industry" within the meaning of Article 4.2(a), particularly in view of the fact that in some cases the 1996 data showed upturns which were not explained. We also consider that an end-point-to-end-point comparison does not meet Article 4.2(a)'s requirement to consider all relevant factors especially where intervening trends in the injury indicators would be highly relevant to determining whether an industry was experiencing serious injury. In addition, we consider that because discrepancies in certain data series were not addressed or explained, and because other assertions were not linked to the statistical data, some of the conclusions drawn were not adequately supported by the evidence.

8.278 Regarding the existence of a causal link between increased imports and serious injury suffered by the domestic industry, we consider that the investigation did not demonstrate a coincidence in trends in injury factors and imports; that the conditions of competition between the imports and the domestic product were not analysed or adequately explained (in particular price); and that "other factors" identified by the CNCE in the investigation were not sufficiently evaluated, in particular, the tequila effect. Thus, in our view, Argentina's findings and conclusions regarding causation were not adequately explained and supported by the evidence.

8.279 For the foregoing reasons, we conclude that Argentina's investigation did not demonstrate that there were increased imports within the meaning of Articles 2.1 and 4.2(a); that the investigation did not evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of the domestic industry within the meaning of Article 4.2(a); that the investigation did not demonstrate on the basis of objective evidence the existence of a causal link between increased imports and serious injury within the meaning of Article 2.1 and 4.2(b); that the investigation did not adequately take into account factors other than increased imports within the meaning of Article 4.2(b); and that the published report concerning the investigation did not set forth a complete analysis of the case under investigation as well as a demonstration of the relevance of the factors examined within the meaning of Article 4.2(c).

8.280 Therefore, we find that Argentina's investigation and determinations of increased imports, serious injury and causation are inconsistent with Articles 2 and 4 of the Safeguards Agreement. As

such, we find that Argentina's investigation provides *no* legal basis for the application of the definitive safeguard measure at issue, or any safeguard measure.

(e) Threat of serious injury

8.281 The European Communities claims that Argentina's finding of threat of serious injury violates Articles 4.1 and 4.2 of the Agreement, as it was based on a prognosis of what would happen if the DIEMs were removed. The European Communities submits that because Article 4.2(a) requires an investigation on the basis of "objective and quantifiable" information, a hypothetical analysis does not satisfy this requirement. In particular, the European Communities argues that there were no increased imports, and that therefore the threat finding constituted a finding of threat of increased imports, rather than a threat of serious injury. For the European Communities, no threat finding can be made absent actual increased imports.

8.282 The CNCE stated in its conclusions in Act 338 that it found in addition to serious injury a threat of serious injury in the absence of the measures additional to the Common External Tariff. We can find no specific reference to an analysis of threat, as such, either in Act 338 or in the Technical Report, however. In answer to a Panel question regarding the basis for Act 338's threat of serious injury finding, Argentina indicated that the finding of threat had been the basis for the application of the provisional measure. Argentina stated that the industry's condition worsened during the course of the investigation, leading to the decision to apply the definitive measure. In response to a Panel question regarding whether it is possible to simultaneously find present serious injury and threat thereof, Argentina indicated that this is possible, as the concepts of serious injury and threat thereof, in the meanings of Articles 4.1(a) and (b), respectively, are not mutually exclusive.<sup>562</sup>

8.283 We recall that pursuant to Article 4.1(b):

"threat of serious injury' shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of paragraph 2. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility;"

8.284 Thus, the question of threat, whether instead of or in addition to a finding of present serious injury, must be explicitly examined in an investigation and supported by the evidence in accordance with Article 4.2(a-c). Moreover, if only a threat of increased imports is present, rather than actual increased imports, this is not sufficient. Article 2.1 requires an actual increase in imports as a basic prerequisite for a finding of either threat of serious injury or serious injury. A determination of the existence of a threat of serious *injury* due to a threat of increased *imports* would amount to a determination based on allegation or conjecture rather than one supported by facts as required by Article 4.1(b).

8.285 Given that the question of threat as such was not adequately addressed or analysed in Act 338 or in the Technical Reports, we do not consider it necessary to rule on the question of whether it is possible to make simultaneously findings of serious injury and threat of serious injury. We further note that, pursuant to paragraphs 1(b) and 2(a) of Article 4, any determination of threat must be supported by specific evidence and adequate analysis.

8.286 For the foregoing reasons, we find that Argentina's determination of the existence of a threat of serious injury does not conform to the requirements of Articles 2 and 4 of the Agreement.

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<sup>562</sup> See descriptive part, paras. 5.303.



## 5. Claims regarding the application of safeguard measures (Article 5)

8.287 The European Communities also claims, in the event the Panel should find that the analyses by Argentina's national authorities of "increased imports", "serious injury" and "causation" were consistent with the Safeguards Agreement, that Argentina violated Article 5.1. The European Communities alleges that Argentina did not demonstrate that safeguard measures were applied only "to the extent necessary to prevent or remedy serious injury and to facilitate adjustment". Specifically, the European Communities requests the Panel to find Argentina's provisional and definitive measures based on the safeguard investigation subject to this dispute, however adapted or adjusted in the meantime (including Resolutions 512/97, 1506/98 and 837/98), to be in violation of Article 5.1.

8.288 Argentina contends that such claims amount to hypotheses about "future" measures and that preventive adjudication is not the function of the dispute settlement system. Argentina reiterates that the modifications of the definitive safeguard measure are not within this Panel's terms of reference. Since Articles 3.7<sup>563</sup> and 19.<sup>564</sup> of the DSU only require the withdrawal of measures that *are* WTO-inconsistent, it is Argentina's position that measures that are not in existence at the time of a Panel's establishment cannot be subject to dispute settlement because they only *could* be inconsistent with the WTO agreements.

8.289 In the light of our findings, *supra*, that the safeguard investigation and determination leading to the imposition of the definitive safeguard measure is inconsistent with Articles 2 and 4 of the Safeguards Agreement, and thus provide no legal basis for the application of a safeguard measure, we do not consider it necessary to make findings on the European Communities' claims concerning Argentina's alleged violations of Article 5.

## 6. Claims regarding the provisional safeguard measure (Article 6)

8.290 The European Communities has raised a claim that the provisional measure applied by Argentina violated Article 6 of the Safeguards Agreement. In particular, the European Communities claims that the measure, which according to Argentina was applied on the basis of a finding of clear evidence of a threat of serious injury, was in fact applied on the basis of a threat of increased imports. The European Communities maintains that the resolution applying the measure makes this clear, in that it refers to a threat of serious injury from future increases in imports expected to result from the removal of the DIEMs on footwear. In the view of the European Communities, it is not a sufficient basis for the application of a provisional measure to equate a threat of increased imports with a threat of serious injury. Rather, there must be an actual increase in imports and clear evidence of at least a threat of serious injury for a provisional measure to be applied consistently with the Agreement on Safeguards.

8.291 Argentina argues that the increased imports requirement was satisfied at the time of the decision to apply the provisional measure, and further maintains that the Panel should not rule on the provisional measure as it had expired well before the commencement of this Panel proceeding.

8.292 In the light of our findings concerning the investigation and the definitive measure, we do not find it necessary to make a finding concerning this claim.

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<sup>563</sup> Article 3.7 of the DSU: "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute. ... the first objective of dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements."

<sup>564</sup> Article 19.1 of the DSU which provides "where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measures into conformity with that agreement."

## 7. Claims regarding notification requirements (Article 12)

8.293 The European Communities' claims under Article 12 have two main elements. First, the European Communities alleges that Argentina failed to notify "all pertinent information" relating to its serious injury and causation findings, as required under Article 12.1(b). Second, the European Communities claims that by failing to notify Resolutions 512/98, 1506/98 and 837/98, which modified the *definitive* safeguard measure after its imposition, Argentina violated the notification obligations of Article 12.1 and 12.2, as in the European Communities' view these provisions require notification of the safeguard measure as actually applied.

### (a) The notification of "all pertinent information"

Articles 12.1 and 12.2 of the Safeguards Agreement read as follows:

"1. A Member shall immediately notify the Committee on Safeguards upon:

- (a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;
- (b) making a finding of serious injury or threat thereof caused by increased imports; and
- (c) taking a decision to apply or extend a safeguard measure.

2. In making the notifications referred to in paragraphs 1(b) and (c), the Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed data of introduction, expected duration and timetable for progressive liberalisation. In the case of an extension of a measure, evidence that the industry concerned is adjusting shall also be provided. The Council for Trade in Goods or the Committee on Safeguards may request such additional information as they may consider necessary from the Member proposing to apply or extend the measure."

8.294 Regarding the first claim, the European Communities argues that Article 12.1(b) requires a Member to *notify* "all pertinent information" concerning its injury and causation finding. In the European Communities' view, this constitutes a requirement to notify "all facts, investigated data, and evaluations needed to establish 'increased imports', 'serious injury or threat' and 'causal link'". The European Communities challenges Argentina's argument that "the relevant information for evaluating compliance with Articles 2 and 4 cannot consist only of the information notified to the Committee according to the approved formats". In the European Communities' view, this argument implies that information relevant to the determination of compliance with Article 4.2 could be missing from the Article 12 notifications. For the European Communities, Article 12 notifications should provide the basis for other Members to "verify whether the conditions of Article 2 and 4 had been met".

8.295 Argentina argues that the European Communities confuses the procedural requirements of Article 12 concerning notification with the substantive requirements of Articles 2 and 4 for the application of a safeguard measure. In Argentina's view, if the European Communities' arguments were accepted, this would add the substantive requirements under Article 2.1 to the notification obligations under Article 12, implying a double failure by Argentina to comply with the Agreement and establishing a standard of notification that the Agreement does not provide for. Argentina also argues that if it were to follow the methodology proposed by the European Communities, it would have to notify the entire 10,000-plus page record of the investigation.

8.296 The European Communities disagrees with Argentina's argument that the European Communities "confuses" the substantive and notification requirements of the Agreement, acknowledging that these are separate obligations. For the European Communities, this separateness does not exclude the possibility, however, that a violation of one of these requirements can lead to the violation of the other. That is, the European Communities maintains, if a Member does not provide, in its Article 12 notification, the evidence necessary to prove that the requirements of Articles 2 and 4 have been fulfilled, then Article 12 automatically would be violated – in this case the violation of Article 12 (in particular Article 12.2) would derive from a violation of Articles 2 and 4. For the European Communities, Article 12 also could be violated without relying on Articles 2 and 4, for example when a justified safeguard measure is taken without any (or insufficient) notification. The European Communities also disagrees that it has implied that the entire record of the investigation should have been notified. Rather, the European Communities argues, all "pertinent" information from that record should have been notified.

8.297 We note that the European Communities' arguments seem to imply that an insufficient notification under Article 12 *per se* implies or leads to a violation of Articles 2 and 4 (i.e., its argument that it is the notifications that permit other Members to judge substantive compliance with Articles 2 and 4). The European Communities also seems to argue this point *vice versa* (i.e., its argument that the violation of Article 12 in this case was "derived from" the substantive violation of Articles 2 and 4). By this, we understand the European Communities to mean that adequate notification under Article 12 is impossible where the substantive requirements of Articles 2 and 4 have not been satisfied.

8.298 In our view, the notification requirements of Article 12 are separate from, and in themselves do not have implications for, the question of substantive compliance with Articles 2 and 4. Similarly, we consider that the substantive requirements of Articles 2 and 4 do not have implications for the question of compliance with Article 12. Article 12 serves to provide transparency and information concerning the safeguard-related actions taken by Members. We note in this context that notification under Article 12 is just the first step in a process of transparency that can include, *inter alia*, review by the Committee as part of its surveillance functions (Article 13.1(f)), requests for additional information by the Council for Trade in Goods or the Committee on Safeguards (Article 12.2), and/or eventual bilateral consultations with affected Members if application of a measure is proposed (Article 12.3). In this regard, the important point is that the notifications be sufficiently descriptive of the actions that have been taken or are proposed to be taken, and of the basis for those actions, that Members with an interest in the matter can decide whether and how to pursue it further.

8.299 In this context, we recall the statement of the Panel in *Guatemala - Cement* that

"... [a] key function of the notification requirements in the [Anti-dumping Agreement] is to ensure that interested parties, including Members, are able to take whatever steps they deem appropriate to defend their interests...."<sup>565</sup>

8.300 Articles 12.2 and 12.3 in our view confirm that Members are not required to notify the full detail of their investigations and findings. Article 12.2 specifically provides for the possibility of requests for further information by the Council for Trade in Goods or the Committee on Safeguards. Article 12.3 provides, *inter alia*, for consultations, upon request, with other Members, to review the information contained in the notifications. Thus, these provisions specifically create opportunities for further information to be provided, upon request, concerning the details of the actions summarised in the notifications. Ultimately, should a violation of Articles 2 and 4 be alleged, it would be the more detailed information from the record of the investigation, and in particular the published report(s) on

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<sup>565</sup> Panel report on *Guatemala – Anti-dumping Investigation regarding Portland Cement from Mexico* (WT/DS60/R), adopted on 25 November 1998, para. 7.42.

the findings and reasoned conclusions of that investigation, that would form the basis for evaluation of such an allegation.

8.301 We note that Argentina's notification to the Committee on Safeguards, under Article 12.1(b), in fact is the full text of Act 338, which Argentina indicates in response to a Panel question is the published report on its serious injury finding (although it also refers to some portions of the "Technical Report"). We find that by having notified this full text, Argentina certainly met the requirements, which we find to be rather descriptive, applicable to notifications under the Articles 12.1 and 12.2. Therefore, we reject the European Communities' claim that Argentina's notification of its finding of serious injury and causation was insufficient, and conclude that in this respect Argentina has not violated Articles 12.1 and 12.2.

(b) Notification of subsequent modifications

8.302 We now turn to the second aspect of the European Communities' claims regarding notifications which is that Argentina should have notified under the Agreement on Safeguards Resolutions 512/98, 1506/98 and 837/98, which modify the definitive safeguard measure. In the European Communities' view, Members are obligated to notify safeguard measures as applied. The European Communities has argued that these resolutions have made the safeguard measure more restrictive than it was when originally applied. We note that the modifications of definitive safeguard measures foreseen in the Agreement (namely early elimination or faster liberalisation potentially resulting from mid-term reviews under Article 7.4,<sup>566</sup> and extension of measures beyond the initial period of application under Article 7.<sup>567</sup> and 7.4), all are subject to notification requirements under Articles 12.5 and 12.1(c)/12.2, respectively.

8.303 In this context, we note that the *only* modifications of safeguard measures that Article 7.4 contemplates are those that *reduce* its restrictiveness (i.e., to eliminate the measure or to increase their pace of its liberalisation pursuant to a mid-term review). The Agreement does not contemplate modifications that *increase* the restrictiveness of a measure, and thus contains no notification requirement for such restrictive modifications.

8.304 We note that the modifications of the definitive safeguard measure made by Argentina are not contemplated by Article 7, and thus Article 12 does not foresee notification requirements with respect to such modifications. Any *substantive* issues pertaining to these subsequent Resolutions would need to be addressed under Article 7, but the European Communities made no such claim. Where the situation at issue is primarily one of substance, i.e., modification of a measure in a way not foreseen by the Safeguards Agreement, we believe that we cannot address the alleged procedural violation concerning notification arising therefrom, as no explicit procedural obligation is foreseen. Therefore, we see no possibility for a ruling on this aspect of the European Communities' claim under Article 12.

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<sup>566</sup> Article 7.4: "In order to facilitate adjustment in a situation where the expected duration of a safeguard measure as notified under the provisions of paragraph 1 of Article 12 is over one year, the Member applying the measure shall progressively liberalise it at regular intervals during the period of application. If the duration of the measure exceeds three years, the Member applying such a measure shall review the situation not later than the mid-term of the measure and, if appropriate, withdraw it or increase the pace of liberalisation. A measure extended under paragraph 2 shall not be more restrictive than it was at the end of the initial period, and should continue to be liberalised."

<sup>567</sup> Article 7.2: "The period mentioned in paragraph 1 [the initial period of application] may be extended provided that the competent authorities of the importing Member have determined, in conformity with the procedures set out in Articles 2, 3 4 and 5, that the safeguard measure continues to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting, and provided that the pertinent provisions of Articles 8 and 12 are observed."

(c) Concluding remark

8.305 We recall our findings that our terms of reference include the definitive safeguard measure in its original legal form (i.e., Resolution 987/97) as well as in its subsequently modified form (i.e., Resolutions 512/98, 1506/98 and 837/98). We further recall our findings that Argentina's safeguard investigation and determination underlying the definitive safeguard measure are inconsistent with Articles 2 and 4 of the Safeguards Agreement and thus cannot serve as a legal basis for any safeguard measure. Given that the subsequent modifications of the definitive safeguard measure are based on the same safeguard investigation and determination, we are of the view that our findings of violations of Articles 2 and 4 resolve the dispute with respect to these modifications as well.

## **IX. CONCLUSIONS**

9.1 The Panel concludes that for the reasons outlined in this Report the definitive safeguard measure on footwear based on Argentina's investigation and determination is inconsistent with Articles 2 and 4 of the Agreement on Safeguards. We therefore conclude that there is nullification or impairment of the benefits accruing to the European Communities under the Agreement on Safeguards within the meaning of Article 3.8 of the DSU.

9.2 The Panel recommends that the Dispute Settlement Body request Argentina to bring its measure into conformity with the Agreement on Safeguards.

Annex I:

The safeguard investigation and measures referred to the following tariff headings:

6401	<b>WATERPROOF FOOTWEAR OF RUBBER OR PLASTICS</b>
6401.10.00	Footwear incorporating a protective metal toe-cap
6401.91.00	Other footwear, covering the knee
6401.92.00	Other footwear, covering the ankle, but not covering the knee
6401.99.00	Other
6402	<b>FOOTWEAR OF RUBBER OR PLASTICS</b>
6402.12.00	Ski and snowboard boots
6402.19.00	Other (sports)
6402.20.00	Footwear with uppers of straps (thongs)
6402.30.00	Other footwear, incorporating a protective metal toe-cap
6402.91.00	Other, covering the ankle
6402.99.00	Other
6403	<b>FOOTWEAR WITH LEATHER UPPERS</b>
6403.12.00	Ski and snowboard boots
6403.19.00	Other (sports)
6403.20.00	Footwear with outer soles of leather and uppers of straps
6403.30.00	Footwear made on a platform of wood
6403.40.00	Other footwear, incorporating a protective metal toe-cap
6403.51.00	Other footwear covering the ankle, with soles of leather
6403.59.00	Other, with soles of leather
6403.91.00	Other, covering the ankle, with outer soles of rubber or plastics
6403.99.00	Other, with outer soles of rubber or plastics
6404	<b>FOOTWEAR WITH TEXTILE UPPERS</b>
6404.11.00	Sports footwear with outer soles of rubber or plastics
6404.19.00	Other, with outer soles of rubber or plastics
6404.20.00	Footwear with outer soles of leather
6405	<b>OTHER FOOTWEAR</b>
6405.10	With uppers of leather
6405.10.10	With soles of rubber or plastics and uppers of composition leather
6405.10.20	With soles and uppers of composition leather
6405.10.90	Other
6405.20.00	With uppers of textile material
6405.90.00	Other

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