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UNITED STATES – SAFEGUARD MEASURES ON IMPORTS OF FRESH, CHILLED OR FROZEN LAMB MEAT FROM NEW ZEALAND AND AUSTRALIA

Report of the Panel

The report of the Panel on United States - Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 21 December 2000 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.

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I. INTRODUCTION

A. COMPLAINT OF NEW ZEALAND

1.1 On 16 July 1999, New Zealand requested consultations with the United States pursuant to Article 4 of the Dispute Settlement Understanding ("the DSU"), Article XXII:1 of GATT 1994 and Article 14 of the Agreement on Safeguards ("the Safeguards Agreement", "SG") with regard to a definitive safeguard measure imposed by the United States on imports of lamb meat.[1]

1.2 On 26 August 1999, New Zealand and the United States held the requested consultations, but failed to resolve the dispute.

1.3 On 14 October 1999, New Zealand requested the establishment of a panel to examine the matter.[2]

B. COMPLAINT OF AUSTRALIA

1.4 On 23 July 1999, Australia requested consultations with the United States pursuant to DSU Article 4, GATT Article XXII:1 and SG Article 14 with regard to the definitive safeguard measure imposed by the United States on imports of lamb meat.[3]

1.5 On 26 August 1999, Australia and the United States held the requested consultations, but failed to resolve the dispute.

1.6 On 14 October 1999, Australia requested the establishment of a panel to examine the matter.[4]

C. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.7 At its meeting of 19 November 1999, in accordance with DSU Article 9 the Dispute Settlement Body ("the DSB") established a single Panel, pursuant to the requests made by New Zealand and Australia.

1.8 At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference, as follows:

> "To examine, in the light of the relevant provisions of the covered agreements cited by New Zealand in document WT/DS177/4 and by Australia in document WT/DS178/5 and Corr. 1, the matter referred to the DSB by New Zealand and Australia in those documents, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

1.9 On 21 March 2000, the parties agreed to the following composition of the Panel:

Chairman:	Professor Tommy Koh
Members:	Professor Meinhard Hilf
	Mr. Shishir Priyadarshi

[1] WT/DS/177/1.
[2] WT/DS/177/4.
[3] WT/DS/178/1 and Corr.1.
[4] WT/DS/178/5 and Corr.1.

1.10 Australia (in respect of New Zealand's complaint), Canada, the European Communities, Iceland, Japan and New Zealand (in respect of Australia's complaint), reserved their rights to participate in the panel proceedings as third parties.

D. PANEL PROCEEDINGS

1.11 The Panel met with the parties on 25-26 May 2000 and 26-27 July 2000. The Panel met with third parties on 25 May 2000.

1.12 On 24 October 2000, the Panel provided its interim report to the parties. See Section VI, *infra.*

II. FACTUAL ASPECTS

2.1 This dispute concerns the imposition of a definitive safeguard measure by the United States on imports of fresh, chilled and frozen lamb meat, imported under subheadings 0204.10.00, 0204.22.20, 0204.23.20, 0204.30.00, 0204.42.20 and 0204.43.20 of the Harmonized Tariff Schedule of the United States.

2.2 On 7 October 1998, a safeguard petition was filed with the United States International Trade Commission ("USITC") by the American Sheep Industry Association, Inc., Harper Livestock Company, National Lamb Feeders Association, Winters Ranch Partnership, Godby Sheep Company, Talbott Sheep Company, Iowa Lamb Corporation, Ranchers' Lamb of Texas, Inc., and Chicago Lamb and Veal Company. On 23 October 1998, the USITC published a notice of institution of a safeguards investigation on lamb meat. The United States notified the Committee on Safeguards of the initiation of the investigation in a communication dated 30 October 1998.[5]

2.3 On 9 February 1999, the USITC unanimously found that increased imports of lamb meat were a substantial cause of threat of serious injury to an industry in the United States. The United States notified this determination to the Committee on Safeguards in a communication dated 17 February 1999.[6]

2.4 The USITC forwarded its threat of injury determination and its remedy recommendations to the President of the United States on 5 April 1999. The USITC published its determination and recommendations in April 1999.[7] In a communication dated 13 April 1999, the United States submitted a revised notification concerning its threat of injury determination, and describing the proposed safeguard measure.[8]

2.5 The United States held consultations pursuant to SG Article 12.3 with New Zealand on 28 April and 14 July 1999, and with Australia on 4 May and 14 July 1999. The United States notified the results of these consultations to the WTO Council for Trade in Goods on 21 July 1999.[9]

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[5] G/SG/N/6/USA/5 (Exh. US-3).

[6] G/SG/N/8/USA/3 + Corr.1 and Corr.2 (Exh. US-4)

[7] USITC Publication 3176, "Lamb Meat", Investigation TA-201-68, April 1999. ("USITC Report", Exh. US-1.)

[8] G/SG/N/8/USA/3/Rev.1 (Exh. US-5).

[9] G/L/313, G/SG/19 (Exh. US-8).

2.6 On 7 July 1999, the United States imposed a definitive safeguard measure, effective 22 July 1999, on imports of lamb meat.[10] The United States notified the measure to the Committee on Safeguards in a communication dated 9 July 1999[11] and provided a supplemental notification concerning the measure in a communication dated 13 August 1999.[12]

2.7 The measure takes the form of a tariff-rate quota, as follows:

Country Allocations

Year	Tariff Rate Quota	Country Allocations		
		Australia	**New Zealand**	**Other Countries**
Year 1	31,851,151 kg	17,139,582 kg	14,481,603 kg	229,966 kg
Year 2	32,708,493 kg	17,600,931 kg	14,871,407 kg	236,155 kg
Year 3	33,565,835 kg	18,062,279 kg	15,261,210 kg	242,346 kg

Tariff Duties

Year	In-Quota	Out of Quota
Year 1	9%	40%
Year 2	6%	32%
Year 3	3%	24%

2.8 The safeguard measure does not apply to imports from Canada, Mexico, Israel, beneficiary countries under the Caribbean Basin Economic Recovery Act or the Andean Trade Preference Act, or developing countries described in the US notification under SG Article 9, footnote 2.[13]

III. FINDINGS REQUESTED BY THE PARTIES

A. AUSTRALIA

3.1 In its first submission, Australia claims:

> (1) that the United States acted inconsistently with GATT Article XIX and the Safeguards Agreement because the USITC Report failed to discuss and demonstrate that increased imports of lamb meat were threatening to cause serious injury to the "domestic industry" ". . . as a result of unforeseen developments and of the effect of the obligations

[10] Proclamation 7208 of 7 July 1999, "To facilitate positive adjustment to competition from imports of lamb meat".(Exh. US-2.)
[11] G/SG/N/10/USA/3 (Exh. US-6).
[12] G/SG/N/10/USA/3/Suppl.1 (Exh. US-7).
[13] G/SG/N/11/USA and G/SG/N/11/USA/3/Suppl. 1 (Exh. US-6 and –7).

incurred by a Member under this Agreement, including tariff concessions . . . "[14] as required by GATT Article XIX:1;

(2) that the United States acted inconsistently with the requirements of SG Article 5.1 for a determination that the measure is applied only to the extent "necessary to prevent or remedy serious injury and to facilitate adjustment";

(3) that the United States acted inconsistently with SG Article 3.1 by failing to publish a report justifying the measure imposed;

(4) that to the extent the United States carried out any investigation subsequent to the report of the USITC, it was in breach of the requirements of SG Article 3.1 and SG Article 12.2 and 12.6;

(5) that the USITC's determination of threat of serious injury being caused to the domestic industry was inconsistent with the provisions of SG Article 4 in a number of respects, principally that the USITC's determination of the relevant "domestic industry" was inconsistent with the provisions of SG Article 4.1(c) through the inclusion of enterprises that do not produce the like or directly competitive products, and that the United States did not demonstrate that increased imports were threatening to cause serious injury to the "domestic industry", in particular because

- the data were inadequate and did not support the determination as required under SG Article 4.2;

- the USITC did not meet the requirements of SG Article 4.1(b) that for a finding of threat of serious injury the serious injury must be imminent and "[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 determination of threat of serious injury, by attributing to increased imports injury caused by other factors, was contrary to SG Article 4.2(b); and

- the USITC failed to consider all the factors in SG Article 4.2(a);

(6) that the United States acted inconsistently with its obligations under SG Article 8.1 and SG Article 12.3, which require a Member to endeavour to maintain a substantially equivalent level of concessions and other obligations and to enter into consultations in good faith to achieve that objective;

(7) that the United States acted inconsistently with SG Article 2.2 to apply the measure to all imports irrespective of source. In particular, no WTO justification was given for the inclusion of Canada, Mexico, Israel and beneficiary countries under CBERA and ATPA in the injury investigation but their exclusion from the measure, which also was inconsistent with SG Article 4;

(8) that the United States breached its obligations under SG Article 11.1(a) because the measure was not emergency action and did not conform to the provisions of GATT Article XIX and other provisions of the Safeguards Agreement;

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[14] GATT 1994 Article XIX:1

(9) that since the United States acted inconsistently with the other provisions of the Safeguards Agreement, in particular SG Article 4, it also is in breach of SG Article 2.1; and

(10) that the United States is in breach of GATT Article II, since the measure is inconsistent with the United States' tariff bindings on lamb meat.

According to Australia, these errors cannot be cured, and the United States can bring the measure into conformity with the Safeguards Agreement and GATT 1994 by revoking the measure without delay.

3.2 Australia requests that the Panel therefore:

(a) find that the measure is inconsistent with the Safeguards Agreement and GATT 1994 and that the US has acted inconsistently with its obligations under the Safeguards Agreement and under GATT 1994;

(b) find that therefore the US is in violation of its obligations under the Safeguards Agreement and GATT 1994; and

(c) recommend that the US bring the measure into conformity with the Safeguards Agreement and GATT 1994.

B. NEW ZEALAND

3.3 In its first submission, New Zealand requests the Panel to find that:

(a) The United States measure is not a response to "unforeseen developments" within the meaning of GATT Article XIX and thus does not comply with SG Article 2.1 and SG Article 11.

(b) The United States has failed to demonstrate that its "domestic industry that produces like or directly competitive products" has been threatened by "serious injury" as required by SG Article 2.1.

(c) The United States has failed to demonstrate that any threat of serious injury to its domestic industry has been caused by increased imports as required by SG Article 2.1

(d) The United States has applied a safeguards measure that is neither necessary to prevent serious injury nor necessary to facilitate adjustment, contrary to SG Article 5.1 , and has failed to publish its findings and reasoned conclusions on the necessity of its measure as required by SG Article 3.1 .

(e) The United States has failed to apply a safeguard measure to all imports irrespective of source as required by SG Article 2.2 and GATT Article I .

(f) The United States has applied a safeguard measure that places it in violation of its obligations under GATT Article II.

3.4 Accordingly, New Zealand requests the Panel to recommend that the United States bring its treatment of imports of lamb meat from New Zealand into conformity with its obligations under the Safeguards Agreement and GATT 1994.

C. UNITED STATES

3.5 The United States requests the Panel to reject Australia's and New Zealand's claims.

IV. ARGUMENTS OF THE PARTIES

4.1 With the agreement of the parties, the Panel has decided that in lieu of the traditional descriptive part of the Panel report setting forth the arguments of the parties, the parties' submissions will be annexed in full to the Panel's report. Accordingly, the parties' written submissions concerning the requests for preliminary rulings by the Panel, the parties' first and second written submissions and oral statements, along with their written answers to questions, are attached at **Annex 1** (Australia), **Annex 2** (New Zealand), and **Annex 3** (United States). The written submissions, oral statements and answers to questions of the third parties are attached at **Annex 4**. The full texts of Australia's and New Zealand's ("the complainants'") requests for the establishment of a panel also are attached respectively at **Annex 5**.

V. PRELIMINARY ISSUES

A. PARTIES' REQUESTS FOR PRELIMINARY RULINGS BY THE PANEL

1. Australia

5.1 In its first submission, Australia requests that the Panel request the United States to produce the following information for review by the Panel and Australia:[15]

(a) all confidential information in the USITC Report on which its determination and recommendation were based; and

(b) all information, including details of any deliberations and analysis, and documents taken into account by the US Administration or the US President in the course of the taking a decision to apply the measure in dispute.

5.2 In Australia's view, this information is relevant to the Panel's responsibility to make an objective assessment of the matter before it under DSU Article 11.[16]

2. New Zealand

5.3 In its first submission, New Zealand addresses the problem of the use of confidential information, but does not request a preliminary ruling.[17] New Zealand argues that once the complainants have established a *prima facie* case, the United States has to demonstrate that the safeguard determination and the measure actually imposed are based on reasoned conclusions to which the Panel must have access.

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[15] Australia's first submission, Annex 1-1, at paragraphs 15ff.

[16] Article 11 of the DSU: "… Accordingly, 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, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. …"

[17] New Zealand's first submission, Annex 2-1, at paragraphs 7.22ff.

3. The United States

5.4 In a letter, dated 5 May 2000, the United States requests preliminary rulings on the following issues: (a) alleged insufficiency of the panel requests; (b) exclusion of the US [Safeguards] Statute from the Panel's terms of reference; (c) protection of Business Confidential Information (BCI).

B. ALLEGED INSUFFICIENCY OF PANEL REQUEST

1. Initial arguments of the parties

5.5 The United States submits that the claims referred to by Australia and New Zealand in their respective requests for the establishment of a panel are insufficient to satisfy the requirements of DSU Article 6.2 . The United States alleges in particular:

> "Every legal provision cited in both Australia's and New Zealand's panel requests contains multiple obligations, yet neither request identifies the specific obligations at issue. Neither the listing of articles nor any other material in the panel requests clarifies which of the multiple obligations potentially at issue is actually implicated.[18]
> …
> The United States does not assert substantial prejudice … with respect to the claims … under Articles I, II and XIX of GATT 1994 and Articles 5, 11 and 12 of the [Safeguards] Agreement, as it was possible for us to discern those sub-provisions that would be implicated on the basis of the context of this proceeding. However, the mere listing of Articles 2, 3 and 4 of the [Safeguards] Agreement, without any elucidation of the actual claims at issue, fails to meet the standards of DSU Article 6.2 and has substantially prejudiced the United States by compromising its ability to respond to the claims of the complaining parties.[19] …
> … with respect to the obligations listed in Article 4 of the Safeguards Agreement, it was unclear whether Australia and/or New Zealand were stating a claim with respect to (1) [the definition of] threat of serious injury as that term is defined in Article 4.1(b); (2) domestic industry [producing like or directly competitive products] as that term is defined in Article 4.1(c); (3) any or all of the economic factors to be evaluated that are set out in Article 4.2(a); (4) causation (Article 4.2(b)); or (5) the published analysis of the case required by Article 4.2(c)".[20]
> Because of the inadequacy of the panel requests, it was not until Australia and New Zealand filed their first written submissions that the United States was able to know their actual legal claims.[21]
> The insufficiency of the Panel requests has seriously prejudiced the United States in the preparation of its defense. It prevented the United States from knowing the true nature of the claims being made against the U.S. measure and placed the United States in the position of merely guessing which of the many obligations in these several articles might be at issue in this review. This severely limited the ability of the United States to begin the task of preparing its defense. The dispute resolution process is intended to be a relatively speedy process. Central to such a speedy process is the requirement that claims be clearly stated at the required time. The failure of a complaining party to do so prejudices the responding party and undercuts

[18] US request for preliminary rulings, 5 May 2000, Annex 3-1, at paragraph 5.
[19] Id. at paragraph 6.
[20] Id. at paragraph 7.
[21] Id. at paragraph 8.

> the fairness of the entire process. It effectively stacks the deck against the responding party."[22]

5.6 On this basis, the United States seeks a preliminary ruling from the Panel that dismisses this proceeding in its entirety because, lacking a legal basis in valid panel requests, the proceeding cannot go forward. In the alternative, the United States requests a preliminary ruling that the claims made by Australia and New Zealand under SG Articles 2, 3 and 4 fail to comply with DSU Article 6.2 and thus lack a legal basis and cannot be considered in a proceeding based upon the panel requests at issue.[23] The United States argues that Australia and New Zealand could then decide whether to renew their complaints on the basis of new legally proper panel requests , or in the alternative, pursuing their complaints on the basis of the remaining claims.

5.7 The United States further requests, in the event that the Panel decides to proceed and to consider the claims under SG Articles 2, 3 and/or 4, an extension of at least two weeks for filing its first written submission, to enable it to respond to the claims and arguments in the first written submissions of Australia and New Zealand so as to mitigate in part the prejudice to the United States resulting from the inadequate request.

5.8 In letters dated 9 May 2000, New Zealand and Australia ask the Panel to dismiss all the US requests for preliminary rulings and not to extend the deadline for the first US written submission. Australia points out, *inter alia*, that the United States only chose to make these requests two weeks after receipt of the complainants' first submissions. Both complainants request the Panel to defer its consideration of the US requests for preliminary rulings until the first substantive meeting of the Panel with the parties.

2. Written response and request for comments by the Panel

5.9 In a letter, dated 10 May 2000, the Panel communicated to the parties the following:

> "The Panel has taken note of the 5 May 2000 request by the United States for preliminary rulings and for an extension of the deadline for its first submission, and the 9 May 2000 letters in response by New Zealand and Australia.
>
> The Panel has also taken note of Australia's request for a preliminary ruling in paragraph 15 of Australia's first submission of 20 April 2000 and of New Zealand's statements in paragraphs 7.22ff of New Zealand's first submission of 20 April 2000.
>
> In accordance with paragraph 13 of the Panel's working procedures, Australia and New Zealand are invited to submit their views on the request by the United States for preliminary rulings in written form by Wednesday, 17 May 2000. Also in accordance with that paragraph, the United States is invited to submit in its first submission any further views on the request by Australia.
>
> The parties to this dispute should be prepared to present their views on the substance of the points raised in the communications mentioned above on the first day of the Panel's first substantive meeting with the parties, i.e., 25 May 2000.
>
> In the meantime, and without prejudice to the Panel's decisions in respect of the preliminary issues, the Panel has decided to extend the deadline for the filing of the

[22] Id. at paragraph 9.
[23] Id. at paragraph 14.

first submission by the United States [from Thursday, 11 May 2000] to Monday, 15 May 2000. For this reason, the deadline for third parties to make their written submissions also is extended, to Friday, 19 May 2000. Otherwise, the Panel's previously-announced timetable remains unchanged."

3. Comments of the parties

5.10 In their written responses of 17 May 2000 and in their oral statements at the first substantive meeting, Australia and New Zealand request the Panel to dismiss the US requests because their panel requests were sufficiently specific to meet the requirements of DSU Article 6.2 and the United States did not show that it suffered any prejudice in preparing its defence.

5.11 The complainants stress that in *Korea – Dairy* the Appellate Body ruled that while the identification of the treaty provisions claimed to have been violated was *always necessary*, and while it *might not always be enough* to simply list the articles at issue, it also *might suffice in the light of attendant circumstances and the particular background of each specific case*. That is, the Appellate Body did *not* say that the mere listing of those provisions would in *all* cases *not* be enough. In addition, it was the *claims* of the complainant, not detailed *arguments* which must be set out with sufficient clarity.

5.12 The complainants concede that SG Articles 2, 3 and 4 contain *multiple* obligations. But they emphasise that it would have been redundant for them to specify that they claim US breaches of all subparagraphs of these provisions, i.e., SG Articles 2.1, 2.2, 4.1(a), 4.1(b), 4.1(c), 4.2(a), 4.2(b) and 4.2(c). As to SG Article 3, the complainants argue that their claim obviously refers to the first paragraph, i.e., the obligation to publish a report setting forth the findings and reasoned conclusions reached on all pertinent issues of fact and law because the second paragraph deals with the treatment of confidential information in domestic proceedings. The complainants conclude that the reference in their panel requests to SG Articles 2, 3 and 4 in their entirety accords completely with their *actual claims* in this case. The Appellate Body's interpretation of DSU Article 6.2 did not require them to set out detailed *arguments* in their panel requests.[24]

5.13 Australia and New Zealand allege that the United States failed to raise its objections to the panel requests at the appropriate time, i.e., when the request was filed or discussed in DSB meetings in October and November 1999, at the organizational meeting of the Panel, or at least briefly after receipt of the first written submissions by the Complainants, and instead raised this issue for the first time only one week before the first US submission was due. Australia noted that the case should not be dismissed on the basis of time-wasting, litigation techniques.

5.14 In New Zealand's view, the United States has not offered sufficient "*supporting particulars*", as the Appellate Body put it in the *Korea – Dairy* dispute, of how it has suffered *prejudice* from the mere listing of articles in the panel request. Thus the US objections against the panel requests should be rejected on the same grounds as the Appellate Body had refused to sustain Korea's procedural objections in the *Korea - Dairy* case. The complainants argue that the ability of the United States to defend itself was not prejudiced given the actual course of the panel proceedings. Any prejudice suffered by the United States has been mitigated by the Panel's decision to extend the deadline for the first US submission.

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[24] New Zealand also pointed out that the US practice with respect to the level of detail it provides in its panel requests was similar in the disputes concerning *Canada – Measures Affecting the Importation of Milk and Exportation of Dairy Products* (WT/DS103/R and WT/DS103/AB/R, panel and Appellate Body reports adopted on 27 October 1999, and *Mexico – Antidumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, (WT/DS132/R), panel report adopted on 24 February 2000.

4. Ruling by the Panel

5.15 At the first substantive meeting of the Panel with the parties on 25 May 2000, the Chairman gave the following preliminary ruling:

> "United States' Request for a Ruling on Alleged Insufficiency of the Panel Requests of Australia and New Zealand
>
> 1. The Panel has carefully considered the written submissions, the oral statements and supplementary comments of the United States, Australia and New Zealand concerning the alleged insufficiency of the panel requests of Australia and New Zealand.
>
> 2. The Panel has also considered the relevant aspects of the decisions of the Appellate Body in the *Korea – Dairy Safeguards* case and the *United States – Foreign Sales Corporations* case concerning Article 6.2 of the DSU.
>
> 3. The Panel has also taken into account all the relevant attendant circumstances of this case.
>
> 4. In the light of the above, the Panel has decided that it is unable to accept the request which the United States has submitted to it.
>
> 5. A more detailed statement of the Panel's decision and reasoning will be provided to the parties in due course."

5. Reasoning

5.16 We have arrived at this ruling that Australia's and New Zealand's respective requests for the establishment of a panel[25] are sufficient on the basis of a number of considerations, as set forth below.

(a) Sufficient specificity of the panel requests

5.17 We turn first to the text of DSU Article 6.2 which states the following:

> "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. …"

We recall that in *Korea – Dairy*, the Appellate Body separated Article 6.2 into its constituent parts, i.e., that the request must:

(i) be in writing;

(ii) indicate whether consultations were held;

(iii) identify the specific measures at issue; and

[25] The request made by New Zealand is contained in WTO Document WT/DS177/4, dated 15 October 1999 and the request by Australia is contained in WTO Documents WT/DS178/5 and WT/DS178/5/Corr.1, dated 15 and 29 October 1999. As noted, these requests are attached at Annex 5.

(iv) provide a brief summary of the legal basis of the complaint *sufficient to present the problem clearly* [26] (emphasis added).

5.18 The only disagreement among the parties concerns element (iv), that the request "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly", as the parties concur that elements (i)-(iii) of DSU Article 6.2 are satisfied. The parties agree that the requests (i) are in writing; (ii) indicate that consultations were held; and (iii) refer explicitly to the measures at issue, being "Proclamation 7208" and the "Memorandum of 7 July" that introduce a "definitive safeguard measure in the form of a tariff-rate quota on imports of lamb meat effective as of 22 July 1999".

5.19 Australia's request for the establishment of a panel reads in pertinent part as follows:

> "Australia considers that the measure, and associated actions and decisions taken by the USA, are inconsistent with the obligations of the USA under the Agreement on Safeguards and GATT 1994, in particular:
> Articles 2, 3, 4, 5, 8, 11 and 12 of the Agreement on Safeguards, and Articles I, II and XIX of GATT 1994."

5.20 New Zealand's request reads in pertinent part as follows:

> "New Zealand considers that this measure is inconsistent with the obligations of the USA under the following provisions:
> Articles 2, 3, 4, 5, 11 and 12 of the Agreement on Safeguards; and Articles I, II and XIX of the GATT 1994."

5.21 We recall that the United States has asserted that the requests are insufficiently specific in respect of only three of the identified provisions, namely SG Articles 2, 3 and 4. Thus, we do not need to consider the question of the specificity of the requests in respect of the other provisions identified by the complaining parties, namely SG Articles 5, 8, 11 and 12 and GATT Articles I, II and XIX .

5.22 As discussed above, in making its request for a preliminary ruling, the United States relies heavily on the decision of the Appellate Body in *Korea – Dairy* including its reference to several elements of the decision in *EC – Bananas.* The United States notes that, as in the *Korea – Diary* dispute, the Panel is confronted with a consideration of the sufficiency of a simple *listing* of the provisions alleged to have been violated *without setting out detailed arguments* as to which specific aspects of the measures at issue relate to which specific provisions of those agreements.

5.23 We note in particular the finding by the Appellate Body in *Korea – Dairy* that a listing of the provisions alleged to be violated is a *minimum* prerequisite for the legal basis of a claim to be presented at all, and that:

> "[t]here may be situations where the simple listing of the articles of the agreement or agreements involved *may, in the light of attendant circumstances*, suffice to meet the standard of *clarity* in the statement of the legal basis of the complaint. However, there *may* also be situations in which the circumstances are such that the mere listing

[26] Appellate Body Report on *Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products*, (complaint by the European Communities), adopted on 12 January 2000, (WT/DS98/AB/R), paragraph 120.

> of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed *establish not one single, distinct obligation, but rather multiple obligations*. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2."[27] (emphasis added).

5.24 Drawing on this ruling, the United States asserts that the "mere listing of Articles 2, 3 and 4 of the Agreement … has substantially prejudiced the United States by compromising its ability to respond to the claims of the complaining parties".[28] That is, the United States argues that it was unclear whether Australia and/or New Zealand were stating a claim with respect to the definition of threat of serious injury under SG Article 4.1(b); the domestic industry producing like or directly competitive products as defined in SG Article 4.1(c); any or all of the economic factors to be evaluated that are set out in SG Article 4.2(a); causation (SG Article 4.2(b)); or the published analysis of the case required by SG Article 4.2(c).[29]

5.25 The United States continues that due to this inadequacy, it was not until Australia and New Zealand filed their first submissions that the United States was able to know their actual legal claims[30] and this therefore "placed the United States in the position of merely guessing which of the many obligations in these several articles might be at issue in this review".[31] The United States also submits that "neither the listing of articles nor any other material in the panel requests clarifies which of the multiple obligations potentially at issue is actually implicated" and that as a result, "these requests are insufficient under [DSU] Article 6.2".[32]

5.26 In this context, the United States notes that in *Korea – Dairy*, the Appellate Body expressly dealt with an appeal by Korea regarding lack of specificity in a request for a panel based upon alleged violations of provisions almost identical to those at issue here, i.e., SG Articles 2, 4, 5 and 12 and GATT Article XIX.

5.27 We note that the Appellate Body identified these provisions as an example of a situation in which the mere listing of articles, in and of itself, *may* fall short of the standard of DSU Article 6.2 (which seems to imply that it *may* suffice in other situations). The Appellate Body's explanation was that the paragraphs and subparagraphs of the articles at issue involve not only one single obligation, but rather *multiple* obligations in a "complex multi-phased process [in which] every phase must meet with certain legal requirements and comply with the legal standards set out in the agreement".[33]

5.28 Turning to the deficiencies of the panel requests alleged by the United States in this case, it is our view that given the nature and scope of the claims by New Zealand and Australia under SG Articles 2, 3 and 4 , the requests for a panel are sufficient in themselves to provide the requisite clarity and notice to the United States in respect of those claims, as required by DSU Article 6.2.

5.29 As noted, a major element of the United States' argument is that Australia's and New Zealand's requests raise nearly identical provisions of the Safeguards Agreement and in a nearly-identical manner, to the request for establishment of the panel in *Korea – Dairy*, and that Korea's appeal on this issue failed in *Korea - Dairy only* because in asserting that it had sustained prejudice, it did not offer any "supporting particulars" in its written or oral submissions. Thus, we understand the

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[27] Id. at paragraph 124.
[28] US request for preliminary ruling, Annex 3-1, at paragraph 6.
[29] Id. at paragraph 7.
[30] Id. at paragraph 8.
[31] Id. at paragraph 9.
[32] Id. at paragraph 5.
[33] Appellate Body Report on *Korea – Dairy*, paragraph 129.

United States to argue that the requests for establishment in this dispute are essentially identical to that in *Korea – Dairy*, which in the US view must compel us to turn immediately to the question of prejudice, and "supporting particulars" in respect thereof.

5.30 A careful comparison of the situation in *Korea – Dairy* with the situation before us, however, reveals that the two can be readily distinguished on the basis of the scope of the respective claims under the articles in question. We note in particular that in *Korea – Dairy*, while the EC's panel request listed SG Articles 2 and 4 (*inter alia*) without elaboration, in its first submission the EC pursued only claims under paragraph 1 of SG Article 2 and under subparagraphs (a) and (b) of SG Article 4.2 . In contrast, in the case at hand, while Australia and New Zealand, like the EC in *Korea - Dairy*, simply listed SG Articles 2, 3 and 4 in their panel requests, in their first submissions they raised claims under effectively all of the subparagraphs thereof, i.e., SG Article 2.1, 2.2, 3.1, 4.1(a), 4.1(b), 4.1(c), 4.2(a), 4.2(b) and 4.2.(c)[34]. Thus, as New Zealand and Australia point out, it would have made little difference for the United States if they had listed all paragraphs and subparagraphs of SG Articles 2, 3 and 4, given that their claims and argumentation concerned essentially *all* of them.

5.31 In our view, the fact that the scope of the claims raised by Australia and New Zealand under SG Articles 2, 3 and 4 effectively cover those articles in their entirety, supports the conclusion that the requests by Australia and New Zealand for the establishment of this Panel are sufficiently specific to meet the requirements of DSU Article 6.2. But as pointed out by the Appellate Body in *Korea – Diary*, in assessing whether the simple listing of articles in a panel request ensures sufficient clarity, the attendant circumstances of the particular case and the question whether the respondent suffered prejudice in the actual course of the proceedings, may also be relevant. In the following sections, we first address a number of attendant circumstances that confirm our above consideration, and second, we discuss whether the "supporting particulars" set forth by the United States would persuade us of the US argument that its ability to defend itself in this dispute had been prejudiced.

(b) Attendant circumstances

5.32 In our view, the attendant circumstances surrounding the panel requests confirm our above consideration that the panel requests were sufficient in this case. In particular, we find relevant in this respect the discussions in the Committee on Safeguards of the US investigation on lamb meat, the consultations that were held concerning the investigation and measure, the DSB's consideration of the requests for a panel and the establishment of the Panel, and the timing of the US request for a preliminary ruling under DSU Article 6.2.

Discussion in the Committee on Safeguards

5.33 Australia and New Zealand point out that the United States was on notice of their main concerns about the lamb safeguard investigation at issue even before the safeguard measure was finally imposed. In particular, at the meeting of the Safeguards Committee on 23 April 1999, the complainants expressed concerns relating to, *inter alia*, the determination of threat of serious injury, the broad definition of the domestic industry, the causation standard applied by the USITC,[35] and the

[34] We note in particular that the claims raised by Australia and New Zealand cover both subparagraphs of SG Article 2.1, and all of the relevant subparagraphs of SG Article 4. As to SG Article 3.2, the only subparagraph of the listed Articles that is not the subject of a claim, its lack of relevance to this dispute would be clear to the United States, as that provision concerns the treatment of confidential information during the course of a safeguard investigation, and thus any issue in respect of that provision would arise during the investigation at the national level.

[35] We also note that the issue of the "substantial cause" standard provided for in the US safeguards law was already raised in discussions of the WTO Committee on Safeguards in the course of the general review

treatment of factors other than increased imports in the causation analysis.[36] These concerns, which were raised with the United States in the Safeguards Committee before the measure was imposed and before the initiation of a formal dispute settlement proceeding, largely coincide with the complainants' allegations made in this case. It is more pertinent to consider whether consultations held between the parties prior to the establishment of the Panel clarified the claims, the measures and the legal basis of the complaint, so as to satisfy specificity requirements under the DSU.

Consultations

5.34 We would note as further pertinent attendant circumstances the two different types of consultations that were held between the complainants and the United States before the panel requests were filed. In the following, we address in turn consultations pursuant to SG Article 12.3, and those pursuant to DSU Article 4 .

5.35 *Consultations under Article 12.3 of the Safeguards Agreement*: This provision requires that consultations be held before a safeguard measure is applied. The United States held consultations under SG Article 12.3 with New Zealand on 28 April 1999, and with Australia on 4 May 1999. The complainants state that on 14 July 1999 they submitted written lists of questions in connection with those consultations, which they have provided to the Panel as exhibits to certain submissions.[37] New Zealand's questions related to the requirements of SG Article 2.1, the definition of the domestic industry in accordance with SG Article 4.1(c) and the US "substantial cause" test and the non-attribution of "other factors" under SG Article 4.2(b). Australia's questions also covered the broad definition of the domestic industry, "significant overall impairment" within the meaning of SG Article 4.1(a), and the evaluation of factors listed in SG Article 4.2(a) to determine threat of serious injury, along with alleged violations of notification and publication requirements. These questions, like the discussion in the Committee on Safeguards, largely coincide with the main elements of the complainants' claims.

5.36 *Consultations under Article 4 of the DSU*: At consultations held between the parties on 26-27 August 1999 pursuant to DSU Article 4, the complainants submitted further written lists of questions specifying their concerns regarding the US safeguard measure on lamb meat.[38] New Zealand's list of questions referred to the alleged inconsistency with SG Article 2.2 of the US exclusion from the safeguard measures of its free trade agreement partners, the United States' alleged failure to meet transparency requirements under SG Article 3.1 with regard to the actual measure, the question of the clear imminence of threat of serious injury under SG Article 4.1(b), and the alleged failure to publish a determination of the relevance of the factors examined in accordance with SG Article 4.2(b). Australia's questions also dealt with different aspects of SG Articles 2, 3 and 4, e.g., the industry definition as well as notification and publication requirements.

5.37 We note that the questions contained in the above lists are quite detailed and thus provide considerable insight into complainants' allegations concerning specific obligations under specific paragraphs and subparagraphs of SG Articles 2, 3 and 4.

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process of the national legislation of the United States in 1995 and 1996. (*See* questions in G/SG/W/39 and US replies to questions by Australia concerning the notification provided by the United States of laws and regulations under SG Article 12.6 , G/SG/W/160.)

[36] See Minutes of the Meeting of the WTO Committee on Safeguards on 23 April 1999, paragraph 60 of G/SG/M/13.

[37] Exhs. NZ-11, AUS-25 and AUS-35 .

[38] Exhs. NZ-12, AUS-27 and AUS-36.

5.38 Concerning the notice functions of consultation and panel requests for potential third parties, we recall that Canada attended consultations under DSU Article 4 because of its substantial interest in the treatment of US-FTA partners under US safeguards legislation. We also note that four Members reserved their third party rights in this dispute, and the complainants' argument that this should be taken as proof of the fact that the panel requests served their function of giving notice to other Members.[39]

5.39 The United States has not expressly contested (nor confirmed) the authenticity of the lists of questions that the complainants claim to have submitted during the consultations under SG Article 12.3 and DSU Article 4. The United States does, however, seriously question the admissibility and the relevance to panel proceedings of information from bilateral, confidential consultations – for which usually no neutral witnesses or written records exist – when ascertaining whether the specificity requirements stipulated by DSU Article 6.2 for *panel requests* are met.

5.40 We are conscious of the US argument that reliance in contentious panel proceedings on information from consultations could jeopardise their very purpose. Consultations are held with the intention of reaching a mutually agreed solution to a dispute. This purpose is not served if, in litigation before a panel, parties hold against one another concessions they have made or compromises they have achieved in the context of consultations. But we do not consider that the very purpose of consultations could be defeated if we were merely to take note of documentary evidence concerning the purely factual question of whether certain issues were raised during consultations. This is different from relying on arguments about the substance or the WTO-consistency of views expressed by parties during consultations. We believe that our approach is compatible with the requirement of DSU Article 6.2 that a panel request must indicate "whether consultations were held." In any event, such concerns are probably less pertinent to consultations held pursuant to SG Article 12.3 than to consultations held pursuant to DSU Article 4 , given the requirement in SG Article 12.5 that the results of the Article 12.3 consultations be notified to the Council for Trade in Goods (implying circulation thereof to all Members).

Establishment of the Panel by the DSB

5.41 We recall that the requests for the establishment of the panel which are the subject of these preliminary objections[40] were submitted on 14 October 1999 and circulated to Members on 15 October 1999. The panel requests were discussed at the DSB meetings of 27 October and 3 November 1999. At its meeting on 19 November 1999, the DSB established a single panel pursuant to DSU Article 9 .

5.42 At the aforementioned DSB meetings, the complainants referred, *inter alia*, to the alleged US breach of the non-discrimination obligation of SG Article 2.2 due to the exclusion of US FTA-partner countries from the imposition of the safeguard measure at issue.[41] We also note (see below) that according to the minutes of these DSB meetings, neither the United States nor any (potential) third party to this dispute raised any concerns about alleged insufficiencies of the complainants' panel requests in the light of the requirements of DSU Article 6.2 .[42]

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[39] Appellate Body Report on *Brazil – Measures Affecting Desiccated Coconut*, (WT/DS22/AB/R), adopted on 20 March 1997, p. 22.

[40] WT/DS177/4 and WT/DS178/5 and Corr.1 (attached at Annex 5).

[41] Minutes of DSB meetings, WT/DSB/M/70, dated 15 December 1999, p. 8 and WT/DSB/M/71, dated 11 January 2000, p. 14.

[42] We recognize that there is, of course, no requirement under the DSU that allegations concerning the sufficiency of a panel request be brought to the attention of the DSB and other parties *before* or *at* the DSB

Timing of the US request for preliminary ruling concerning the specificity of the panel requests

5.43 As a final attendant circumstance that in our view would support the conclusion that the panel requests were sufficiently specific, we note that these requests were dated 14 October 1999, and thus presumably any lack of specificity therein would have been apparent to the United States as of that time. In particular, it was clear at that point that consultations had failed to achieve a satisfactory resolution, and thus that the United States was likely be required to refute claims in the course of formal panel proceedings. We agree with the United States that, according to paragraph 13 of the panel working procedures,[43] parties may request preliminary rulings on any issue until the first substantive meeting or even later upon a showing of good cause. But we also note that this paragraph does not preclude the raising of procedural objections against allegedly insufficient panel requests at an earlier point in time. On the contrary, one might expect that requests for preliminary rulings of a very important nature which could lead to the dismissal of an entire case would be raised soon after the filing of an allegedly insufficient panel request.

5.44 In this respect, we consider it appropriate to recall the Appellate Body's statements in *United States – Tax Treatment for Foreign Sales Corporations ("US – FSC") that*:

> " *responding Members [should] seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes.* "[44] (emphasis added)

5.45 We note that the Appellate Body made the preceding statements in relation to the "statement of available evidence" as required by SCM Agreement Article 4.2 in the context of a request for *consultations*, not a request for a *panel*. But we nevertheless find the above statement of the Appellate Body to be relevant to our examination of "attendant circumstances" in this case in connection with the procedural issue before us. In this regard, we find particularly pertinent the following statement of the Appellate Body in *US – FSC:*

> "a year passed between the submission of the [EC] request for consultations … and the first mention of the objection by the United States – despite the fact that the United States had numerous opportunities during that time to raise its objections. It seems to us that, by engaging in consultations on three separate occasions, and not even raising its objections in the two DSB meetings at which the request for establishment of a panel was on the agenda, the United States acted as if it had accepted the establishment of the panel in this dispute, as well as the consultations preceding such establishment."[45] (emphasis added).

5.46 As in the *US – FSC* case, in the case before us there was a lengthy period following the requests for establishment, during which: (1) the DSB twice considered the requests and the panel was established at a third DSB meeting, (2) numerous meetings were held concerning the composition of

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meeting establishing a panel. We simply believe that the absence of any objection in the DSB to the specificity of the panel requests would constitute a further "attendant circumstance" that would be relevant.

[43] Paragraph 13: "A party shall submit any requests for preliminary rulings not later than in its first submission to the Panel. If the complaining party requests such a ruling, the respondent shall submit its response to the request in its first submission. If the respondent requests such a ruling, the complaining party shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure will be granted upon a showing of good cause."

[44] WT/DS108/AB/R, paragraph 166.

[45] Id. at paragraph 165.

the Panel, and (3) once the Panel was composed (on 21 March 2000) an organizational meeting was held with the Panel concerning the procedures that would be followed. On none of those occasions did the United States mention its procedural objections against the panel requests. In fact, it was only on 5 May 2000, i.e., fifteen days after it received the complainants' first submissions and five days before the date when its first submission was due, that the United States for the first time *made known* its procedural objection in respect of the requests for establishment.

5.47 We recognize that at none of the various meetings held prior to that time could any of the bodies or individuals involved have been expected to *resolve* any procedural objections. This is so because in dispute settlement practice the DSB has proven ill-suited to rule on preliminary issues and there is no instance to substitute for the DSB in taking such decisions before a panel is in fact composed. The practical difficulties with obtaining a *decision* on such procedural issues would not, however, prevent a respondent party from making its procedural objections *known* to the complainants on those occasions.

(c) Prejudice to due process rights

5.48 Next we discuss whether the "supporting particulars" set forth by the United States would persuade us of the argument that its ability to defend itself in this dispute had been prejudiced. As set out below, it is our view that the United States has not submitted sufficient "supporting particulars" to demonstrate that it has suffered any such prejudice in preparing its defence in this case. This confirms our above consideration that the panel requests in this case were sufficiently specific to ensure that the due process rights of all parties have been respected in this dispute.

5.49 We recall that the US allegation of prejudice is that the alleged lack of specificity of the panel requests placed it in the position, before the complainants' first submissions were filed, of merely guessing which of the obligations of the articles at issue were the subject of claims. According to the United States, this severely limited its ability to begin preparing its defense, in particular because it had only three weeks in which to submit its own first submission following the receipt of the complainants' submissions. Concerning the time available for preparing its first submission, the United States also complains that at the organizational meeting the complainants were given an additional six days to prepare their first submissions than had initially been proposed by the Panel, while the United States received only one additional day.

5.50 Concerning the time available, we note in the first instance that at the organizational meeting, the parties all requested additional time for preparing their first submissions, beyond that set forth in the draft timetable that we proposed, and agreed that any such additional time be essentially evenly split between the complainants on the one hand and the United States on the other hand.[46] Moreover, as mentioned above, in response to the US request in its request for preliminary rulings for an extension of time to file its first submission, we decided to extend the due date for that submission from 11 May to 15 May 2000. We invited the complainants to respond to the US allegations by 17

[46] Our initial proposal was that the complainants' first submissions be due on 13 April 2000, that the United States' first submission be due on 4 May 2000, and that the third party submissions be due on 11 May 2000. At the organizational meeting, New Zealand proposed that the complainants' submissions be due on 20 April, that the United States' submission be due on 11 May and that the third party submissions be due on 18 May. The United States proposed in response that the complainants' first submissions be due on 18 April, that the Unites States' first submission be due on 11 May, and that the third party submissions be due on 18 May. During the course of the discussion, the parties accepted the following dates, which we incorporated into the timetable, for filing their first submissions: complainants' first submissions to be due on 19 April, United States' first submission to be due on 11 May, and third party submissions to be due on 18 May.

May 2000, and we reserved a separate session of the first substantive meeting to hear the parties' arguments on the preliminary issues raised.

5.51 We further note that the US first written submission and its oral statement at the first substantive meeting contain detailed and comprehensive *arguments* rebutting the complainants' *arguments* on all claims related to paragraphs and subparagraphs of SG Articles 2, 3 and 4 . In particular, these submissions rebut in detail the arguments made by the complainants in their first submissions concerning the issues listed in the US request for preliminary rulings of 5 May 2000,[47] i.e., (1) the concept of threat of serious injury as that term is defined in SG Article 4.1(b); (2) the definition of the domestic industry producing like or directly competitive products set out in SG Article 4.1(c); (3) any or all of the economic factors to be evaluated according to SG Article 4.2(a); (4) causation within the meaning of SG Article 4.2(b); and (5) the published analysis of the case required by SG Article 4.2(c). In this context, we recall the Appellate Body's statements in *EC – Bananas III* and *Korea – Dairy* that "Article 6.2 of the DSU requires that the *claims*, and not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel".[48] Thus the complainants were not required under the DSU to develop their factual and legal *arguments* on all these issues before filing their first submissions to the panel.

5.52 After the first substantive meeting with parties, we posed a significant number of detailed questions pertaining to the claims before us. To allow the parties to take into account in their rebuttal submissions one another's written answers to these questions, we extended the deadline for the rebuttal submissions. In its answers to questions and in its rebuttal submission, the United States again provided very detailed and comprehensive arguments on the claims before us.

5.53 In light of the foregoing, therefore, we do not believe that the United States has submitted sufficient "supporting particulars" to persuade us of its assertion that it has been prejudiced in its ability to defend itself in the actual course of the proceedings in this dispute. As noted above, as a matter of fact, the US submissions have been very thorough and detailed. In addition, by extending the deadlines for both the first submission of the United States and all parties' rebuttal submissions, we have ensured that during the course of these proceedings the due process rights of all parties have been fully respected. Our conclusion that the United States has not submitted sufficient supporting particulars to establish that it suffered prejudice in its ability to defend itself in the actual course of this proceeding confirms our above consideration that the panel requests in this case were sufficiently specific to meet the requirements of DSU Article 6.2.

C. REQUEST FOR THE EXCLUSION OF THE US STATUTE FROM THE PANEL'S TERMS OF REFERENCE

1. Arguments of the parties

5.54 In its letter dated 5 May 2000, the United States notes that in their respective panel requests, neither Australia nor New Zealand raises the claim that the US safeguards statute, on its face, is inconsistent with US obligations under the Safeguards Agreement. However, in the view of the United States, New Zealand makes that allegation in its first submission. The United States requests the Panel to rule that the US statute is not within its Panel's terms of reference.

5.55 In their submissions of 17 May 2000, New Zealand and Australia clarify that they request no finding by the Panel on the consistency of the US statute with the Safeguards Agreement. The

[47] US Request for Preliminary Ruling, Annex 3-1, at paragraph 7.

[48] *See* Appellate Body Report on *European Communities – Regime on the Importation, Sale and Distribution of Bananas (III)*, (WT/DS27/AB/R), paragraph 143 and Appellate Body Report on *Korea – Dairy*, paragraphs 123-125.

complainants specify that their claim is that the United States wrongfully applies a "substantial cause" test that is not found in the Safeguards Agreement. It is the application of this test in the safeguards investigation and determination at issue which the complainants are challenging in this dispute.

2. Ruling at the first substantive meeting of the Panel with the parties

5.56 At the first substantive meeting of the Panel with the parties, the Chairman gave the following ruling on this issue:

> "United States' Request for a Ruling on Exclusion of the US Safeguards Statute from the Panel's Terms of Reference
>
> 1. The Panel has given careful consideration to the US request for a preliminary ruling that the consistency of the US safeguard statute with the Safeguards Agreement and WTO law is outside the terms of reference of this Panel.
>
> 2. The panel agrees with the US that that issue is outside the Panel's terms of reference.
>
> 3. However, the question of "causation" and the more specific question whether the application in this case of the criterion of "substantial cause" is consistent with the Safeguards Agreement and WTO law is clearly within this Panel's terms of reference."

3. Reasoning

5.57 It appears to us that the relevant paragraphs in New Zealand's first written submission allege that in determining whether a threat of serious injury has been *caused* by increased imports, the United States wrongfully applies a "substantial cause" test, based upon Section 202(b)(1)B of the US Trade Act. In other words, New Zealand *has not claimed*, in the portion of the first submission at issue, that the US Safeguard Statute is on its face inconsistent with WTO law. Rather, it claims that the causation test applied by the USITC in the lamb investigation and determination, *pursuant* to that legislation, is less stringent than and thus inconsistent with the Safeguards Agreement.

5.58 Thus, in our preliminary rulings on 25 May 2000, we ruled that the consistency of the US safeguards statute with the Safeguards Agreement and WTO law was outside its terms of reference. However, as we also ruled, the question of "causation", and the more specific question of whether the application in this case of the criterion of "substantial cause" is consistent with the Safeguards Agreement, are clearly within our terms of reference.

D. SUBMISSION AND PROTECTION OF CONFIDENTIAL INFORMATION

1. Arguments of the parties

5.59 In reaction to Australia's request in its first written submission for the provision of certain confidential information from the USITC investigation, the United States notes in its first written submission that this information was submitted to the USITC by foreign and domestic producers under strict assurances of non-disclosure. In the US view, the private parties concerned would be unlikely to provide their consent to share such information with the Panel and the Complainants unless adequate procedures for their protection were adopted.

5.60 Australia responded that it was prepared to enter into a "reasonable" undertaking on the treatment of confidential information. New Zealand took a similar view. Australia emphasised that if the United States was not ready to submit all pertinent information about the investigation and determination, the Panel should draw negative inferences within the meaning of the Appellate Body Report on *Canada – Measures Affecting the Export of Civilian Aircraft*.[49]

5.61 At the first substantive meeting of the Panel with the parties, the United States stated that Australia's request to the Panel for a ruling that the United States produce all confidential business information was not in truth a request for a preliminary ruling, as it was the Panel's prerogative to request parties, in accordance with DSU Article 13, to submit information at any time in the proceeding.

2. Ruling at the first substantive meeting of the Panel with the parties

5.62 At the first substantive meeting with the parties, the Chairman of the Panel gave the following ruling in respect of this issue:

> "Australia's Requests Regarding Disclosure of Confidential Information by the US
>
> 1. The panel has carefully considered the requests of Australia for preliminary rulings on the disclosure by the US of confidential information excluded from the USITC report and information covering the process after the USITC reported to the President.
>
> 2. The Panel does not wish to make such preliminary rulings.
>
> 3. Instead, the Panel will consider these issues in the context of particular requests or questions which the parties or the Panel may wish to submit to the United States."

3. Reasoning

5.63 In its questions to the parties of 31 May 2000, the Panel requested the United States to submit certain statistical information which had been redacted from the published version of the USITC's report on the investigation and determination to protect business confidential information.[50]

5.64 In its replies to the Panel's questions of 22 June 2000, the United States submitted the requested information in indexed form, with the first number of each data series assigned a value of 100.0 and the ensuing numbers reflecting the percentage change from the starting number. In their rebuttal submissions of 29 June 2000, the complainants did not object to that course of action.

5.65 Having carefully reviewed and analyzed the indexed information, we have found that it is adequate and sufficient for purposes of our review of the USITC's investigation and determination pursuant to our terms of reference. As the complaining parties raise no objection to the US decision to provide the requested data in indexed form, we consider that Australia's request for information is moot and does not need to be dealt with further.

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[49] Appellate Body Report on *Canada – Measures Affecting the Export of Civilian Aircraft* (WT/DS70/AB/R), adopted 20 August 1999, paragraphs 181-206.

[50] Question 24 by the Panel to the United States (Annex 3-7).

VI. INTERIM REVIEW

6.1 We submitted our interim report to the parties on 24 October 2000. On 7 November 2000, the parties requested review, in accordance with DSU Article 15.3 , of precise aspects of the interim report. On 14 November 2000, the parties commented in writing on one anothers' requests for interim review, in accordance with paragraph 17 of the Working Procedures of this Panel. In response to these comments, we have made a number of drafting changes to the report, as summarized in the sections below. We also have introduced a number of technical and typographical corrections.

A. AUSTRALIA'S REQUESTS FOR INTERIM REVIEW

6.2 In response to Australia's interim review request, we have modified our descriptions of complainants' arguments in paragraph 7.14 and footnote 159.

B. NEW ZEALAND'S REQUESTS FOR INTERIM REVIEW

6.3 New Zealand requests us to review certain aspects of our descriptions of New Zealand's argumentation as well as of our reasoning.

6.4 Concerning its own arguments, New Zealand first requests that we clarify our description of its position in respect of a "two-step" causation test under GATT Article XIX. In particular, New Zealand states that its view is that there must be an indication of some developments that were unforeseen which led to products being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury, and that increased imports must "generally follow" from unforeseen developments, but need not be "caused" by them. We have in response to this comment modified our description of New Zealand's argument in paragraph 7.14 and footnote 58.

6.5 New Zealand also requests that we clarify that it did not argue that there was no separate section in the USITC report concerning "unforeseen developments", but rather that the report simply did not address this issue. We have modified paragraph 7.25 accordingly.

6.6 New Zealand confirms that it did not contest that imported lamb meat was "like" domestic lamb meat, but requests that we clarify that it did argue that imported lamb meat is not "like" domestic live lambs. We have accordingly modified our description of New Zealand's argument on this point in paragraphs 7.46 and 7.47, and have inserted footnote 76 citing to the relevant section of New Zealand's first written submission.

6.7 Concerning the complainants' arguments in respect of threat of serious injury, New Zealand objects to a statement by the Panel, in paragraph 7.137 of the interim report, that there was "no basic disagreement" among the parties concerning the interpretation of the threat of serious injury standard in the Agreement on Safeguards. Accordingly, we have deleted that paragraph of the interim report.

6.8 New Zealand also asks us to clarify in paragraph 7.190 that it does not question the relevance of *any* data from the past in a threat analysis, stating that its argument instead is that reliable assessments of what will happen in the future cannot be made on the basis of an analysis of short-term conditions. We have modified paragraph 7.190 accordingly.

6.9 We have made two changes to paragraph 7.200 in response to New Zealand's comments. First, we have corrected a reference, by removing a characterization of testimony on projected price increases for 1999 as "*ex post*". Second, New Zealand requests that we modify our description of its views on the information on underselling in the USITC report. In this regard, we have added language to paragraph 7.200 to indicate that New Zealand questions the comparability of some of the

products for which price comparisons were made by the USITC. We note, however, that at least in an argument in the alternative, New Zealand does appear to acknowledge that the *USITC* found some underselling. We have modified footnote 220 to this effect.

6.10 Concerning the discussion of the representativeness of data in paragraphs 7.209 and 7.213,[51] New Zealand requests that we change the drafting to make clear that the issue raised by complainants was not the representativeness of the data on a factor-by-factor basis, but rather in respect of the data on financial performance, on the one hand, and on the industry's production, capacity and capacity utilisation, etc., on the other. We have modified these paragraphs accordingly.

6.11 Regarding the question of causation, New Zealand requests that we clarify its position in respect of the three-step causation test that we applied, set forth in paragraph 7.232. In particular, New Zealand recalls that it made arguments in respect of the second step, the USITC's consideration of conditions of competition, as well as in respect of the third step, the USITC's consideration of "other factors". We have modified paragraphs 7.232 and 7.256 to more fully reflect New Zealand's arguments as to the USITC's consideration of conditions of competition. We nevertheless continue to believe that the main focus of the causation arguments in this dispute is in respect of the questions of the US "substantial cause" standard and the non-attribution of injury caused by "other factors" to increased imports, and therefore have inserted a statement to that effect in paragraph 7.232.

6.12 Concerning our reasoning, New Zealand requests that we change our reference to "statistics" in paragraph 7.42. New Zealand submits that what is being referred to is not limited to statistics, but rather concerns more generally the questions of change in the product mix of imports and increases in the cut size of imported lamb meat. In respect of the latter, New Zealand argues that the claim that the cut size of imported lamb meat increased does not withstand close analysis. We have not modified paragraph 7.42 because our reasoning already distinguishes between statistics and statements in the USITC report[52].

C. THE UNITED STATES' REQUESTS FOR INTERIM REVIEW

6.13 The United States requested us to review certain aspects of our description of the USargumentation as well as of our reasoning.

6.14 In connection with its request for preliminary rulings, concerning the time available to prepare its first submission, the United States comments in respect of paragraph 5.50 that at the Panel's organizational meeting it objected to the complainants' request for additional time and also requested more time for itself, since it was being asked to respond to two separate submissions in the time normally available for responding to one. New Zealand objects to this comment, stating that the United States did not make known any disagreement with the Panel's timetable once it was established. We have modified paragraph 5.50 and inserted footnote 46 to clarify the parties' positions at the organizational meeting concerning deadlines for their first submissions. In particular, we have inserted text to clarify that both sides proposed that all parties receive additional time, to be essentially evenly split between complainants and the United States, and accepted a schedule under which the complainants received six additional days and the United States seven additional days beyond the dates that we originally proposed for the preparation of the first submissions.

[51] The United States also requested a modification of paragraph 7.213.

[52] The United States, in its comments on New Zealand's request for interim review, objects to New Zealand's comment on this issue, stating that the Panel distinguished between statistics and statements in the USITC report.

6.15 The United States objects to our statement in paragraph 7.73 that it acknowledged that the term "producers *as a whole* of the like or directly competitive products" has to do at least in part with the respresentativeness of the data concerning the domestic industry at issue. New Zealand objects to the US comment, stating that our characterization accurately reflects the US arguments. To more fully reflect the US arguments on this point, we have added, in footnote 108, the full text of the US answer to our question concerning whether the term "producers as a whole…" has to do with the representativeness of data.

6.16 The United States objects to the Panel's statement in paragraph 7.83 that no data are available for years other than those covered by the safeguard investigation concerning the percentage of live lamb production dedicated to the production of lamb meat. In this connection, the United States cites to a 1995 study by the USITC concerning competitive conditions for domestic and imported lamb meat, which, according to the United States, was before the USITC in the safeguard investigation and contains such information. We have modified paragraph 7.83 and have inserted footnote 122 to indicate that this study was neither before us in this dispute, nor were the statistics contained therein, to which the United States refers in its interim review comments, reproduced in the USITC report on the safeguard investigation. That report merely cites the title of this study. We also have noted New Zealand's responses to the US characterization of the statistics in question, and have as well reiterated our view that, in any case, economic interdependence between producers of input and final products is not relevant to the industry definition under the Safeguards Agreement.

6.17 Concerning the representativeness of the data relied upon by the USITC, in response to comments by the parties we have clarified the description in paragraph 7.212 of the information before us on the coverage of the USITC questionnaire data. In particular, we note that we do not share the US view that, from the fact that four out of 16 known breakers responded to the USITC's questionnaire, it can be presumed that the four respondents account for 25 percent of total production by breakers. We also reiterated (as stated in paragraph 7.213) that the five responding packers and packer/breakers accounted for a sizeable majority, of the lambs slaughtered.

6.18 In response to the US objection to our indication in paragraph 7.242 that the *United States – Wheat Gluten* panel report is part of past GATT/WTO dispute settlement practice, given that it is currently on appeal, we have modified this reference, to distinguish between this report and other, previous GATT/WTO panel and Appellate Body reports.

6.19 Concerning our findings on the USITC's analysis of "other factors" in the context of causation, we have accepted the United States suggestion to expand, in paragraph 7.264, the quote from the USITC's determination concerning the termination of payments under the National Wool Act of 1954, to include passages identified by the United States in its interim review comments as relevant to understand the USITC's determination in its context. We also have inserted language to more fully reflect the US view that the USITC's statement that the effects of termination of Wool Act subsidies were expected to recede further with each passing month were essentially the same as a finding by the USITC that the termination made no appreciable contribution to the threat of serious injury. However, we see no need to modify our reasoning or conclusion on this point. We remain of the view that the USITC's determination that the loss of Wool Act payments was a *less important cause* of the threat of serious injury than imports of lamb meat is *not* equivalent to a determination that the termination of the Wool Act payments would not contribute to *any* appreciable extent to a likely worsening of the industry's situation.

6.20 In response to the US comment that we should explain why the failure to develop an effective marketing programme can be an "other" factor within the scope of SG Article 4.2(b), we have added the contrary US view in footnote 269. In that footnote we also note, however, that SG Article 4.2(b)

is open-ended as to what sorts of "other factors" might be relevant in a given case, and we clarify that in keeping with our standard of review, we have assessed the USITC's determination concerning this factor on its own terms, i.e., as a finding in respect of a possible "other factor" within the meaning of SG Article 4.2(b) as identified and investigated by the USITC. We also see no need to modify our reasoning or conclusion on this point because we remain of the view that the USITC's determination that the failure to develop an effective marketing programme was a *less important cause* of the threat of serious injury than imports of lamb meat is *not* equivalent to a determination that this failure to develop such a programme would not contribute to *any* appreciable extent to a likely worsening of the industry's situation.

6.21 Concerning our interim findings in respect of remedy under SG Articles 3 and 5, the United States in its request for interim review argues that, contrary to our characterization in footnote 267 of the interim report, it did elaborate on the fourth step of its four-part approach for determining the consistency of a measure with SG Article 5.1, in its response to our question 19. The complainants object to this US comment and consider that our description of the US argumentation is accurate.

6.22 The United States also requests a number of modifications to section VII.F.4 of the interim report, on the remedy imposed by the US President, generally with a view to clarifying (i) that the parties agreed that the quota quantities under the USITC plurality recommendation and under the measure applied by the US President were roughly equivalent (i.e., when the difference between carcass weight and meat weight is factored in) and that their disagreement was limited to the trade restrictiveness of the in-quota and out-of-quota tariff rates, (ii) that the plurality recommendation, while under US law constituting the recommendation of the USITC, nevertheless is not legally binding, and (iii) that the United States provided in the course of this panel proceeding certain explanations regarding why it believes the measure is consistent with SG Article 5.1, although acknowledging that it did not publish these explanations at the time when the determination was made. The complainants in their comments on the US interim review request argue, in essence, that the explanations of the measure provided by the United States during the course of the dispute were *ex post* justifications which in their view do not meet the requirements of SG Articles 3 and 5.

6.23 We have considered the parties' comments, and upon reflection have decided that our interim findings on Article 3 and 5 are not necessary to ensure a positive resolution of this dispute. Therefore we have deleted section VII.F of the interim report, and have simply noted, in paragraph 7.280, our decision to exercise judicial economy for the following reasons. Given our findings in respect of the definition of the domestic industry, threat of serious injury and causation, there is no need for us to reach the remedy issue. This was made clear in footnote 271 of the interim report, in which it was noted that our findings under SG Articles 3.1 and 5.1 in any case were based on the assumption (*arguendo*) that the requirements of the Safeguards Agreement in respect of domestic industry, threat serious injury and causation had been met. Therefore, even without making findings under SG Articles 3.1 and 5.1, we believe that the findings that we have made in respect of other claims are sufficient to resolve this dispute.

VII. SUBSTANTIVE ISSUES

A. STANDARD OF REVIEW

7.1 We recall that, to abide by our mandate in examining the claims in this case, we must adhere to the correct standard of review. We consider the panel and the Appellate Body findings in the *Argentina – Footwear* case particularly relevant for the issue of the appropriate standard of review in a safeguards dispute. The panel, in examining the Argentine authorities' finding that there had been,

along with actual serious injury, a threat thereof, found that "any determination of threat must be supported by *specific evidence and adequate analysis*".[53] On appeal, the Appellate Body found that the Panel was correct in reviewing the details of the safeguards *determination* and that the competent authorities had to *adequately explain* how the facts supported their determination. The Appellate Body stated that:

> "with respect to its *application* of the standard of review, we do not believe that the Panel conducted a *de novo* review of the evidence, or that it substituted its analysis and judgement for that of the Argentine authorities. Rather the Panel examined whether, as required by Article 4 of the *Agreement on Safeguards*, the Argentine authorities had considered all relevant facts and had adequately explained how the facts supported the determinations that were made. Indeed, far from departing from its responsibility, in our view, the Panel was simply fulfilling its responsibility under Article 11 of the DSU in taking the approach it did. To determine whether the safeguard investigation and the resulting safeguard measure applied by Argentina were consistent with Article 4 of the *Agreement on Safeguards*, the Panel was obliged, by the very terms of Article 4, to assess whether the Argentine authorities had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination."[54]

7.2 Along these lines, the Panel on Korea – *Dairy* emphasised that its task was to "examine the analysis performed by the national authorities *at the time of the investigation* on the basis of the various national authorities' determinations and the evidence it has collected."[55]

7.3 Thus we conclude that the standard of review that applies in safeguard disputes, as set out above, requires us to refrain from a *de novo* review of the evidence reflected in the report published by the competent national authorities. Our task is limited to a review of the determination made by the USITC and to examining whether the published report provides an adequate explanation of how the facts as a whole support the USITC's threat determination.

B. THE EXISTENCE OF "UNFORESEEN DEVELOPMENTS"

1. General interpretative analysis of Article XIX of GATT 1994

(a) Introduction

7.4 Australia and New Zealand claim that the United States violates GATT Article XIX because safeguard measures were imposed although increased imports were not a result of unforeseen developments. Rather, for the complainants, increases in imports were in large part a result of decreased US production as a consequence of the removal of subsidies under the Wool Act, which could and should have been foreseen by the United States.

7.5 The United States contends that (i) the change in the product mix of imports from frozen meat to fresh/chilled meat and (ii) the increase in the size of imported lamb meat cuts were unforeseen developments within the meaning of GATT Article XIX.

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[53] Panel Report on *Argentina – Safeguard Measures on Imports of Footwear*, (complaint by the European Communities), adopted on 12 January 2000, (WT/DS121/R), paragraph 8.285 (emphasis added).

[54] Appellate Body Report on *Argentina – Footwear*, WT/DS121/AB/R, adopted 12 January 2000, paragraph 121 (underline emphasis added; italic emphasis in original).

[55] Panel Report on *Korea – Dairy*, paragraph 7.55.

7.6 The complainants allege that there is no mention in the published USITC report of a separate consideration of "unforeseen developments" and that the references to changes in product mix and increasing cut size are contained in sections of that report dealing with different topics.

7.7 The United States responds that neither GATT Article XIX nor SG Article 3.1 provides for a specific publication requirement with respect to the examination of the existence of unforeseen developments. For the United States it is thus sufficient to demonstrate the existence of unforeseen developments upon challenge before a WTO panel provided that the relevant factual circumstances were considered by competent national authorities at the time of the determination and that such consideration is discernible from the report published by the USITC.

7.8 GATT Article XIX:1(a) on "Emergency Action on Imports of Particular Products" 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 Member 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 Member 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).

7.9 This Article thus provides for the criteria of (i) "unforeseen developments" and (ii) the "effect of obligations incurred by a Member under this Agreement, including tariff concessions" in addition to the conditions for the imposition of safeguard measures as defined in detail in the WTO Safeguards Agreement.

(b) Relationship between GATT Article XIX and the Safeguards Agreement

7.10 In the WTO disputes on *Argentina – Footwear* and *Korea – Dairy*, the Appellate Body ruled that the requirements of the WTO Safeguards Agreement and of GATT Article XIX apply on a *cumulative* basis:

> "Article 1 states that the purpose of the *Agreement on Safeguards* is to establish 'rules for the application of safeguard measures which shall be understood to mean *those measures provided for in* Article XIX of GATT 1994' (emphasis added). The ordinary meaning of the language in Article 11.1(a) – 'unless such action conforms with the provisions of that Article applied in accordance with this Agreement' – is that any safeguard action *must conform* with the provisions of Article XIX of the GATT 1994 *as well as* with the provisions of the *Agreement on Safeguards*. Thus, any safeguard measure[56] imposed after the entry into force of the WTO Agreement must comply with the provisions of *both* the *Agreement on Safeguards* and Article XIX of the GATT 1994."[57]

7.11 Thus the Appellate Body explicitly rejected the idea that those requirements of GATT Article XIX which are not reflected in the Safeguards Agreement could have been superseded by the requirements of the latter and stressed that all of the relevant provisions of the Safeguards Agreement and GATT Article XIX must be given meaning and effect.

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[56] Original footnote 38: "With the exception of special safeguard measures taken pursuant to Article 5 of the *Agreement on Agriculture* or Article 6 of the *Agreement on Textiles and Clothing*.

[57] Appellate Body Report on *Korea – Dairy*, paragraph 77.

7.12 Concerning the criterion "as a result … of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions", the Appellate Body was of the view that this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including relevant tariff concessions on the particular product in question, i.e., in this case the concessions on lamb meat bound by the United States in its Uruguay Round tariff schedule. This issue is not in dispute between the parties in this case.

(c) Does GATT Article XIX imply a "two-step" or "one-step" causation approach?

7.13 The parties disagree, however, on whether increased imports were the result of *unforeseen developments* and threatened to cause serious injury to the relevant domestic industry.

7.14 In our view, the complainants construe this requirement of GATT Article XIX.1(a) as implying a "two-step causation approach" in the sense that there need to exist (a) unforeseen developments that (b) lead to a surge in imports under such conditions as in turn to (c) cause (a threat of) serious injury[58].

7.15 The United States rejects such a two-step causation approach by contending that the term "unforeseen developments" in GATT Article XIX is grammatically linked not only to import increases "in such quantities", but also to "under such conditions".

7.16 We do not find, in the ordinary meaning of GATT Article XIX, a textual basis for what we see as a "two-step causation approach" implied by the complainants' arguments. The phrase concerning "unforeseen developments" in Article XIX:1 is grammatically linked to both "in such increased quantities" and "under such conditions". Rather than implying a two-step causation, we view this structure as meaning that while "unforeseen developments" are distinct from increases in imports *per se*, it may be sufficient for a showing of the existence of this "factual circumstance" that "unforeseen developments" have caused increased imports to enter "under such conditions" and to such an extent as to cause serious injury or threat thereof.[59] We note that the Appellate Body also referred to "developments which led to a product being imported in such increased quantities *and* under such conditions as to cause or threaten to cause serious injury to domestic producers."[60]

(d) What are "unforeseen developments"?

7.17 The question of "unforeseen developments" under GATT Article XIX was first addressed in the *Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of GATT* (1951)[61] ("*Hatters' Fur*") under GATT 1947, and subsequently in two WTO disputes, i.e., on *Argentina – Footwear* and *Korea – Dairy*.

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[58] We note that New Zealand disagrees with a characterization of its position as "imposing a double causation test", in particular stating that it does not argue that unforeseen developments must cause increased imports which in turn cause serious injury or threat thereof. Rather, New Zealand states, its argument is that "in order to comply with the requirement that unforeseen developments be demonstrated, the United States must indicate some developments that were unforeseen that led to products being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury." (Second Written Submission of New Zealand, Annex 2-9, at paragraph 2.12.)

[59] We note in this context the Appellate Body's statement that "[t]he principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of states." *See* Appellate Body Reports on *EC – Hormones*, at footnote 154 to paragraph 165.

[60] Appellate Body Report on *Korea – Dairy*, at paragraph 84 (emphasis added).

[61] GATT/CP/106, Working Party Report adopted on 22 October 1951, GATT/CP.6/SR.19.

7.18 As to the content of the obligation to examine the existence of "unforeseen developments", the Appellate Body in *Korea – Dairy* and *Argentina – Footwear* referred to this concept as a *factual circumstance* which has to be "*demonstrated as a matter of fact*":

> "The first clause in Article XIX.1(a) – 'as a result of unforeseen developments and of the obligations incurred by a Member under the Agreement, including tariff concessions …' is a dependent clause which, in our view, is linked grammatically to the verb phrase 'is being imported' in the second clause of that paragraph. Although we do not view the first clause of Article XIX.1(a) as establishing independent *conditions* for the application of a safeguard measure, additional to the *conditions* set forth in the second clause of that paragraph, we do believe that the first clause describes certain *circumstances* which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX."[62]

7.19 The Appellate Body's statement does not elucidate the difference between an "independent *condition"* and a "factual *circumstance"*. In our view, the latter term could be read to imply a lesser threshold than the former. In any case, the Appellate Body makes clear, and the parties do not dispute, that a demonstration of the existence of "unforeseen developments" is a legal requirement.

7.20 We next turn to the questions of *what* such "unforeseen developments" could be and *how* in practice (and at what time) the Member applying safeguard measures has to demonstrate the existence of this factual circumstance.

7.21 In *Korea – Dairy*, the Appellate Body addressed the question of what makes "developments" "unforeseen":

> "the dictionary definition of 'unforeseen', particularly as it relates to the word 'developments,' is synonymous with 'unexpected'. 'Unforeseeable', on the other hand, is defined in the dictionaries as meaning 'unpredictable' or 'incapable of being foreseen, foretold or anticipated'. Thus it seems to us that the ordinary meaning of the phrase 'unforeseen developments' requires that the developments which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been 'unexpected'". (footnotes omitted).[63]

7.22 We find the distinction drawn by the Appellate Body between *unforeseen* and *unforeseeable* to be important. In our view, the former term implies a lesser threshold than the latter one. That is, what may be unforeseen, as a matter of fact, within the meaning of unexpected by a particular individual or entity and in a particular situation, may nonetheless be foreseeable or predictable in the theoretical sense of capable of being anticipated from a general, scientific perspective. We believe that a panel's review of a Member's safeguard determination must be specific to the factual circumstances of the particular case at hand, that is, we must consider what was and was not actually "foreseen", rather than what might or might not have been theoretically "foreseeable".

7.23 As regards the type of facts or events that may be considered as "unforeseen developments", we deem relevant the report of the Working Party in *Hatters' Fur*. This case concerned a complaint by Czechoslovakia that the United States, in withdrawing a concession on women's fur hats and hat

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[62] Appellate Body Report on *Argentina – Footwear*, at paragraph 92.
[63] Appellate Body Report on *Korea – Dairy*, at paragraph 84.

bodies, had failed to fulfil the requirements of GATT Article XIX. The members of that Working Party (except the United States) agreed

> "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."[64]

The members also agreed "that the *fact that hat styles had changed did not constitute an 'unforeseen development'* within the meaning of Article XIX",[65] 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, 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."[66] (emphasis added).

7.24 Thus, while the Working Party in *Hatters' Fur* did not view fashion changes over time *per se* as an "unforeseen development", it nevertheless accepted that the scale of the particular change in fashion and its duration as well as the degree of its impact on the competitive situation was *unforeseen* in that case. In other words, fashion changes in general are *foreseeable* ("change is the law of fashion"[67]), but the extent of the fashion change in the US market relating to women's fur felt hats (and hat bodies) was *unforeseen*.

(e) Does the competent national authority have to reach a reasoned conclusion concerning the existence of "unforeseen developments"?

7.25 In this dispute, it is a main allegation of New Zealand and Australia that the United States cannot have possibly complied with the requirements of GATT Article XIX because there is no explicit consideration of the question of "unforeseen developments" in the report published by the USITC.

7.26 The United States contends that nothing in GATT Article XIX requires that a consideration of "unforeseen developments" be published at the time when the determination is made and that the publication requirements of SG Article 3 do not include an examination of "unforeseen developments". The United States argues that a demonstration of the existence of "unforeseen developments" upon challenge in a dispute settlement proceeding is sufficient. In this respect, the United States points to two factual elements which are reflected in the report which the USITC published at the time when the determination was made, i.e., (i) a change in product mix of imports from frozen to fresh/chilled meat and (ii) an increase in the size of the imported cuts of meat, both of which increased the similarity of the imported product to the domestic product, and thus, according to the United States, intensified the competition from the imported products in a way that profoundly changed the US market. In the US view, the changes in the product mix and size of imported products constitute developments which it did not and could not foresee. Thus it claims to have demonstrated the existence of unforeseen developments and satisfied the requirements of GATT Article XIX:1.

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[64] GATT/CP/106, report adopted on 22 October 1951, GATT/CP/.6/SR.19, at paragraph 9.
[65] Id., at paragraph 11.
[66] Id., at paragraph 12.
[67] Id., at paragraph 10.

7.27 We note at the outset that GATT Article XIX implies that the fulfilment of the three main conditions (which need to be met for the imposition of a safeguard measure to be permitted under the Agreement) have to be the "result" of, *inter alia*, "unforeseen developments". This semantic structure of GATT Article XIX suggests that a *demonstration* of the existence of the circumstance of "unforeseen developments" must be based on factual evidence which was before the competent authority *at the time* when the investigation was carried out and considered by that authority before the determination to apply a safeguard measure was made. The United States, while contesting a publication requirement, seems to accept that a demonstration of the existence of unforeseen developments upon challenge in a dispute settlement proceeding has to be based on evidence *from the time* when the safeguards determination was made.

7.28 We further note that GATT Article XIX does not contain any explicit publication requirement with respect to the consideration of "unforeseen developments". In fact, in terms of provision of information, GATT Article XIX only requires a Member proposing to apply a safeguard measure to notify other Members with a substantial interest as exporters of the product concerned of the proposed measure. In any case, in our view, it is important to distinguish the lack of a requirement to publish an explicit consideration/finding on "unforeseen developments" as such from the requirement to examine information from the record of the safeguard investigation as evidence for the existence of circumstances that were considered by the competent authorities to constitute "unforeseen developments".

7.29 Nonetheless we feel that GATT Article XIX's lack of a specific publication requirement concerning "unforeseen developments" has to be viewed in the context of the provisions of the Safeguards Agreement, including SG Article 3.1, which must be interpreted cumulatively with GATT Article XIX. In particular, Article 3.1 requires, inter alia, that:

> "... The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on *all pertinent issues of fact and law*." (emphasis added).

Thus, the requirement in this provision is phrased in a very broad way. The competent authorities' "findings and reasoned conclusions" must be in respect of *all* pertinent issues of fact and law, not on *some* or *selected* issues of fact and law.[68] Given that GATT Article XIX:1 makes clear that the question of unforeseen developments is intertwined with the basic conditions for the application of a safeguard measure, we conclude that GATT Article XIX:1 read in the context of SG Article 3.1 implies that it must be clear from the published report that the investigating authorities examined the existence of unforeseen developments and came to a reasoned conclusion in this regard.

7.30 We note that our interpretation of GATT Article XIX:1, read in context with the Safeguards Agreement, is consistent with the findings of the Working Party report on *Hatters' Fur*. In that case, the records of the national investigation did not contain a separate finding on the existence of "unforeseen developments". Nonetheless, the Working Party accepted that the competent authority's discussion of the degree of the fashion change and its impact on the competitive situation as discernable from the authority's published determination was sufficient proof that the United States had considered that change as an unforeseen development. We note that in *Korea - Dairy*, the

[68] We note in this context that no party disputes that the published report needs to contain findings concerning the main *conditions* for the lawful imposition of safeguard measures (i.e., (i) increased imports, (ii) serious injury or threat thereof, (iii) causal link between the two) and also concerning other issues (e.g., on the definition of the relevant like or directly competitive products and the pertinent domestic industry), although these conditions are not mentioned in express terms in SG Article 3.1.

Appellate Body agreed with the interpretation of the *Hatters' Fur* Working Party of "unforeseen developments".

7.31 On the basis of the foregoing considerations, we conclude (1) that "two-step" causation is not required under GATT Article XIX:1, i.e., that "unforeseen developments" may be unforeseen changes in the conditions of competition which result in the increased imports causing or threatening to cause serious injury; and (2) that GATT Article XIX:1 read in the context of SG Article 3.1 requires the competent national authority, in its determination, to reach a conclusion demonstrating the existence of "unforeseen developments" in the sense of GATT Article XIX:1. In our view, this substantive requirement of GATT Article XIX:1 could be fulfilled even if the conclusion in question did not use the precise terminology "unforeseen developments". Nevertheless, no matter how such a conclusion is presented in an authority's determination, there needs to be a conclusion that makes clear that changes that had not been anticipated had taken place in the market, and that these changes had resulted in a situation in which increased imports were causing or threatening to cause serious injury.

2. Examination of "unforeseen developments" in this case

7.32 In this dispute, the United States advances essentially two factual elements as "unforeseen developments" as a result of which lamb meat was being imported in such increased quantities and under such conditions as to threaten to cause serious injury to domestic producers of the like or directly competitive products: (i) the change in the product mix of imports from frozen lamb meat toward fresh/chilled lamb meat and (ii) the change in cut size of imported lamb meat.

7.33 In light of our finding, above, that a competent authority should reach a conclusion as to the existence as a matter of fact of unforeseen developments, we need to examine first whether the United States has reached such a conclusion in respect of the change in product mix and/or the change in cut size, of imported lamb. In accordance with our standard of review, we confine our consideration of this issue to the USITC's determination and report. [69]

7.34 The United States argues that a shift in the product mix of imports from frozen lamb meat to chilled/fresh lamb meat occurred towards the end of the investigation period, and that this change increased competition between domestic and imported lamb and constituted an "unforeseen development". Thus, the United States argues, it could impose the safeguard measure consistent with the requirements of GATT Article XIX:1 and the Safeguards Agreement. In the US view, in the terminology of SG Article 2.1 and GATT Article XIX:1, the shift in product mix indicated an unforeseen change in the "conditions" under which increased imports entered the United States.

7.35 On the substance of the argument, the complainants do not contest that as a factual matter the product mix of imports shifted from frozen to chilled/fresh lamb meat over time. Rather, they argue first, that the increase in imports or the composition of those imports cannot itself be an unforeseen development because increased imports have to result from unforeseen developments. As noted above, we do not find such a two-step causation approach to be required, and thus we do not consider this issue any further.

7.36 The second line of the complainants' arguments is that the shift in the product mix was not unforeseen for the United States (i) because it was a long-term development that already had started before the investigation period commenced in 1993 as well as before the relevant tariff concessions were made in 1994/95, and also (ii) because the share of chilled/fresh meat imports remained a minor proportion of total imports even in most recent years.

[69] We note here that the United States has not argued that we should consider any other documents or evidence in considering this matter, nor has it offered any such documents or evidence.

7.37 We thus need to examine whether the USITC demonstrated, as a matter of fact, that the product-mix of imports constituted a development in the conditions under which the imports entered the United States that was unforeseen or unexpected by the United States within the meaning of GATT Article XIX:1.

7.38 From the statistics in the USITC report it appears that imports of fresh/chilled lamb meat were relatively small in the first part of the investigation period. In particular, the report shows that much of the increase in imports between 1995-1997 was in fresh and chilled lamb (i.e., 101 per cent increase c.f. 11 per cent for frozen product), but that frozen lamb still accounted for 65 per cent of total lamb imports from Australia and new Zealand over the entire period of investigation. Thus we note that in 1997 and interim-1998, the share of fresh/chilled meat had risen to 35 per cent of total imports. In our view, this constitutes a significant proportion of total imports. Moreover, the composition of imports shifted rapidly during the latter part of the investigation period, i.e., after the relevant tariff concessions on lamb meat were made at the end of the Uruguay Round negotiations.

7.39 However, the United States does not identify in the published USITC report any conclusion to the effect that the shift in product mix was a development that had a profound effect on the US market for lamb meat[70] and was unforeseen. In fact, the USITC's determination addresses the product mix shift in the contexts of "like product" and "conditions of competition" and simply describes in factual terms that such a change had occurred. In the "like product" section, the determination states that:

> "We find the differences between imported and domestic lamb meat alleged by the respondents, to the extent that they exist, to be limited. While most domestic lamb meat traditionally has been sold as fresh or chilled and imported lamb meat was sold frozen, imported lamb meat increasingly enters as fresh or chilled. Thus, domestic and imported lamb are to a large extent sold in the same form. The majority of respondents (10 of 16) to the Commission's purchasers' questionnaire reported that the grades, cuts, and sizes enumerated in the survey were available from both importer and domestic sources. ..."[71]

7.40 In the section on "conditions of competition", the question of the change in product mix is also addressed in a purely descriptive manner, and is not characterized as unforeseen or unexpected, or in any other way, and seems only to address the degree of substitutability of imported and domestic lamb meat:

> "We find that imported and domestic lamb are somewhat substitutable. Although respondents argued that imported lamb meat was distinguishable from domestic lamb meat in size, taste and consistency of quality and supply, the records shows that imported and domestic products in fact became more similar during the period of investigation. Traditionally, virtually all domestic lamb meat sold in the domestic market was fresh or chilled, and most imported lamb meat was frozen. However, much of the increase in imports between 1995 and 1997 was in fresh or chilled lamb meat, which increased by 101 per cent during that period, as compared to 11 per cent for imports of frozen lamb meat. Moreover, foreign exporters estimate that the major portion of their 1999 increase will be in fresh and chilled lamb meat."[72]

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[70] See, US Answer to Question 1(c) from the Panel (Annex 3-7): "The shift in the product mix of imports … deeply affected conditions in the U.S. market".

[71] USITC Report, Exh. US-1, at I-11.

[72] Id. at I-22-23.

7.41 Similarly, the second of the factual elements advanced by the United States as an unforeseen development, that is the increase in the cut size of imported meat during the investigation period is addressed in the section on "conditions of competition" of the USITC report which contains the statement:

> "In addition, there is evidence that imported cuts have become larger in size and more comparable to domestic cuts."[73]

7.42 While the above statistics in the USITC report may suggest that the USITC viewed these changes as unforeseen developments, it is also obvious that the above quoted statements by the USITC on the degree of similarity and substitutability of domestic and imported products[74] do not constitute a *conclusion* that the shift in the product mix or the increase in the cut size constituted an unanticipated change that created conditions in which increased imports were causing or threatening to cause serious injury. In our view therefore it would not normally be possible to conclude from the above statements that the USITC demonstrated as a matter of fact that the change in product mix or the increase in cut size, was an "unforeseen development" in the sense of GATT Article XIX:1.

7.43 Therefore it is our view that these USITC statements concerning the change in product mix or the increase in cut size, on their face, are simple descriptive statements, and cannot be construed as a conclusion as to the existence of "unforeseen developments" in the sense of GATT Article XIX:1.

(b) Finding on "unforeseen developments"

7.44 In the light of the foregoing, we conclude that the USITC report does not contain a conclusion that either the change in product mix or the increase in cut size was an "unforeseen development" in the sense of GATT Article XIX:1. In view of this, we need not consider whether any such conclusion was "reasoned" in the sense of SG Article 3.1.

7.45 We therefore find that the United States has failed to demonstrate as a matter of fact the existence of unforeseen developments as required by Article XIX:1(a) of GATT 1994.

C. DEFINITION OF THE DOMESTIC INDUSTRY

1. Introduction

7.46 In its safeguard investigation concerning imported lamb meat, the USITC defined the domestically-produced product that was "like" the imports at issue as lamb meat. The respondents in the investigation did not contest that US-produced lamb meat was "like" the imported lamb meat[75], but did argue that live lambs are not "like" lamb meat. In assessing the condition of the domestic industry producing that like product, the USITC included in the industry the growers and feeders of live lambs on the one hand, and the packers and breakers of lamb meat on the other, because according to the USITC's approach, they are all *producers* of lamb meat.

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[73] Id.

[74] We note that the remedy section of the USITC's report contains two additional references to the shift in imports toward fresh/chilled lamb meat. (USITC Report, Exh. US-1, at I-30 and I-31). Because these references are made in the context of remedy, which the USITC addressed in a separate hearing several weeks after having reached its injury and causation determination, they are not relevant to our consideration of whether the injury/causation determination contains a conclusion as to the existence of unforeseen developments.

[75] USITC Report, Exh. US-1, at I-11.

7.47 Australia and New Zealand claim that because the USITC included producers of raw materials and inputs – i.e., growers and feeders of live lambs – as producers of lamb meat, the United States violated SG Article 4.1(c). In the view of the complainants, Article 4.1(c) requires that only producers of the like product, and not producers of raw materials and inputs, can be considered to constitute the domestic industry producing a like product. Thus, according to the complainants, the industry producing the like product should have been limited to packers and breakers of lamb meat, as live lambs are not "like" lamb meat[76]. In the alternative, Australia and New Zealand argue that even if live lambs had been defined by the USITC as a "directly competitive" product to lamb meat, any such definition would not have been legally sustainable. In this context, they cite past cases, in particular those under GATT Article III in which the question of directly competitive products has been addressed.[77]

2. Background

7.48 The US safeguard statute, section 202(c)(6)(A)(i) of the US Trade Act of 1974[78] defines the term "domestic industry" in a manner virtually identical to the relevant text of Article 4.1(c) of the Safeguards Agreement, namely as

> "the domestic *producers as a whole* of the *like* or *directly competitive* Article or those producers whose *collective production* of the like or directly competitive Article constitutes a major proportion of the total domestic production of such article."

7.49 In the lamb meat investigation, the USITC explained its approach in safeguards investigations in identifying the *producers as a whole* of a product under investigation as follows:

> "Most … [safeguard] cases involve firms and workers producing a product at the *same stage* of production as the imported article. However, in some instances firms and workers at an *earlier stage* of processing have accounted for a significant part of the value of the product and have been either the primary proponent or a strong supporter of relief. … Over the years, the Commission generally has taken an approach similar to that developed, and later codified, under title VII [antidumping and countervailing duty provisions]. Under that approach, the *Commission includes producers of the raw product in the industry producing the processed product*, if it finds
>
> (1) there is a *continuous line of production* from the raw to the processed product; and
>
> (2) there is a *substantial coincidence of economic interest* between the growers and the processors. (footnotes omitted, emphasis added)."[79]

7.50 In the case at issue, the USITC found that these criteria were satisfied. In particular, on the basis of these criteria, the USITC found that the domestic producers of lamb meat consisted of the growers and feeders of *live* lambs as well as the packers and breakers of lamb *meat* because:

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[76] *See* First Written Submission of New Zealand, Annex 2-1, at section VII.G.2(a).

[77] First Written Submission of New Zealand, Annex 2-1, at paragraphs 7.42-7.49, First written submission of Australia, Annex 1-1, at paragraph 113.

[78] 19 U.S.C. 2252(b).

[79] USITC Report, Exh. US-1, at I-12.

> "[T]he evidence clearly establishes a *continuous line of production* from a raw product, live lambs, to the processed product, lamb meat […]
>
> There is also evidence of a *coincidence of economic interests* between lamb growers and processors. The value added by lamb growers and feeders (*i.e.*, the value of slaughter-ready live lambs) accounts for 88 percent of the wholesale cost of lamb meat. Thus, packers and breakers can be viewed largely as *finishers* of products for which the *vast majority of value* [88 per cent] has already been created by growers and feeders. Packers' and breakers' operations are therefore highly affected by the supply and quality of the live lambs produced by growers and feeders."[80] (footnote omitted, emphasis added).

7.51 The USITC further stated, in respect of its finding of "a coincidence of economic interests", that there was evidence of some degree of vertical integration (*i.e.*, that some growers engage in both feeding and slaughtering of lambs) and evidence that "the price of lamb meat affects all four industry segments similarly (that is, when processors do well, growers and feeders also benefit, but when processors confront lower prices, they pass the lower prices back to feeders and then growers, and all suffer to some extent)".[81]

3. Arguments of the Parties

(a) Australia and New Zealand

7.52 New Zealand and Australia contend that the methodology adopted by the USITC in defining the domestic industry (i.e., continuous line of production and coincidence of economic interests) finds no basis in the text of the Safeguards Agreement. They assert that for the purposes of a safeguards investigation, the determination of what constitutes the "domestic industry" must turn on whether the producers in question *produce* a "product" that is "like or directly competitive with" imported lamb meat. That is, the determination of what constitutes the like or directly competitive product drives the determination of which producers constitute the industry producing that product. Hence, growers and feeders of *live lambs* would only fall within this definition if the *live lambs* produced by them were deemed a product that is "like or directly competitive" with *lamb meat*.[82] For the complainants, the fact that the United States has traditionally used an alternative approach is irrelevant.[83]

7.53 Thus, the complainants argue, SG Articles 2.1 and 4.1(c) require a determination as to what industry produces a product that is "like or directly competitive" with imported lamb meat. They contend that, contrary to this, the United States has instead applied a test to determine what constitutes the abstract class of "producers as a whole". In their view, the qualifying term "as a whole" defines the scope of the producers within an industry and is not a term that defines the scope of the industry itself.[84]

7.54 The complainants further point to past dispute settlement cases, which they argue consistently have rejected the idea that a determination of what constitutes the relevant industry should be made on the basis of some notion of vertical integration.[85] In this respect, the complainants rely largely on the reports of the panel on *United States – Definition of Industry Concerning Wine and Grape Products*

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[80] Id. at I-13.
[81] Id. at I-14.
[82] New Zealand First Written Submission, Annex 2-1, at paragraph 7.41.
[83] New Zealand Oral Statement, First Meeting of the Panel, Annex 2-5, at paragraph 30.
[84] Id. at paragraphs 27-29.
[85] New Zealand's Second Written Submission, Annex 2-9, at paragraph 3.4.

("*US – Wine and Grapes"*)[86] and the panel on *Canada – Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC* ("*Canada – Beef"*).[87]

7.55 In the alternative, the complainants oppose the US argument that, as a factual matter, extensive integration exists between firms at different stages in the continuous line of production. In their view, most of the integration actually found by the USITC was between growers and feeders on the one hand and packers and breakers on the other, and there is little evidence, if any, of firms which both grow live lambs and engage in packing operations.[88] Therefore, the complainants reject the US argument that the industry is so highly integrated that it is not possible to separate respective sectors of the production process.[89]

(b) United States

7.56 The United States approaches the issue of whether the USITC's definition of the "domestic industry" is consistent with the provisions of the Safeguards Agreement from a different angle. It argues that the relevant consideration is not whether live lambs are "like or directly competitive" with lamb meat, but whether the USITC majority correctly found that growers, feeders, packers and breakers all can be considered to *produce* the like product, i.e., lamb meat. In the alternative, the United States contends that in any event, the USITC would have reached the same conclusions as to threat of serious injury and causation if it had limited the industry to lamb meat packers and breakers.[90]

7.57 The United States notes that the USITC drew on its own practice relating to anti-dumping and countervailing duties in finding that the "domestic industry" producing lamb meat included the *producers of the raw product.* As noted above, this methodology considers whether (1) there is a *continuous line of production* from the raw material (i.e., live lamb) to the processed product (lamb meat); and (2) there is a *substantial coincidence of economic interest* between the producers of the raw material (i.e., growers and feeders) and the processors (i.e., packers and breakers).

7.58 In support of this approach, the United States stresses that the growers and feeders together contribute approximately 88 per cent of the value of the wholesale price of lamb meat. It claims that limiting the definition of "producer" to those who contribute only limited value-added toward the final stages of production would create an *artificially defined 'domestic industry'*, especially where extensive *vertical integration* exists. The United States argues that such an artificially narrow approach to defining "domestic industry" in turn would have the negative effect of denying the possibility of safeguard relief to producers of raw products even where such producers were clearly suffering from or threatened with serious injury caused by imports of processed end products.[91]

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[86] Adopted by the SCM Committee on 28 April 1992, SCM/71, BISD 39S/436.

[87] Not adopted, SCM/85, dated 13 October 1987.

[88] New Zealand's Responses to Questions by the Panel, Annex 2-8, Response to Question 5.

[89] US First Written Submission, Annex 3-2, at paragraph 73.

[90] Closing Statement of the United States at the First Meeting of the Panel, Annex 3-5, at paragraph 14. We note in this regard that footnote 61 of the USITC's determination (Exh. US-1 at. I-16) states that "…we find that all sectors show evidence of a threat of serious injury…", without elaborating. It is not clear whether the USITC meant in this statement to equate a finding that there was "evidence" of a threat of injury in respect of all sectors with a hypothetical finding that all sectors individually were threatened with serious injury. Even if this was the USITC's meaning, we do not consider that such a statement, contained in a single sentence fragment with no supporting facts or explanation, can be viewed as constituting a finding by the USITC that all industry sectors individually were threatened with serious injury.

[91] The United States argues in particular that "remedial measures that addressed on the effects of imports on one aspect of a continuous line of production would be inadequate to 'prevent or remedy serious

7.59 Furthermore, the United States maintains that any attempt to utilise a more narrow approach to the delimitation of the "domestic industry" would prove difficult since the US lamb industry "is vertically integrated in such a way that it is *virtually impossible* to analyse each segment of the domestic industry producing lamb meat by focusing on only one, discrete sector. … [The] inability to disaggregate the respective sectors producing the like product requires that the definition of domestic industry include all four sectors contributing to the production of the like product".[92] The United States relies in this respect on the report of the panel on *New Zealand – Imports of Electrical Transformers from Finland*[93] ("*New Zealand – Transformers*") which rejected that argument that the transformer industry at issue consisted of four distinguishable ranges of transformers which should have been considered separately for purposes of the injury and causation determination.

7.60 The United States also submits that it only applies the above USITC approach in investigations involving "processed *agricultural* products."[94] Evidence of this is found in the test applied by the USITC, which provides that there needs to be a continuous line of production *from the raw to the processed product.* The United States concludes that this test does not "simply provide for relief to be available to input suppliers *in general* when they suffer injury from imports equivalent to that normally suffered by those who produce end products".[95]

7.61 The United States dismisses the relevance of the past GATT panel report on *Canada – Beef*[96] because it remains unadopted. Further, the United States also distinguishes the report of the panel on *US – Wine and Grapes* from this case on the basis that that panel had decided that grape growers were not part of the domestic wine-producing industry because the production of wine grapes was *not wholly dedicated* to wine production, i.e., in a previous USITC investigation it was found that only 42-55 percent of wine grapes were used in the production of wine, and there were other major markets for wine grapes, such as table grapes and raisins. As a result, it was possible to separately identify the production of wine grapes and the production of wine.

7.62 In contrast, the United States asserts that disaggregation of the lamb industry is extremely difficult because US lambs are overwhelmingly raised for meat rather than for wool[97] and that the United States does not conduct trade in live lambs. Furthermore, unlike wine grapes, which go through a process of treatment and fermentation prior to bottling as wine, lamb meat remains substantially the same during processing and is never transformed into a different article.[98]

4. Discussion by the Panel

7.63 The complainants' claims under SG Article 4.1(c) raise the basic questions of whether the broad reading of that provision adopted by the United States is permitted, or whether the narrow reading advocated by the complainants is required. In assessing these claims, we will consider in detail the text of the provision, taking into account past panel reports that have addressed similar

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injury and to facilitate adjustment' under Article 5.1, since adjustments made by only one segment of the line of production would not insulate it from the effects of increased imports on other segments". (*See* US First Written Submission, Annex 3-2, at paragraph 70.)

[92] Id. at paragraph 73.

[93] Panel Report on *New Zealand – Imports of Electrical Transformers from Finland*, adopted on 18 July 1985, BISD 32S/55.

[94] The United States also argues, however, that it does not in fact limit use of this test to processed agricultural products, but rather could apply it in any situation in which the two criteria were met.

[95] US Response to Question 2 from the Panel, Annex 3-7, at paragraph 28.

[96] US First Written Submission, Annex 3-2, at paragraph 72.

[97] Id. at paragraph 75.

[98] Id. at paragraph 74.

issues as well as relevant negotiating history, in particular with a view to determining whether the text can support the methodology applied by the USITC as to "continuous line of production" and "coincidence of economic interests".

(a) The definition of the "domestic industry" in SG Article 4.1(c)

7.64 SG Article 4.1(c) provides in relevant part that a "domestic industry"

> "shall be understood to mean 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*." (emphasis added).

7.65 We recall that in this case, the USITC found that there was a "like product", lamb meat, and did not make any finding concerning whether live lambs (or any other domestically-produced product) were "directly competitive" with the imported lamb meat. Given that the USITC[99] only made a finding concerning "like product" – lamb meat – the question before us is whether the USITC's broad determination of the *producers* of that "like" product is consistent with the Safeguards Agreement.

7.66 We turn first to the ordinary meaning of the relevant portion of the text, i.e., SG Article 4.1(c)'s industry definition: "*producers as a whole* of the *like* or directly competitive products … or those whose *collective output* of those products constitutes a *major proportion* of the total domestic production of those products" (emphasis added).

(i) "Producers … of the like … products"

7.67 We consider that the basic elements of SG Article 4.1(c)'s industry definition are contained in the phrase "producers … of the like or directly competitive products". To us, the ordinary meaning of this phrase is straightforward: the producers *of an article* are those who make *that* article. That is, the determination of the relevant domestic industry is derivative from the identification of the relevant "like" or "directly competitive" products. We find no basis in the text of this phrase for considering that a producer that does not itself make the product at issue, but instead makes a raw material or input that is used to produce that product, can nevertheless be considered a producer of the product.

7.68 The second part of the definition in SG Article 4.1(c), specifically the reference to the producers "whose … *output*" includes "those products", explicitly confirms our reading of the basic industry definition. In particular, this part of the definition underscores that the relevant industry consists of producers that themselves have "output" of the "like" or "directly competitive" products.

7.69 We find further support for our reading of the phrase "producers … of the like … products" in numerous dictionary definitions: a "*producer*" is variously defined as "a person or a thing which produces something",[100] or "one that produces, especially one that grows agricultural products *or*

[99] The USITC investigation covered only imported lamb meat, and excluded imported live sheep and live lambs. (USITC Report, Exh. US-1, at I-3, footnote 1). The USITC plurality found that the domestic product that was "like" the imported lamb meat was domestic lamb meat (Id. at I-12). Although two individual Commissioners found that domestically produced live sheep were "directly competitive" with imported lamb meat (Id. at I-8-9, footnotes 7-8), the USITC as a whole did not rely on the concept of "directly competitive" products (Id. at I-10, footnote 10). Rather, the USITC found that the domestic industry producing lamb meat encompassed both 'growers and feeders of live lambs as well as packers and breakers of lamb meat' (Id. at I-13).

[100] Oxford English Dictionary, at. 2367.

manufactures articles".[101] To "*produce*" means to "bring a thing into existence, bring about, effect or cause an action or result",[102] or "to give being, form or shape to, make, or manufacture".[103] A "*product*" is a "thing produced by an action, operation or natural process"[104] or "something produced, or the amount, quantity or total produced".[105] The term "*output*" means "what is produced by an industry or process" or "the action or process of supplying an output, production".[106]

7.70 The important common element of these dictionary meanings is that there is a clear link and close connection between the one who undertakes an action to bring an article into existence and the article resulting from this action. This supports our view that a given enterprise can be considered as a *producer* of only those goods that it actually makes. By this logic, a producer that makes primary or intermediate goods used in the production of further processed goods must be considered a producer of the primary or intermediate good, rather than of the processed good that it does not itself ever produce.

7.71 Applying this ordinary meaning to the facts of this case – if not to state the obvious – points to the conclusion that growers and feeders are producers of live lambs, whereas packers and breakers of lamb carcasses are producers of lamb meat. This is so because the good produced by growers and feeders, i.e., live lambs, is not itself the like product at issue, i.e., lamb meat. The lamb growing and feeding operations give rise to a product which is different from the product that results from the subsequent processing operations where lambs are slaughtered and carcasses are cut into lamb meat for final consumption.

(ii) "Producers as a whole"

7.72 We recall that in defending the USITC's decision to include growers and feeders in the lamb meat industry, the United States relies on the phrase "producers as a whole" from the industry definition in SG Article 4.1(c).[107] In particular, the United States contends that the growers and feeders form part of the producers "as a whole" of lamb meat. We further recall that the complainants disagree with this construction of the phrase "as a whole", arguing that in fact this phrase has to do with the representativeness of the data collected from producers in the industry, and not with which producers should be included in that industry.

7.73 We thus next consider whether the phrase "producers *as a whole*" can be seen as context relevant to the interpretation of the basic industry definition, which would permit an industry to be defined so as to include input producers, as was done by the USITC in this case. We note in this regard that the phrase "producers *as a whole*" is grammatically linked to, and juxtaposed with, the phrase "or those whose collective output … constitutes a *major proportion* of … total … production". This context implies that the phrase "as a whole" like the phrase "major proportion" relates to the representativeness of the data pertaining to the condition of the industry. That is, pursuant to SG Article 4.1(c), for purposes of determining injury or threat, the domestic industry to be investigated consists in the first instance of *all* producers of the relevant product in their entirety, or – at a minimum – of those producers accounting for a major proportion of the total production of the product. We recall in this regard that in response to a question from the Panel, the United States seems to acknowledge that the phrase "as a whole" – at least also – relates to the representativeness of

[101] Webster's New Encyclopaedic Dictionary, at 805.
[102] Oxford English Dictionary, at 2367.
[103] Webster's New Encyclopaedic Dictionary, at 805.
[104] Oxford English Dictionary, at 2367.
[105] Webster's New Encyclopaedic Dictionary, at 805.
[106] Oxford English Dictionary, at 2040.
[107] *See*, e.g., US First Submission, Annex 3-2, at paragraphs 63 and 126.

the data concerning the industry,[108] not only to the scope of the industry as it claims under its main line of argumentation.

7.74 We conclude, on the basis of the foregoing analysis, that the phrase "producers as a whole" is not related to the process of manufacturing or transforming raw materials and inputs into a final product, and thus provides no contextual support for including producers of raw materials or inputs as part of the industry producing a like product. In our view, this phrase provides a quantitative benchmark for the proportion of producers – within an industry properly defined on the basis of the like output product it makes – which a safeguards investigation has to cover. We note that – if the phrase "as a whole" could be used to widen the scope of an industry to include producers of any upstream products – competent national authorities could "tailor" domestic industries of different scope as they saw fit simply by choosing between two alternatives under SG Article 4.1(c).

7.75 Another element of relevant context for interpreting the "domestic industry" definition of SG Article 4.1(c) are the parallel provisions of the WTO Agreements on Subsidies and Countervailing Measures ("SCM") and on Anti-dumping ("AD"). In particular, the three Agreements' definitions of the industry producing a *like* product are essentially identical.[109] We also note that, while the SCM and AD Agreements refer exclusively to "like products", the SG Agreement also refers to "directly competitive products", but in the absence of a USITC finding on "directly competitive products" in this investigation, this issue is not before us. Thus the distinction between "like" and "directly competitive" products is not relevant to the complainants' claims under SG Article 4.1(c). For these reasons, we consider that particularly in the present safeguard dispute, past panel reports concerning industry definition in the context of the SCM and AD Agreements are relevant to our interpretation and application of the industry definition under the Safeguards Agreement. We discuss the past dispute settlement practice interpreting these provisions in detail below.

7.76 In our view, this reading of the industry definition is consistent with the object and purpose of the Safeguards Agreement. In particular, this reading is consistent with the Agreement's objectives of, on the one hand, creating a mechanism for effective, temporary protection from imports to an industry that is experiencing serious injury or threat thereof from imports in the wake of trade liberalization, and on the other hand, encouraging "structural adjustment", and "clarify[ing] and reinforc[ing] the disciplines of … Article XIX of GATT", in view of "the need to enhance rather than limit competition in international markets".[110]

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[108] The question posed by the Panel to the United States was: "Please comment on New Zealand's argument at para. 29 of its [first] oral statement that the term 'as a whole' in Article 4.1(c) has to do with the representativeness of data used in an investigation in respect of the entire industry, and not with the scope or breadth of the domestic industry itself." The United States replied: "The term 'as a whole' is not defined by the Safeguards Agreement. *While the United States supports New Zealand's view that the purpose of the term may be to ensure that a safeguard investigation is not limited to selected individual members of an industry*, it rejects the claim that 'as a whole' is a qualifying term meant to define the scope of the producers *within* an industry. Contrary to New Zealand's additional assertion, the United States has not used the term 'as a whole' to expand the membership of an industry beyond those who produce the 'like or directly competitive product'." US Response to Panel Question 5, Annex 3-7 (emphasis added).

[109] The respective definitions in AD Article 4.1 and SCM Article 16.1 are identical to one another in pertinent part, and read as follows: "…the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products."

[110] See, *inter alia* (1) the preamble to the SG Agreement: "*Recognizing* the importance of structural adjustment and the need to enhance rather than limit competition in international markets"; (2) Articles 5.1 and 7.1, which provide that a Member shall apply safeguard measures only to the extent necessary and for the period necessary to prevent or remedy serious injury and to *facilitate adjustment*; and (3) Article 7.2 which permits the

7.77 If WTO law were not to offer a "safety valve" for situations in which, following trade liberalization, imports increase so as to cause serious injury or threat thereof to a domestic industry, Members could be deterred from entering into additional tariff concessions and from engaging in further trade liberalisation. It is for this reason that the safeguard mechanism in Article XIX has always been an integral part of the GATT. However, we note that SG Article XIX of GATT 1994 as well as SG Article 11.1 both refer to safeguard measures as "emergency" measures, and the Appellate Body has characterized them as "extraordinary" remedies[111] A conceptual approach to defining the relevant domestic industry which would leave it to the discretion of competent national authorities how far upstream and/or downstream the production chain of a given "like" end product to look in defining the scope of the domestic industry could easily defeat the Safeguards Agreement's purpose of reinforcing disciplines in the field of safeguards and enhancing rather than limiting competition. These considerations based on the object and purpose of the Safeguards Agreement thus further support a reading of the industry definition in SG Article 4.1(c) as not permitting input producers to be included as part of the industry producing the "like" end-product.[112]

(b) Past panel reports

7.78 As we have stated above, given that the industry definitions in the SCM and AD Agreements are virtually identical to that in the Safeguards Agreement in so far as "like products" are at issue (as in this case) we consider that past panel cases concerning the industry definition in disputes on antidumping, subsidies and countervailing measures are particularly relevant to our examination of the complainants' claim against the industry definition used by the USITC in this case.[113] These include in particular the reports of the panels on *Canada – Beef*[114] and *US – Wine and Grapes*[115], but also the *New Zealand – Transformers*[116] report. We note in this regard that the parties as well have extensively referred in their arguments concerning "domestic industry" to interpretations developed in these past panel reports.

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extension of a safeguard measure beyond its initial period of application if in a new investigation it is determined that the safeguard measure continues to be necessary to prevent or remedy serious injury and that there is evidence that the *industry is adjusting*.

[111] Appellate Body Report on *Argentina – Footwear*, at paragraph 94.

[112] Our conclusion is subject to the *caveat* that – in a factual situation where a so-called input product can be considered to be "like" to the final product – producers of that input product could be included in the domestic industry producing the final product.

[113] We note that the reports in the latter two cases were adopted, while that in the *Canada – Beef* case was not. In this regard, we recall the Appellate Body's statements in *Japan – Alcohol* that "adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute. (footnote omitted)." The Appellate Body further agreed with the Panel in that case that "'a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant'". *See* Appellate Body Report on *Japan – Taxes on Alcoholic Beverages*, adopted on 1 November 1996, (WT/DS8/10/11/AB/R), pp. 14-15, citing the panel report, at paragraph 6.10

[114] Report of the Panel on *Canada - Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC*, dated 13 October 1987, not adopted, SCM/85.

[115] Report of the Panel on *United States – Definition of Industry Concerning Wine and Grape Products*, adopted by the Committee on Subsidies and Countervailing Measures on 28 April 1992, SCM/71, BISD 39S/436.

[116] Panel Report on *New Zealand – Imports of Electrical Transformers from Finland*, adopted on 18 July 1985, BISD 32S/55.

(i) The *United States – Wine and Grapes* case

7.79 We find quite pertinent to the question before us the adopted report of the panel on *United States – Wine and Grapes* under the Tokyo Round Subsidies Code, to which the parties also refer. In that case, the panel found inconsistent with the Code's industry definition a US law which mandated specifically that in countervailing duty cases involving imported wine and grape products, the domestic producers of the principal raw agricultural product (i.e., grapes) were to be included as part of the industry producing wine and grape products if they alleged injury or threat thereof caused by imports of those products.

7.80 The parties agreed that wine and grapes are *not like* products. The panel held that the producers of the like products could be interpreted to comprise *only* producers of wine.[117] It also considered whether, in the light of the "close relationship" between grape and wine production, the wine-grape growers could be regarded as part of the industry producing wine. In this regard, the panel took into account that the parties agreed that in the United States, wineries did not usually grow their own grapes, but rather bought them from grape growers. Given this, the panel found that "irrespective of ownership, a *separate identification* of production of wine-grapes from wine … was possible and that therefore in fact two separate industries existed in the United States…"[118] The *Wine and Grapes* panel concluded that

> "[h]aving found that in fact two *separate* industries existed in the United States, namely an industry comprising *wine-grape growers* on the one hand and an industry comprising *wineries* on the other and having found that Article 6.5 of the [Subsidies] Code gave a precise definition of 'domestic industry', a definition which in the view of the Panel could not be interpreted extensively, … [the law at issue] was inconsistent with the definition of "domestic industry" contained in …[Subsidies] Code."[119]

7.81 In reaching this conclusion, the panel took the view that "once such a separate identification was possible (e.g., because of the structure of production), *economic interdependence* between industries producing *raw* material or *components* and industries producing the *final* product" was not relevant for a like product determination.[120] As discussed above, we too find no basis in the text of the Safeguards Agreement that would permit this consideration of economic interdependence or coincidence of economic interest to be taken into account in defining the domestic industry.

7.82 The United States distinguishes the present case from the *Wine and Grapes* case, *inter alia*, on the basis of certain factual arguments, including that grapes were not wholly dedicated to wine production. In that case, the USITC had determined that only 42-55 per cent of wine grapes were used in the production of wine and that there were other major markets for wine grapes, such as table grapes and raisins. In contrast, the United States points out that the USITC found that lambs are overwhelmingly raised for meat rather than for wool and that the ratio of net sales/revenue for slaughter and feeder lambs in comparison to net sales/revenues obtained by US lamb growers from any other item including wool increased from 84.6 per cent in 1997 to 88.9 per cent in interim-1998.[121]

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[117] Panel Report on *United States – Wine and Grapes*, op. cit., paragraph 4.2.
[118] Id., at paragraph 4.3.
[119] Id., at paragraph 4.6 (emphasis added).
[120] Id., at paragraph 4.5.
[121] US First Written Submission, Annex 3-2, at paragraph 75; USITC Report, Exh US-1, at II-4, II-26.

7.83 We recall the *Wine and Grapes* panel's finding, with which we agree, that the factor of economic interdependence between producers of raw, intermediate and final products is not relevant for the industry definition. Even assuming *arguendo*, that nevertheless criteria such as "continuous line of production" and "inputs wholly dedicated to the production of a single end-product" were at all relevant, we note that the USITC report contains no information as to the percentage of live lamb production dedicated to the production of lamb meat other than for the years covered by the safeguard investigation. It thus is unclear to what extent such predominant dedication to meat as opposed to wool production was a temporary result of the removal of the wool subsidies.[122]

7.84 Moreover, as in *Wine and Grapes*, where alternative uses for grapes were found to exist, the USITC report makes clear that there are alternative uses for live lambs, including growing mature sheep for mutton meat as well as for wool production or growing ewes for breeding purposes.[123] The extent to which these alternatives are actually used may depend on amounts of imports, but also on market conditions, consumer preferences and the possibility to generate equivalent profits with these alternative uses. Thus, even assuming *arguendo* in the alternative that the degree of an input's dedication to a final product were relevant for the industry definition, we find no factual evidence that the situation of lamb growers and feeders in respect of the availability of alternative uses for live lambs in the longer run is fundamentally different from that of the grape growers as described in the *Wine and Grapes* report.

7.85 The United States also submits that unlike grapes, which undergo a process of treatment and fermentation prior to bottling as wine, lamb meat remains substantially the same during processing and is never transformed into a different article. Here again, however, in our view no such factual distinction can be drawn. In the case of both lamb and wine, we note that the agricultural input product (i.e., grapes and live lambs, respectively) is transformed into a different end-product (i.e., wine or meat, respectively).

7.86 In the light of the foregoing, we consider that the reasoning of the *Wines and Grapes* panel is both directly relevant to, and fully consistent with, our conclusion that the domestic industry in the lamb case should be limited to packers and breakers. Analogous to *Wine and Grapes*, live lambs and lamb meat not being like products to one another, producers of live lambs cannot be included as producers of lamb meat.

(ii) The *Canada – Beef* case

7.87 We also find that the reasoning of the panel in the *Canada – Beef*[124] case is highly relevant to, and strongly supports, our reading of SG Article 4.1(c). In *Canada – Beef*, the EC challenged a

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[122] In its interim review comments, the United States argues that information on this point was contained in a 1995 USITC study on lamb meat ("Lamb Meat: Competitive Conditions Affecting the US and Foreign Lamb Industries") which was before the USITC in the safeguard investigation. We note however that this study was not part of the record before us, nor was information derived from it reproduced in the USITC's report on the safeguard investigation. Rather, only the title of the study was cited in the USITC Report. Furthermore, while in its interim review comments the United States argues that this study shows that income received by live lamb producers from *shorn* wool declined from 12 percent in 1990 to 5 percent in 1993, New Zealand in its comments on the US comments argues that the very same study shows that income from shorn wool *plus* the Wool Act payments was higher during that period, declining from 30 percent to 23 percent, and would be even higher if income from wool pelts and slipe wool were included. In any case, we recall our view that economic interdependence between producers of inputs and final products is not relevant for industry definition, and thus see no reason to further consider these statistics.

[123] USITC Report, Exh. US-1, at I-30.

[124] Report of the Panel on *Canada – Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC*, dated 13 October 1987, not adopted, SCM/85.

Canadian countervailing duty investigation in which the producers and feeders of *live cattle* were treated as part of the domestic industry producing *manufacturing beef.* The factual and legal issues arising in *Canada – Beef* are strikingly similar to those of the present dispute.

7.88 The parties were in agreement that the "like" product was manufacturing beef, but differed on whether the domestic industry producing manufacturing beef included the producers and feeders of live cattle. Likewise, in the lamb case, the parties agree that the "like" product is lamb meat, but they disagree as to whether the industry producing lamb meat includes the growers and feeders of live lamb.

7.89 The *Canada – Beef* panel agreed with the parties that the *like* product was manufacturing beef, and that live cattle produced by ranchers and feedlots constituted a product *different* from the like product. The panel also observed that the relevant provision of the Tokyo Round Subsidies Code (Article 6:5)[125] did not define the term "producers", but that "in common usage, one is normally considered the 'producer' of only those goods one actually makes and sells; one who produces a raw material is not normally regarded as a 'producer' of the end-product.[126]

7.90 Before the *Canada – Beef* panel, Canada argued that a narrow definition of the domestic industry was not appropriate where there was (i) a continuous sequential process of production involving the use of only one raw material input which, by undergoing relatively little processing prior to becoming an end-product, accounted for a substantial proportion of the value of the end-product; (ii) an input which was functionally dedicated to the manufacture of only one end-product and which had no economically viable alternative uses; and (iii) a situation of economic interdependence in which end-product producers were able to "pass-back" to input producers a decrease in the price of the end-product resulting from competition from subsidized imports.[127] We note that these criteria are very similar to those under the two-pronged test applied by the USITC in the lamb investigation.

7.91 The *Canada - Beef* panel articulated concerns with respect to Canada's criteria for deciding in which cases to include input producers as producers of a processed product. Concerning the criteria used by Canada, that panel understood that these were meant to identify situations in which all or most of the adverse economic impact from subsidized imports would be concentrated on the raw material supplier. [128] It found, however, that this interpretation by Canada would

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[125] The industry definition in Article 6.5 of the Tokyo Round Subsidies Code is identical to that in Article 16.1 of the WTO SCM Agreement

[126] *See, Canada – Beef,* op. cit. at paragraph 5.2. In that case, virtually all of the processing operations were under separate ownership from the live cattle operations.

[127] *See, Canada – Beef,* op. cit., at paragraph 3.12. The reasons for the Canadian Import Tribunal to define the industry in this way were that (i) "the production of manufacturing beef in Canada was a continuous sequential process commencing with the live cattle and ending with the boxed grinding beef"; (ii) "there was a high degree of functional dedication and economic dependence in this sequential process"; (iii) "no one disputed that the primary purpose of raising beef cattle was to produce beef, and that grinding beef was merely one of the product forms produced by the cattlemen". *See, Canada – Beef,* op. cit., at paragraph 2.2.

[128] The *Canada – Beef* panel also recalled that although there had been proposals in the negotiations leading to the Anti-dumping Code of 1967 to allow a certain flexibility in defining the domestic industry, so as to encompass producers whose products were "competitive" or in "close competition" with the imported product, in the end the "narrow" definition of domestic industry based on the like product concept was adopted in the 1967 Code. The panel noted that that definition was imported unchanged into the Tokyo Round Code. See *Canada – Beef,* op. cit., at paragraph 5.11. As noted, the same definition was subsequently introduced, again unchanged, into the WTO Agreements on Anti-dumping, Subsidies and Safeguards.

> "*introduce an element of open-endedness into the Code's definition of 'domestic industry'* of the kind that the code drafters had been concerned to avoid. The principle underlying the Canadian interpretation was that relief ought to be made available to *input* suppliers when they *suffered injuries* from subsidised imports *equivalent* to the injuries normally suffered by those who produce *end-products*. … Canada was asserting that this principle applied *only to the situation described* [in the criteria applied by Canada] above. The Panel was *not* persuaded, however, that this situation was so *unique* that it could be distinguished from many other claims for relief that could be advanced under the same principle. *There was no reason to believe that the degree of injury suffered by input suppliers meeting the Canadian criteria would be any greater than the degree of injury subsidized imports might cause to input suppliers in any number of other cases*.[129] Nor was any greater-than-normal degree of injury required to satisfy these criteria. In the present case, for example, the criteria had been satisfied by a 'threat of injury' finding involving a product which was only one of several products produced by the same production facilities … *Nor*, finally, was there *any basis for limiting* this exception to cases involving processed *agricultural* products. Although all the cases called to the Panel's attention had involved processed *agricultural* products, there was *nothing in the text* or in the negotiating history of the Code that *could justify a special rule* for such products. The Panel did not, of course, question Canada's declared intention to limit the exception to cases meeting the three main criteria indicated. The Panel's decision, however, could only rest on *principles of general applicability*. In the Panel's judgment, any principle justifying the Canadian exception would *open the door* to claims of standing by a substantial number of *other input suppliers*."[130]

7.92 The argumentation of the parties in the lamb dispute is largely similar to that before the *Canada – Beef* panel. The complainants argue that the USITC's above-mentioned two-prong test could lead to competent national authorities devising open-ended industry definitions, without objective limitations in practice. In contrast, the United States (as Canada did) argues that it applies its test only in the case of processed agricultural products where the inputs are wholly dedicated to the production of the processed product, and thus would not open the door to large scale tailor-making of industry definitions.

7.93 We are not however persuaded by US argumentation in the present dispute, and we too are concerned by the possibility of "open-endedness" in defining domestic industries that was highlighted by the *Canada – Beef* panel. We see no basis in the text of the Safeguards Agreement, nor has the United States put forward any *principles of general applicability*, to effectively limit the inclusion of input producers as producers of an end-product to cases involving processed agricultural products, or to any subgroup of cases.

7.94 The *Canada – Beef* panel also rejected the argument that industry definitions based on the like end product could cause outcomes to vary according to the degree of vertical integration which

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[129] *See, Canada – Beef*, original footnote 5 to paragraph 5.12: "The criterion requiring that the input in question account for 'a substantial portion of the value of the end-product' has nothing to do with the severity of the economic harm that subsidized imports may cause to any particular input supplier. In addition, while the fact that an input has 'no economically viable alternative uses' is certainly relevant, the existence of an alternative market will cushion the impact of subsidized imports only to the extent that prices in the alternative market are equal to or higher than the import-depressed price in the principal market."

[130] Panel Report on *Canada – Beef*, op. cit., at paragraph 5.12. Emphasis added, footnotes in part omitted.

happened to exist at a particular time or in a particular country because, the panel found, the definition of "domestic industry" involves two criteria, neither of which depends on vertical integration as such:

> "First, there must be a determination of which product or range of products constitutes the 'like product'. If the production process for that 'like product' happens to be subdivided into two or more separate stages, that fact will not mean that each stage must be considered a separate 'domestic industry'; as long as the products at the various stages are enough 'like' each other to be considered different forms of the same 'like product', the separate production stages will all be part of the same 'domestic industry'. The second criterion - whether the production process for the 'like product' can be separately identified - is likewise independent of vertical integration. *If the process of production for one 'like product' can be separately identified, it will be treated as a separate industry whether or not it is owned in common with parallel, earlier or subsequent production lines. The only case in which the fact of common ownership will affect the definition of industry will be the case in which common ownership results in such a complete integration of production processes that it is impossible to analyze each one separately*."[131]

7.95 We agree that the factors of vertical integration or common ownership are not in themselves determinative or even particularly relevant for the scope of the domestic industry. Rather, the issue is (i) whether the products at various stages of production are *different forms of a single like product* or have become *different products*; and (ii) whether it is possible to *separately identify* the production process for the like product at issue, or whether instead common ownership results in *such complete integration* of production processes that *separate identification and analysis of different production stages is impossible*.[132]

7.96 In the present dispute, the parties agree and the USITC found that the production process from live lamb to lamb meat has resulted in *separate* products, *not* products that are different forms of a *single like* product. Likewise, assuming *arguendo* that vertical integration and common ownership were at all relevant for the defining the scope of an industry, there is little vertical integration of growing and feeding operations with packing and breaking operations, and in any case it is clearly possible to *separately identify* the different physical stages of the production process. Moreover, according to the information contained in the USITC report, there is relatively little vertical integration in the sense of common ownership between growers, feeders, packers and breakers of lamb.[133] Furthermore, to the extent that there is an overlap in activities between companies, this overlap occurs predominantly between growing and feeding operations, or between packing and breaking operations,[134] but it does not occur between growers and feeders on the one hand and packers and breakers on the other.[135] In other words, we find no evidence to support the US assertion that the US lamb industry "is vertically integrated in such a way that it is virtually impossible to analyze each segment … " and that "[t]he inability to disaggregate the respective sectors requires that the definition of domestic industry include all four sectors contributing to the production of the like product."[136] We thus conclude that in this case it is possible to separately identify the physical production processes involved in producing live lambs on the one hand and lamb meat on the other, and, in addition,

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[131] Id., at paragraph 5.14 (emphasis added).
[132] Id.
[133] USITC Report, Exh. US-1, at II-11ff, II-12, I-14.
[134] Id. at II-29, II-33.
[135] Id. at II-11-16.
[136] First Written Submission of the United States, Annex 3-2, at paragraph 73.

separate data clearly are available for the four industry segments, as evidenced by the fact that the USITC collected such data.[137]

7.97 We recall that the United States argues that the reasoning of *Canada – Beef* and *US – Wine and Grapes* are irrelevant to the lamb case at hand because these panels applied provisions[138] of the Tokyo Round SCM and Anti-dumping Codes narrowing the scope of the domestic industry which the Safeguards Agreement does not provide for. In our view, this difference does not make these past panel reports inapposite to the present case because the provisions referred to by the United States do not address the question of the definition of the domestic industry. Rather they deal primarily with the data collection in an investigation so as to ensure that the data reflect as closely as possible the operations pertaining to the like product, where separate identification of those operations in a producer's records is difficult or impossible. The parallel article of the WTO SCM Agreement[139] makes it even clearer that this provision does not detract from the fact that the industry definition must be based on the "like" product and on the ability to separately identify the production processes. Thus, we find the *Canada – Beef* and *Wine and Grapes* cases to be factually similar to the case before us, and the legal reasoning of those panels to be both relevant and persuasive[140].

(iii) The New Zealand – Transformers case

7.98 We note that the United States argues that there is support for its broad definition of the US lamb meat industry in the statement of the panel in *New Zealand – Transformers*[141] that the domestic industry in that case should not be restricted to two kinds of transformers located along the spectrum of transformer types, because "each segment of the industry's operation made a contribution to the overall viability and profitability of a producer of transformers" and that to "allow the possibility to grant relief through anti-dumping duties to individual lines of production of a particular industry or company … would clearly be at variance with the concept of industry in Article VI."[142]

7.99 In our view, however, the factual and legal issues before the *Transformers* panel were rather different from those arising in the present dispute. First, *Transformers* involved a claim under Article VI:1 of GATT, not under the Tokyo Round Anti-dumping Code. Article VI:1 does not contain any reference to the concept of "like product", and thus its language is quite different from that in the Safeguards Agreement (as well as that in the parallel provisions of the WTO SCM and AD

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[137] "A major US packer (Transhumance) also owns both a breaker operation and Superior Farms, which is a lamb feeder". (*See* USITC Report, Exh. US-1, at I-14, footnote 47, II-14). Apparently, these commonly owned companies are legally separate entities and therefore, separate business operations can be identified.

[138] Article 6.6 of the Tokyo Round Subsidies Code: "The effect of subsidized imports shall be assessed in relation to the domestic production of the like product where available data permit the separate identification of production in terms of such criteria as: the production process, the producers' realization, profits. When the domestic production of the like product has no separate identity in these terms the effects of subsidized imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided."

[139] Article 15.6 of the WTO SCM Agreement: "The effect of subsidized imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of production on the basis of such criteria as the production process, the producers' sales and profits. If such separate identification of that production is not possible, the effects of subsidized imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided."

[140] We recall our reference to the Appellate Body's statement in *Japan – Alcohol* in footnote 113, above.

[141] Panel Report on *New Zealand – Imports of Electrical Transformers from Finland*, adopted on 18 July 1985, BISD 32S/55.

[142] Panel Report on *New Zealand – Transformers*, op. cit., at paragraph 4.6.

Agreements).[143] The arguments of New Zealand in *Transformers* pertained, if anything, more to the question of the relevant domestic product to be analyzed (i.e. an issue akin to identifying the "like product") rather than to the second-step question of how broadly to define the producers of that product once identified. Second, the factual situation in *Transformers* was very different from that in the lamb case. In *Transformers*, New Zealand's domestic transformer industry essentially consisted of a *single* company that produced the full range of power transformers[144], and the product differentiation at issue was as between different kinds of finished transformers produced by that company, i.e., differentiated kinds of the *same* product (transformers) at the *same* stage of production. By contrast, in the lamb case, there are many companies involved, most of which operate at only a single step in the production chain, and the product differentiation at issue is as between *different* products at *different* stages of production.

7.100 Moreover, to the extent that *Transformers* is at all relevant to the issue before us, it supports rather than undercuts our reading of SG Article 4.1(c). In particular, it appears to us that one of the primary concerns of the *Transformers* panel was the possibly artificial picture of the relevant company's/industry's condition that could result from looking at only one small slice of that company's/industry's product range, where there were no clear dividing lines either between the products themselves or between the production processes used to produce them. In our view, this is fully consistent with our view, confirmed by the *Canada – Beef* panel, that separability of production processes is a key factor in identifying the domestic producers of a like product.

(iv) Criteria of continuous line of production and substantial coincidence of economic interests

7.101 We also share the concerns of the *Canada – Beef* panel about the "open-endedness" of an industry definition if it is based on criteria such as (i) continuous line of production and (ii) substantial coincidence of economic interests. It is true for most processed products that there is a continuous line of production from raw materials or inputs to the final product and thus economic interdependence between operators at different stages of production. But we do not see how raw materials or inputs which are *agricultural* differ in this respect from *industrial* raw materials or inputs.

7.102 Concerning the coincidence of economic interests, moreover, whether there is a single input transformed or incorporated into a final product, whether an input is wholly dedicated to the production of a final product, or whether there are viable alternative uses at equivalent profit for that input cannot in itself be determinative of the degree of economic interdependence among industry segments. In the case of final products composed of a larger number of inputs, producers of those inputs may just as easily be highly economically dependent on the producers of the final product. But depending on the allocation of market power in the manufacturing and processing chain of a particular end-product, the opposite may also be true and producers of the final product may be dependent on producers of raw materials or intermediate inputs rather than *vice versa*.

7.103 Furthermore, the interests of producers in different industry segments may coincide, regardless of whether they are involved in a continuous line of production, whether there is a single or more inputs into a final product, and whether an input is wholly dedicated to a single final product. Interests may happen to coincide even if producers are engaged in entirely unrelated economic activities. Likewise, there is no certainty that economic interests of producers necessarily coincide even if there is a continuous line of production from an input which is wholly dedicated to one final

[143] The language in the Tokyo Round Code in respect of like product and the domestic industry definition (Article 4.1) is identical to that in the WTO Anti-dumping Agreement (also Article 4.1), which as discussed above is essentially identical to the part of the language of Article 4.1(c) of the Agreement on Safeguards which is relevant to this case.

[144] Panel Report on *New Zealand – Transformers*, op cit., at paragraph 4.6.

product which is composed of only that input. Thus, we see nothing in the USITC's approach that limits its open-endedness.

7.104 We note that the USITC traditionally applies the two parts of its test (continuous line of production and substantial coincidence of economic interests) on a cumulative basis and not as alternative justifications for widening the industry definition. However, we are not persuaded that these are objective principles capable of general application that would in fact restrict the ability to include input producers to only a narrow set of clearly defined cases. Moreover, we cannot see a textual or logical basis in the Safeguards Agreement for applying different tests in the fields of agricultural as opposed to manufactured products.

(v) Value added at different stages of the production chain

7.105 In the specific factual constellation of this investigation, we nonetheless consider the US argument significant that the inputs (live lambs) constitute a high percentage of the value added (e.g., 88 per cent of the wholesale value) and that the final product (i.e., lamb meat) derives essentially from a single input (i.e., live lambs). The US position seems to be that in such a situation, defining the industry as finishers only would mean, *inter alia*, that remedial measures that addressed only the effects of imports on one aspect of a continuous line of production would be inadequate to "prevent or remedy serious injury and to facilitate adjustment" since any adjustment by that industry segment would not insulate the other (higher value-added) segments from the effects of increased imports.[145] This argument seems to depend on the ability of the processors to pass back any injury from increased imports to the input producers. Indeed, the USITC found that "…when processors confront lower prices, they *pass the lower prices back* to feeders and then growers, and all suffer to some extent."[146]

7.106 In our view, however, the pass-back argument in favour of broadly defining a domestic industry to include input producers does not necessarily hold true. As noted above, a high degree of economic interdependence between *upstream* producers and *downstream* processors is a commonplace in most manufacturing and processing chains. In such situations the US argument would only hold if the *finishing* segment in the production chain is able to "pass back" to *input* producers any serious injury caused or threatened by imports. In the absence of such "pass-back" effects, there is reason to assume that serious injury caused by increased imports, if any, will be felt (at least *inter alia*) in the *finishing* segment. In such a case, if a safeguard measure were applied in respect of imports of the *finished* product by definition this should also benefit the *input* producers.[147]

7.107 In this regard, the US "pass-back" argument could be seen to some extent as internally inconsistent. On the one hand, the argument is that the fortunes of the packers/breakers and growers/feeders rise and fall together. This is a major part of the USITC's justification for a broad industry definition, even though it does not explain why profits/losses of growers/feeders declined prior to those of packers/breakers.[148] On other hand, assuming that it is true that the fortunes of all industry sectors move in tandem, a safeguard measure to assist packers/breakers would be likely also

[145] US First Written Submission, Annex 3-2, at paragraphs 69-70.

[146] USITC report, Exh. US-1, at I-14 (emphasis added).

[147] We note that the United States does allude to this possibility, but argues that if such benefits were to reach input producers, such safeguard actions would escape multilateral control. (See US First Written Submission, Annex 3-2, at paragraph 70.) We do not see why this would be the case, as any safeguard measure that would benefit a domestic industry, to be permitted, would have to comply with all of the relevant WTO rules, including those pertaining to defining the domestic industry. We note that the WTO rules on safeguard measures do not concern the effects of safeguard measures on any economic actors other than the domestic producers of the like or directly competitive products.

[148] *See* Question 8 by the Panel to the United States and US Response, Annex 3-7.

to assist growers/feeders. Thus a narrow industry definition would not necessarily preclude the benefits of a safeguard measure on the finished products from "trickling upstream" to the input producers. In other words, the "pass-back" argument suggesting that growers/feeders must be included in the industry definition only holds true if the fortunes of packers/breakers and growers/feeders do *not* move in the same direction (the opposite of what the USITC found and what the United States argues before us).

7.108 Furthermore, the extent to which earlier stages of input production as opposed to processing of the final product contribute to the product's total value may change over time and may depend on the allocation of market power in the manufacturing, processing and distribution chain, rather than on any inherent characteristics of the products involved. The availability of viable alternative uses for inputs, their ability to generate equivalent revenue and the degree to which the inputs contribute to the value of the final product are parameters which determine, depending on market conditions, the extent of economic interdependence between input producers and processors. We believe, however, that these parameters are not easily quantifiable or susceptible of objective assessment and cannot serve as principles of general applicability for purposes of defining a domestic industry in a safeguard investigation. Thus, even if we were to accept *arguendo* that a criterion of value-added at different stages of the production chain were relevant to the definition of a domestic industry in a safeguards investigation, we do not see how a cut-off percentage for such a test could be defined, nor at what level.

(vi) Concluding remarks on past panel reports

7.109 In the light of the foregoing, we conclude that the reasoning of the panels in *New Zealand – Transformers*, *US - Wine and Grapes* and *Canada – Beef* support the interpretation that the domestic industry should be defined as the producers as a whole of the like end-product, i.e., lamb meat in this case. We also concur with the reasoning of those panels that separability of operations and data between different stages of production, rather than vertical integration, common ownership, continuous lines of production, economic interdependence or substantial coincidence in economic interests are relevant for determining the scope of the industry in consistency with SG Article 4.1(c).

(c) Negotiating history

7.110 In accordance with Article 32 of the Vienna Convention on the Law of Treaties, we refer to records of the Uruguay Round negotiations as supplementary means of interpretation in order to confirm the meaning of the text of Article 4.1(c) resulting from application of Article 31 of the Vienna Convention. Before doing so, we recall that the *Canada – Beef* panel's conclusion that

> "both the text and the negotiating history of the relevant Code provisions made it impossible to accept Canada's contention that governments intended the concept of 'domestic industry' to be interpreted with sufficient flexibility to permit treating input suppliers as 'producers' of the like product when economic circumstances warranted … The only way such an interpretation could be adopted would be to *amend the Code through negotiation*." (emphasis added).[149]

7.111 We thus turn to the question of whether our interpretation of SG Article 4.1(c) is confirmed by the records of the multilateral round of trade negotiations concerning contingent trade remedies following the issuance of the above-mentioned panel reports.

[149] Panel Report on *Canada – Beef*, at paragraph 5.13.

7.112 The Uruguay Round negotiating history reveals that the above-mentioned panel reports formed part of the basis of the discussions during the negotiations. There seems to have been a general understanding among negotiators – as suggested by the *Canada – Beef* panel – that broadening the industry definition standard would have required an amendment of the treaty law or at least the adoption of an agreed interpretation by negotiators.[150] Given that the *Canada – Beef* and *US – Wine and Grapes* reports concerned countervailing measures, the industry definition was primarily discussed in the Negotiating Group for Subsidies and Countervailing Measures, but this question was addressed in the negotiations on anti-dumping and safeguards as well.

7.113 There were a number of specific negotiating proposals to redress the findings of the panels on *Canada – Beef* and *US - Wine and Grapes*, including from Canada, the United States and Australia. These proposals were intended to broaden the industry definition to encompass producers of inputs, at least in the case of processed agricultural products.[151] However, a number of countries such as the EEC and other developed and developing countries submitted negotiating proposals in opposition to such amendment or agreed interpretation. These proposals favoured maintaining a narrow industry definition based upon like (or directly competitive) products for purposes of applying contingent trade remedies.[152] While these proposals were made in the framework of the negotiations on countervailing and anti-dumping measures, the issue was briefly considered in the negotiations on safeguards as well.[153]

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[150] For example, Canada proposed that a "special provision" be made to clarify the term 'domestic industry', and Australia proposed to "develop an agreed and more reasonable interpretation" of the definition of "domestic industry" in the case of agricultural products.

[151] Canada noted that the industry definition "under current rules" could preclude the use of countervailing duties, particularly in respect of processed agricultural products, even where subsidized imports were shown to be directly causing injury. Canada thus proposed introduction of "special provisions" to clarify the term "domestic industry" in such situations. (*See* MTN.GNG/NG/10/W/25, Framework for Negotiations – Communication from Canada, 28 June 1989, at Section 2(c). Canada made an identical proposal later in 1989 in the context of the anti-dumping negotiations. *See* MTN.GNG/NG8/W/65, dated 22 December 1989.) The US proposal explicitly referred to "at least two disputes" over what constitutes the 'domestic industry' in countervailing duty investigations involving processed agricultural products, and suggested a review of the relevant provisions focusing on the relationship between primary and processed product producers where the production of the primary product was wholly or primarily dedicated to production of the processed product. (*See* MTN.GNG/NG10/W/1, Communication from the United States, dated 16 March 1987, at section II.E. The United States made an identical proposal in the anti-dumping negotiations later in 1987. *See* GNG.MTN/NG8/W/22, dated 14.12.87.) Australia's proposal voiced concern over a panel's "unduly narrow" interpretation of the term "domestic industry", which in Australia's view would deny any remedy against injurious subsidization to producers of agricultural and other raw materials destined for transformation into a commonly traded form, and proposed the development of an agreed interpretation of the domestic industry definition, in relation to this type of product. (MTN.GNG/NG10/W/15, Communication from Australia, 30 November 1987, at paragraphs 14-15).

[152] *See* MTN.GNG/NG10/W/7, Communication from the EEC, 11 June 1987; MTN.GNG/NG10/W/30, Communication from the Nordic Countries, 27 November 1989; MTN.GNG/NG10/W/11, Communication from Korea, 22 October 1987, as well as MTN.GNG/NG10/W/36 and MTN.GNG/NG8/W/10, dated 30.09.87), also from Korea; MTN.GNG/NG10/W/14, Communication from Egypt, 30 November 1987; MTN.GNG/NG10/W/24, Communication from Brazil, 10 November 1988; MTN.GNG/NG10/W/33, Communication from India, 30 November 1989.

[153] A note by the Secretariat reporting on the 7 and 10 March 1988 meeting of the negotiating group on safeguards indicates that "[m]any delegations stressed that 'domestic producers' and 'like or directly competitive products' had to be clearly defined in order to avoid the abusive use of safeguard actions. One delegation said that there should be limits on both the upstream and downstream of products to qualify as like or directly competitive products". (*See* MTN.GNG/NG9/5, dated 22.04.98).

7.114 We thus conclude that the Uruguay Round proposals for and objections against changing the 'domestic industry' definition demonstrate that the issue was extensively discussed in the Uruguay Round negotiations, especially in the context of subsidies, but also in respect of anti-dumping and safeguards. These negotiating documents also demonstrate that the discussion was heavily influenced by the panel reports on *Canada – Beef* and *US – Wine and Grapes*. However, in the end the relevant Uruguay Round negotiating groups did not agree to any broadening of the industry definitions in the texts of the Anti-dumping, SCM and Safeguards Agreements, and the relevant provisions remained unchanged from the predecessor provisions in the Tokyo Round Codes.

(d) "Directly competitive products"

7.115 We recall, and wish to emphasize, that our analysis of the industry definition adopted by the USITC, and of the methodology applied by the USITC in arriving at that definition, have to do only with that part of SG Article 4.1(c) that pertains to the "like product" and the domestic industry producing it. That is, our analysis does not address the issue of "directly competitive" products and the industry producing them. Because the USITC explicitly did not make any determination concerning "directly competitive" products,[154] this issue is not before us and we do not speculate as to whether live lambs conceivably could be considered "directly competitive" with imported lamb meat.[155] Nor does the United States argue before us that they could.

7.116 Given that the USITC plurality did not make a finding on whether lamb meat and live lamb may be considered as "directly competitive", if we were to address this issue, we would substitute our own analysis and judgment for that of the USITC and would thus violate the principle that panels in disputes under the Safeguards Agreement must not engage in a *de novo* review of the evidence before a competent national authority.

7.117 This being said, it is clear on the face of the Safeguards Agreement that the product coverage of a safeguard investigation can potentially be broader than in an anti-dumping or countervail case, to the extent that "directly competitive" products are involved. In our view, this apparent additional latitude that exists under the Safeguards Agreement may be related to the basic purpose of the Safeguards Agreement and GATT Article XIX, namely to provide an effective safety valve for industries that are suffering or are threatened with serious injury caused by increased imports in the wake of trade liberalization.

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[154] In particular, the USITC plurality defined lamb meat as the like product, and identified the growers, feeders, packers and breakers as producers of that *like* product. The USITC plurality did not define any product as "directly competitive" with lamb meat, and indeed explicitly stated that it had not made such a determination in respect of live lambs. (*See* USITC Report, Exh. US-1, at I-11). Therefore, it is not relevant to this Panel's review of the domestic investigation and determination that two individual Commissioners stated their view that domestically produced live sheep were "directly competitive" with imported lamb meat (Id. at I-8-9, footnotes 7-8) because the USITC as a whole did not rely on the concept of "directly competitive" products (Id. at I-10, footnote 10).

[155] The interpretation of the phrase "directly competitive products" in SG Article 4.1(c) has not been addressed by any panel to date. Indeed, GATT Article III is the only context in which the concept of directly competitive products has been addressed in GATT/WTO dispute settlement practice (*See* Panel Report on *Chile – Taxes on Alcoholic Beverages*, adopted on 12 January 2000, WT/DS87/110/R, paragraphs 7.14ff. Appellate Body Report on *Japan – Taxes on Alcoholic Beverages*, adopted on 1 November 1996, WT/DS8/10/11/AB/R, paragraph 6.28; Panel and Appellate Body reports on *Korea – Taxes on Alcoholic Beverages*, adopted on 17 February 1999, WT/DS75/84/R and WT/DS75/84/AB/R, paragraph 10.38; Report of the Panel on *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, adopted on 10 November 1987, BISD 34S/83; Report of the *Working Party on Border Tax Adjustment*, adopted on 2 December 1970, BISD 18S/97, paragraph 18). But it is not clear whether or to what extent the interpretation of this concept in the context of GATT Article III would necessarily be relevant to SG Article 4.1(c).

5. Findings on the definition of the domestic industry

7.118 In the light of our considerations above, we find that the USITC's inclusion in the lamb meat investigation of input producers (i.e., growers and feeders of live lamb) as producers of the like product at issue (i.e. lamb meat) is inconsistent with Article 4.1(c), and thus also with Article 2.1 of the Agreement on Safeguards.

6. "Judicial economy" and the analysis of additional claims

7.119 A finding that the industry definition used by the USITC is inconsistent with SG Article 4.1(c) would appear to compromise the investigation and determination overall. In this respect, we recall the statements of the Appellate Body on "judicial economy" in the dispute on *United States – Shirts and Blouses*.[156] But we also note that in a subsequent dispute on *Australia – Measures Affecting the Importation of Salmon*, the Appellate Body focuses on the need for panels to address all claims and/or measures necessary to secure a positive solution to a dispute and adds that providing only a partial resolution of the matter at issue would be false judicial economy.[157] It is in the spirit of the Appellate Body's statements in *Australia – Salmon* that we continue with an analysis of other claims in the alternative, assuming *arguendo* either (1) that the USITC's industry definition were consistent with the Safeguards Agreement or (2) that, as the United States argues in the alternative, the USITC would have made a finding of threat of serious injury even if the industry definition had been limited to packers and breakers.

D. THREAT OF SERIOUS INJURY

1. The Safeguard Agreement's standard for analysing *threat* of serious injury

(a) Introduction

7.120 According to SG 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;"

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[156] In *United States – Shirts and Blouses*, the Appellate Body stated:

"Nothing in this provision or in previous GATT practice requires a panel to examine all legal claims made by the complaining party. Previous GATT 1947 and WTO panels have frequently addressed only those issues that such panels considered necessary for the resolution of the matter between the parties, and have declined to decide other issues. Thus, if a panel found that a measure was inconsistent with a particular provision of the GATT 1947, it generally did not go on to examine whether the measure was also inconsistent with other GATT provisions that a complaining party may have argued were violated. ..". (Footnotes omitted). *See* Appellate Body Report on *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses*, adopted 23 May 1997, WT/DS33/AB/R, at.18.

[157] In *Australia – Salmon*, the Appellate Body stated:

"The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and 'to secure a positive solution to a dispute'. To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members.'" (Footnotes omitted). *See* the Appellate Body Report on *Australia – Measures Affecting the Importation of Salmon*, adopted on 6 November 1998, WT/DS18/AB/R, paragraph 223.

> "serious injury" in turn is defined in SG Article 4.1(a) as "… a significant overall impairment in the position of a domestic industry."

7.121 SG Article 4.2(a) enumerates relevant injury factors for safeguard investigations:

> "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 this 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."

7.122 The USITC's determination concerning *threat* of serious injury reads as follows:

> "In view of the declines during the period of investigation in the domestic industry's market share, production, shipments, profitability and prices among other difficulties that the domestic industry is facing, we conclude that it is threatened with imminent serious injury."[158]

7.123 Australia and New Zealand criticise this determination as equivalent to a finding that – because there was not actual serious injury at the time of the USITC's determination – there must have been necessarily a threat of serious injury.[159] The complainants submit that this is not a sufficient basis for a finding of imminent threat and that in fact increased imports caused neither actual injury of a serious degree nor threat thereof.

7.124 For the complainants, a finding of declines in certain indicators by itself, with no further explanation substantiating why these declines constitute a threat of a "significant overall impairment in the position of the domestic industry", is not sufficient to demonstrate the existence of imminent serious injury.[160] The complainants argue in particular that the USITC's analysis of threat of serious injury is flawed because it was not "prospective", i.e., it was rather based on past data, and should, in line with the *Korea – Resins* panel findings[161], instead have been based on projections as to how the industry was likely to perform in the immediate future.

7.125 The United States contends that the threat finding concerning declines in various indicators and "other difficulties" demonstrates why the USITC regarded the industry as being on the verge of a

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[158] USITC Report, Exh. US-1, at I-21.

[159] Australia and New Zealand state that the USITC found that there was no present serious injury, citing, in answer to question 11 from the Panel, the following statements which were made in the USITC's remedy recommendations: "[W]e have taken into account that the US lamb industry is not currently experiencing serious injury, but rather is threatened with serious injury" (USITC Report, Exh. US-1, at I-29); and "[W]e found a threat of serious injury … as opposed to present serious injury" (USITC Report, Exh. US-1, at I-33, fn 166).

The United States contends that there was no express statement by the USITC that there was *no* actual serious injury.

[160] For example, Australia argues that "[t]here is no analysis in the USITC Report how 'the declines' and 'other difficulties' during the period of investigation proved that serious injury was clearly imminent in February 1999…". Australia's Response to the Panel's Question 7.

[161] Panel Report on *Korea – Anti-dumping Duties on Imports of Polyacetal Resins from the United States* (ADP/92), adopted by the Committee on Anti-dumping Practices on 27 April 1992, BISD 40S/205.

significant overall impairment of its position. The United States also submits that it based its threat determination on the most recent data available, in particular the year 1997 and interim 1998 (January - September), which reflects the most recent trends and is clearly most relevant for whether significant overall impairment of the domestic industry is imminent.

(b) Interpretation by the Panel

7.126 Before discussing the USITC determination on the existence of threat of serious injury resulting from the lamb investigation in this dispute, we address the question of the relevant legal standard for a competent national authority to apply in determining threat of serious injury, and the benchmark for assessing the data gathered in an investigation against that standard.

7.127 The Safeguards Agreement contains no explicit guidance on any specific methodology that a competent national authority must employ when establishing threat of serious injury. The first sentence of SG Article 4.1(b) merely states that domestic industry must face "serious injury" – defined with reference to the injury factors listed in SG Article 4.2(a) – which is clearly "imminent". The ordinary meaning of "imminent" connotes that the industry's significant overall impairment needs to be "ready to take place"[162] or "be impending, soon to happen … event, especially danger or disaster".[163] The imminent injury that is threatened must be "serious".

7.128 In line with this emphasis on the imminent nature of threat, the article's second sentence requires that such a determination has to be based on facts and not on allegation, conjecture, or remote possibility. "Allegation" means "an assertion, especially one made without proof".[164] "Conjecture" connotes "an opinion or conclusion based on insufficient evidence or on what is thought probable, guesswork, guess".[165] In turn, remote "possibility" means "contingency, likelihood, chance".[166]

7.129 From these elements of SG Article 4.1(b), i.e., the emphasis on clear imminence of significant overall impairment, the requirement to base a threat determination on objective facts, and the rejection of "assertions", "opinions" and "conclusions" that are not based on sufficient factual evidence, it is possible to draw at least some inferences on how to conduct a threat analysis. These elements suggest (i) that a threat determination needs to be based on an analysis which takes objective and verifiable data from the recent past (i.e. the latter part of an investigation period) as a starting-point so as to avoid basing a determination on *allegation, conjecture or remote possibility*; (ii) that factual information from the recent past complemented by fact-based projections concerning developments in the industry's condition, and concerning imports, in the imminent future needs to be taken into account in order to ensure an analysis of whether a significant overall impairment of the relevant industry's position is *imminent* in the near future; (iii) that the analysis needs to determine whether injury of a *serious* degree will *actually* occur in the near future *unless safeguard action is taken*.

7.130 Contextual guidance for safeguards cases may be found in the provisions of the Agreements on Antidumping (AD) and Subsidies and Countervailing Measures (SCM) providing specific rules for the determination of a threat of material injury in anti-dumping and countervailing duty investigations.[167]

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[162] Webster's New Encyclopaedic Dictionary (1994), at 496.
[163] Oxford English Dictionary, at 1316.
[164] Oxford English Dictionary, at 54.
[165] Oxford English Dictionary, at 480.
[166] Oxford English Dictionary, at 2302.
[167] These provisions refer, *inter alia*, to those factors which the USITC took into account in its causation analysis (and which the US argues are relevant to its threat finding).

7.131 In particular, AD Article 3.7 and SCM Article 15.7 state that in making a determination of threat of material injury, investigations "should consider, *inter alia*, such factors as a significant rate of increase in imports indicating a likelihood of substantially increased importation; sufficient freely disposable capacity in the exporting countries or an imminent substantial increase therein; the prices of the imported goods, as an indication of whether the imports are likely to suppress or depress the domestic producers' prices; and inventories of the product being imported".[168] These provisions go on to say that the totality of the factors must lead to the conclusion that further dumped or subsidized imports are imminent, and that *unless protective action is taken*, material injury will occur.

7.132 The overall object and purpose of the Safeguards Agreement, as discussed in the section on domestic industry above, is to provide a mechanism for "emergency action" where, in the wake of trade liberalization, increased imports cause or threaten to cause serious injury to the domestic industry producing like or directly competitive products. This objective to provide for a remedy only in this type of emergency situation applies *a fortiori* when the relevant domestic industry is threatened with significant overall impairment of an *imminent* nature, but does not presently suffer serious injury. We cannot see how a future-oriented analysis of whether, in the absence of any safeguard action, injury of a serious degree is soon to occur could be carried out if it were not based on the most recent data available, combined with factual information as to expected future developments concerning imports and the condition of the domestic industry.

7.133 The parties refer to the reports of the panels on *Korea – Resins*, *US – Softwood Lumber*, and *Mexico – Syrup*[169] as relevant for developing an interpretation of the standard that is required in an analysis of threat of serious injury under the Safeguards Agreement, although these reports concerned threat analyses in antidumping disputes. We find these reports relevant as well, and in our view, they stand for the general proposition that in contingent trade remedy cases an evaluation of whether threat of injury is *clearly imminent* requires a *fact-based, future-oriented* analysis.

7.134 The *Korea – Resins* panel found that:

> "… a proper examination of whether a threat of material injury was caused by dumped imports necessitated a *prospective* analysis of a present situation with a view to determining whether a 'change in circumstances' was 'clearly foreseen and imminent'. … [such] determination … required an analysis of *relevant future developments with regard to the volume, and price effects of the dumped imports and their consequent impact on the domestic industry*."[170]

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[168] The list in the SCM Agreement also includes the "nature of the subsidy or subsidies", and the likely trade effects thereof (presumably referring to whether the subsidies are export subsidies or import subsidies, as opposed to production or other "domestic" subsidies). The AD Agreement in a footnote provides as an example "though not an exclusive one", "convincing reason to believe that there will be, in the near future substantially increased importation of the product at dumped prices".

The Tokyo Round Anti-dumping Code under which the *Korea - Resins* dispute was adjudicated did not elaborate on the nature of the factors to be examined in a threat case except to cite as a possible example the convincing reason to believe that there would be substantially increased dumped imports. The Tokyo Round Subsidies Code in the context of threat cited only the nature of the subsidy and its likely trade effects. Thus, it was in the Uruguay Round that the more elaborated framework for assessing threat, which refers almost exclusively to future developments in imports, and which closely resembles the analysis set forth in *Korea - Resins* was explicitly introduced into the relevant provisions concerning anti-dumping and countervailing duty investigations.

[169] Panel Report on *Mexico – Anti-Dumping Investigation Of High Fructose Corn Syrup (HFCS) from The United States*, WT/DS132/R and Corr.1, not appealed, adopted 24 February 2000.

[170] Panel Report on *Korea – Resins*, op. cit. at paragraph 271.

The prospective analysis referred to by the *Korea - Resins* panel concerned the industry's current condition as well as future trends in import volumes and prices.

7.135 The panel report on *US – Softwood Lumber*[171] affirms that such threat analysis needs to be based on objective factual evidence. It stated that "this concept had been interpreted as requiring factual evidence of a clearly foreseen and imminent change in circumstances in which subsidised imports would cause material injury. Thus a determination of threat of material injury could not be based on mere speculation as to possible future events."[172] Applying this reasoning to the safeguards context, the prospective analysis of the factual evidence would need to establish that a significant overall impairment of the industry's condition would happen soon unless safeguard action were taken.[173]

7.136 The panel on *Mexico – Syrup* made a similar finding, namely that a threat determination means that "material injury would occur in the absence of an anti-dumping duty or price undertaking".[174] It also makes clear that the "threat" factors enumerated in the Antidumping Agreement must be considered *in addition to*, and *not instead of*, the factors concerning the state of the domestic industry.[175] Thus, at least in the context of anti-dumping and countervailing investigations, the threat analysis must take into account, in addition to the state of the industry, factors relating to the likelihood of increased imports in the immediate future at prices that are likely to suppress or depress domestic producers' prices. The Safeguards Agreement does not provide for a list of particular "threat" factors. Thus the factors for evaluating actual serious injury listed in SG Article 4.2(a) need also to be basis for an investigation of threat of serious injury. However, we believe that the above statement of the *Mexico – Syrup* panel provides useful guidance also for safeguards disputes, and note that it confirms our view that an examination of the existence of *threat* of serious injury implies a future-oriented analysis of the domestic industry's condition which is distinct from an examination of whether *actual* serious injury exists.[176]

7.137 In the present dispute, the complainants have raised a number of interrelated questions concerning the analytical approach used by the USITC's threat findings. In this regard, the complainants have argued (1) that the USITC failed to consider all of the factors listed in SG Article 4.2(a); (2) that the USITC failed to conduct a "prospective" analysis in reaching its conclusion that a threat of serious injury existed; and (3) that the time period focused on by the USITC in reaching this conclusion was not the correct one. In addition, the complainants have argued that the data on which the USITC relied was not sufficiently representative of the industry as a whole. Moreover, and as addressed in another section, the complainants claim that the industry definition used by the USITC is overly broad.

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[171] Panel Report on *United States – Measures Affecting Imports of Softwood Lumber from Canada*, adopted by the Committee on Subsidies and Countervailing Measures on 27-28 October 1993, SCM/162, BISD 40S/358.

[172] Panel Report on *US – Softwood Lumber*, op.cit., at paragraph 402.

[173] In the context of safeguard measures under the Agreement on Textiles and Clothing, the panel on *US – Underwear* noted that a threat finding has to "demonstrate that unless action is taken, damage will most likely occur in the near future." That panel also affirmed the need for a prospective analysis. *See* Panel Report on *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/R, adopted on 25 February 1997, at paragraph 7.55.

[174] Panel Report on *Mexico – Syrup*, op. cit., at paragraph 7.125.

[175] Panel Report on *Mexico – Syrup*, op. cit., at paragraph 7.131 et seq.

[176] *See*, also *Argentina – Footwear*, op. cit., at paragraph 8.284, in which the Panel found that an analysis of threat of serious injury in the safeguards context is separate from an analysis of actual serious injury: "[t]he 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).

7.138 As we noted above, in view of our findings in respect of industry definition, we could exercise judicial economy in respect of the claims concerning the USITC's threat finding. We further recognize that depending on our findings regarding representativeness of the data, an issue that we take up below, there might be no need to address the analytical issues that have been raised concerning the USITC's threat finding. However, we consider it important for our task "to make such findings as will assist the DSB"[177] in carrying out its dispute settlement functions that we address the threat claims as well. We do so by taking at face value, ***arguendo***, the data and reasoning contained in the USITC's report, and without prejudice to our above finding concerning the definition of the domestic industry in this investigation. Furthermore, while recognising the interconnectedness of the various issues raised in the context of the threat claims, we choose, again for the sake of clarity, to address these issues separately.

2. Whether the USITC evaluated in this investigation all injury factors listed in SG Article 4.2(a)

(a) Introduction

7.139 SG Article 4.2(a) requires that 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 factors listed in that provision. The language in this provision is mandatory ("shall…"). Also, this list is preceded by the term "in particular…". On the basis of the wording of the provision, we therefore concur with the shared view of the parties that all of the factors listed in SG Article 4.2(a) must be evaluated,[178] and, moreover, we consider that factors not enumerated in SG Article 4.2(a) that are "relevant" must be examined. An examination of any one of those factors in a given case may lead the investigating authority to conclude, however, that a particular factor is not of an objective or quantifiable nature or probative in the circumstances of a particular industry (or segment) in a particular case.

7.140 In examining the USITC's threat of serious injury determination we examine, first, whether the USITC evaluated "*all* relevant factors of an objective and quantifiable nature having a bearing on the situation of [the] industry", in particular, the factors listed in SG Article 4.2(a), as well as any other relevant factors. Second, we examine whether the *approach* followed by the USITC consisted of a fact-based, future-oriented consideration of increased imports and of the condition of the US domestic industry.[179]

7.141 An initial issue before us is whether, accepting *arguendo* the USITC's industry definition, all factors need to be investigated in detail for *all* identified industry *segments* (i.e., growers, feeders, packers and breakers) or whether an investigation of certain injury factors with respect to *particular*

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[177] *See* Article 7.1 of the DSU.

[178] We find support for our view in the Appellate Body Report in *Argentina – Footwear*, *op. cit.* There, the Appellate Body stated: "We agree with the Panel's interpretation that Article 4.2(a) of the *Agreement on Safeguards* requires a demonstration that the competent authorities evaluated, at a minimum, each of the factors listed in Article 4.2(a) …". Appellate Body Report, *Argentina-Footwear*, paragraph 136; Panel Report, *Argentina-Footwear*, op. cit., at paragraph 8.123. See also Panel Report on *Korea – Dairy*, op. cit., at paragraph 7.55. Regarding disputes concerning safeguard measures under the Agreement on Textiles and Clothing, the panel and Appellate Body Reports on *US – Underwear* and *US – Shirts and Blouses* follow the same line holding that at least all the injury factors applicable under the Textiles Agreement need to be examined.

[179] Here again we emphasize that for purposes of our analysis of this question we accept, *arguendo*, the facts in the USITC report at face value, without prejudice to our consideration of the issues before us, including industry definition and representativeness of data.

segments only would be sufficient to meet the requirements of SG Article 4.2(a). In the light of the general standard of review, as it applies to contingent trade remedy cases, we consider the latter as sufficient if there is an adequate explanation in the report published by the USITC, of (i) why conclusive inferences from the data concerning *one* industry segment can be drawn for *another* industry segment,[180] or (ii) why the factual constellation in particular industry segment in the given case does *not* permit data collection (i.e., *not* a "factor of a *objective* and *quantifiable* nature"), or (iii) renders a certain injury factor not probative in the circumstances of a particular industry segment (i.e., *not* a factor "*having a bearing* on the situation of that industry" within the meaning of SG Article 4.2(a).

(b) Summary of the injury data collected by the USITC

7.142 A review of the data, factor by factor, and industry segment by segment shows the following for the period from the end of 1996 to September 1998 (the part of the investigation period which the USITC stated formed the basis of is threat finding):

(i) Production and shipments

7.143 For growers, production and shipment volume of lambs increased between 1996 and interim 1998 annualised.[181] Total shipment value and average unit value declined.

7.144 For feeders, production, shipment volume and value, and average unit value declined between 1996 and 1998 interim annualised.[182]

7.145 For packers, production, shipment volume, value and average unit value all declined between 1996 and interim 1998 annualised.[183] Shipment volume declined between 1996 and 1997, then increased slightly in interim 1998. Shipment value declined steadily throughout the period.[184]

7.146 For breakers, production and shipment volume and value increased between 1996 and interim 1998 annualised, and average unit value declined.[185]

(ii) Capacity and capacity utilisation

7.147 As regards growers, the USITC did not collect data on capacity and utilisation because it was considered impractical given the variability in land conditions from ranch to ranch.

7.148 For feeders, data on capacity and capacity utilisation was also not collected because it was considered impractical given the difficulty of measuring a number of variables including length of time that lambs are kept by feeders, which may vary with market conditions.

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[180] "In considering each of the factors listed in SG Article 4.2, and any others found to be relevant by the authority, the investigating authority has two options: for each factor, the investigating authority can consider it either for all segments, or if it decides to examine it for only one or some segment(s), it must provide an explanation of how the segment(s) chosen is (are) objectively representative of the whole industry". *See* Panel Report on *Korea – Dairy*, op. cit., at paragraph 7.58.

[181] Table 1, USITC Report, Exh. US-1, at II-12.

[182] Table 2, Id. at II-13.

[183] Tables 8 and 9, USITC Report, Exh. US-1, at II-22 (indexed data, Annex 3-7, US Answer to Panel Question 24).

[184] Table 5, USITC Report, Exh. US-1, at II-17.

[185] Tables 3 and 4, USITC Report, Exh. US-1, at II-16 (indexed data, Annex 3-7, US Answer to Panel Question 24).

7.149 For packers, capacity increased and production and capacity utilisation decreased between 1996 and interim 1998.[186]

7.150 For breakers, capacity increased by 30 per cent between 1996 and interim 1998. Capacity utilisation declined by 17 per cent.[187] The USITC states that the decline in capacity utilisation resulted from the increase in capacity which was outpaced by the increased production reported to the USITC by breakers.

(iii) Employment

7.151 In respect of growers, the USITC notes that US Department of Agriculture ("USDA") data show a 20 percent decline in the number of growing establishments and that the sharp declines in slaughter suggest that employment indicators (such as the number of workers and the number of hours worked) declined during the period of investigation.

7.152 In respect of growers/feeders, the report also notes, however, that the questionnaire data show increases in the number of workers and the number of hours worked of both growers and feeders. The data also show small to moderate increases in these indicators between 1996 and interim 1998.[188]

7.153 In respect of packers/breakers, no employment data were provided. The USITC report states only that data were requested from growers and feeders, and does not mention packers and breakers in this context. It is not clear whether the USITC even requested data from packers/breakers.

(iv) Market share

7.154 For growers/feeders, no market share data were collected or calculated as they hold 100 per cent off market for live lambs.

7.155 For packers/breakers, the US producers' share of the US lamb meat market declined from 83.4 per cent in 1996 to 80.3 per cent in 1997 and to 76.9 per cent in interim-1998. In 1993, it had been at 88.8 per cent. Thus, imports' market share increased from 16.6 per cent in 1996 to 19.7 per cent in 1997 and to 23.3 per cent in interim 1998.[189]

(v) Productivity

7.156 In terms of growers and feeders, productivity remained "relatively constant" during the period of investigation.[190]

7.157 In terms of packers and breakers, the USITC characterised productivity as "relatively constant" during the period of investigation, on the basis of information on direct labour costs.[191]

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[186] Table 8, USITC Report, Exh. US-1, at II-22 (indexed data, Annex 3-7, US Answer to Panel Question 24).

[187] Table 4, USITC Report, Exh. US-1, at II- 16 (indexed data, Annex 3-7, US Answer to Panel Question 24).

[188] Table 11, USITC Report, Exh. US-1, at II-23.

[189] Table 32, USITC Report, Exh. US-1, at II-50.

[190] Productivity was calculated from questionnaire data, referenced in the USITC Report (Exh. US-1) in footnote 97, at I-20.

[191] Referenced in USITC Report, Exh. US-1, footnote 98, at I-20.

(vi) Inventories

7.158 For growers and feeders, according to the USITC report, inventory data were not collected or discussed, but this factors is also not listed in SG Article 4.2(a). In any case, growers and feeders of live lamb are unlikely to have inventories of lamb meat.

7.159 Inventories of packers decreased during the 1993-1995, then increased between 1995 and 1997, before decreasing in interim 1998. Inventories were apparently at a low level (i.e., "remained under" an undisclosed percentage) throughout that period of investigation. The USITC also found that inventories were a not particularly probative injury factor in this case due to the perishability of fresh lamb meat.[192]

(vii) Financial performance (profit and loss)

7.160 Regarding growers, net sales value increased between 1996 and 1997, then decreased in interim 1998 compared to interim 1997. Net income increased between 1996 and 1997, although it remained well below the levels of 1993-1995[193]. Net income decreased between interim periods. As a percent of sales, net income increased from 0.7 percent in 1996 to 2.8 percent in 1997, and (for the smaller group of companies that reported data for the interim periods) declined from 22.2 percent to 13.5 percent between interim 1997 and 1998.[194]

7.161 Regarding feeders, net sales value increased between 1996 and 1997, then declined between interim periods. Net income went from positive to negative between 1996 and 1997, with the loss increasing several-fold in interim 1998. As a percent of net sales, net income declined from a profit of 3 percent to a loss of 0.7 percent between 1996 and 1997, and to a loss of 8.4 percent in interim 1998.[195]

7.162 Regarding grower/feeders, no data were reported for the interim periods. Net sales value increased between 1996 and 1997, and total expenses also increased, more rapidly than did net sales. No indexed data were provided by the USITC for profits and losses. The unit value of sales for slaughter lambs declined, while it increased for feeder lambs and cull ewes.[196]

7.163 Regarding packers, total net sales declined between 1996 and 1997, and continued to decline in interim 1998. The unit value of sales decreased between 1996 and 1997 and continued to decrease in interim 1998. Operating income dropped from positive to negative between 1996 and 1997, and the losses deepened in interim 1998.[197]

7.164 Regarding breakers, there was only one reporting company. For purposes of protecting business confidential information, the panel did not request, and the United States did not submit this information, also not in indexed form.[198]

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[192] USITC Report, Exh. US-1, at I-20.

[193] Complainants attribute this decline in income to the elimination of the Wool Act subsidies.

[194] Table 12, USITC Report, Exh. US-1, at II-25. We note that only 27 of 49 producers provided interim period data, so these are not comparable to the full year data.

[195] Table 15, USITC Report, Exh. US-1, at II-30-32.

[196] Table 14, USITC Report, Exh. US-1, at II-29 (indexed data, Annex 3-7, US Answer to Panel Question 24). No data were provided for the interim periods.

[197] Table 16, USITC Report, Exh. US-1, at II-33 (indexed data, Annex 3-7, US Answer to Panel Question 24).

[198] Table 20, USITC Report, Exh. US-1, at II-34.

7.165 Regarding packer/breakers, net sales value decreased steadily between 1996 and interim 1998. Operating income in 1997 and interim 1998 declined sharply from the 1996 level. The unit value of sales also declined during this period.[199]

(viii) Difficulty of generating capital

7.166 For growers/feeders, the USITC report indicates that a number of them reported difficulties in generating adequate capital to finance the modernisation of their plant and equipment (i.e., cancellation/rejection of expansion plans, reductions in the size of capital investments, bank rejection of loans, reduced credit ratings, and difficulty in repaying loans).[200]

7.167 For packers/breakers, the USITC indicates that a number of them reported difficulties in recouping new investments and in repaying loans.[201]

(ix) Prices and price trends

7.168 The USITC collected data on a number of specific products[202] and also examined USDA wholesale price data on various products.[203] The data collected by the USITC data generally show US producers' prices at a lower level at the end of the interim-1998 than during 1997, although these prices generally turned upward during interim 1998. A similar finding is made with respect to the import prices.

7.169 The USITC states that some packers and breakers reported having to reduce prices to compete with low-priced imports.

7.170 USDA data on prices for live lambs purchased for slaughter also were lower in interim 1998 than in 1997, although they increased somewhat over the course of the interim 1998 period. The USDA data also show some upturns in the interim period for certain cuts of lamb meat, although here again the prices at the end of the interim period remained below the 1997 level.

7.171 The USITC data on prices included as well prices of imported lamb meat, as well as margins of under/overselling by the imported product over the domestic product.[204] The report on the investigation notes that the imported lamb consistently undersold the domestic lamb for all products except one, and that the average margins of underselling by the Australian product ranged from 29.0 to 42.0 percent. Underselling by the New Zealand product ranged from 19.7 to 36.5 percent. The USITC determination does not refer to these price differentials, but rather notes the declining trends in the unit values and prices of imports.

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[199] Table 18, USITC Report, Exh. US-1, at II-33 (indexed data, Annex 3-7, US Answer to Panel Question 24).

[200] USITC Report, Exh. US-1, at I-21, Appendix F.

[201] USITC Report, Exh. US-1, at I-21. The data show that packers made large capital investments in 1997, and packer/breakers in 1995 and 1996.

[202] Tables 39-43, USITC Report, Exh. US-1, at II-75-76 (indexed data, Annex 3-7, US Answer to Panel Question 24).

[203] USITC Report, Exh. US-1, figures 5-10, at II-58 to II-61.

[204] USITC Report, Exh. US-1, at II-51ff.

(c) Evaluation by the Panel

7.172 We emphasize again here that our evaluation of the USITC's consideration of the factors listed in SG Article 4.2(a) is based on our acceptance, *arguendo*, of the industry definition that in fact was used by the USITC in the investigation. That is, taking at face value the industry defined as encompassing growers, feeders, packers and breakers, the question that we address here is whether the USITC adequately addressed all of the SG Article 4.2(a) factors in respect of the industry so defined. Of course, this in no way alters our finding above in respect of that industry definition as such.

7.173 We recall that the USITC stated that for growers and feeders of live lamb, by definition there can be no *inventories* of lamb meat and that for packers and breakers, while inventories of packers rose slightly, this factor is not particularly probative for the industry's condition due to the perishability of meat.

7.174 The USITC report in this case also states that collection of *capacity* data from growers and feeders was impractical due to measurement variations among individual growers. For similar reasons, the USITC did not place much emphasis on the information on increasing *capacity* of packers and breakers. The USITC acknowledges though that declines in *capacity utilisation* were also due to the fact that capacity increased at a faster rate than production.[205]

7.175 Moreover, the treatment of *employment* in respect of packers and breakers is very cursory, essentially consisting of an inference drawn from these establishments' financial information as to labour productivity.[206]

7.176 Furthermore, we note that "total net sales" are only one of the possible indicators for an industry's *financial performance*. It is clear from the USITC report that this factor was indeed investigated for the different industry segments. We recall that we did not request such information regarding *breakers* for reasons of protecting business confidentiality, but we consider that the financial information before us was sufficient for a review of the industry's profits and losses.

7.177 We emphasise that more thorough treatment of these factors (i.e., capacity utilisation and employment) would have been better. However, we also note that the USITC has investigated all the relevant injury factors listed in SG Article 4.2(a), consistent with WTO dispute settlement practice.[207] We also consider that, where the USITC did not collect data concerning a particular injury factor with respect to all industry segments, the USITC report provides an adequate explanation for that. Either the USITC report explains how inferences can be drawn from the data collected with regard to *one* segment for *another* segment for which data were not collected, or it explains why, in the circumstances of the particular industry segment at issue, the collection of data of an objective and quantifiable nature was not possible, or it explains why a specific injury factor is not probative for that segment.

7.178 However, these preliminary considerations about the analysis of injury factors are subject to our discussions concerning the analytical approach taken by the USITC in reaching its threat determination as well as to whether the data collected are representative of a "major proportion" of the

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[205] USITC Report, Exh. US-1, at I-20.

[206] Tables 16-20, USITC Report, Exh. US-1, at II-33-34 (indexed data, Annex 3-7, US Answer to Panel Question 24). USITC Report, Exh. US-1, at I-20.

[207] See Panel and Appellate Body Reports on *Argentina – Footwear*, op. cit., at paragraph 8.123 and paragraph 136, and Panel Report on *Korea – Dairy*, op. cit., at paragraph 7.55 in respect of the Safeguards Agreement.

producers in the relevant industry segments, and whether the USITC properly defined the domestic industry (see section VII.C above).

3. The USITC's analysis of *threat* of serious injury in this investigation

(a) Projections relevant to a threat of injury finding

7.179 The complainants claim that the USITC approach to examining whether threat of serious injury exists does not meet the standard set by SG Article 4.1(b) for a prospective analysis of the industry's condition. In particular, New Zealand[208] argues that there should be an examination of the trends in supply and demand in the domestic market, of the factual evidence of the position of the domestic industry in the past and an extrapolation into the future, and of trends in domestic and imported prices of the product. Based on these past trends and any evidence of forward contract prices, there should be an analysis of how prices were likely to develop in the future. This is particularly important in the case of seasonal or agricultural products because of seasonal fluctuations, and such an analysis should be based on at least three years' worth of data. In New Zealand's view, a price analysis based on "a single season's data" as it characterises the USITC's price analysis, does not provide the basis for an objective determination "based on facts".

7.180 Australia argues that a threat analysis supported by facts must demonstrate that the situation of the domestic industry will change markedly and that such a change is imminent. For Australia it is necessary that "facts are prospective" so as to allow an evaluation to determine that serious injury will occur imminently. The complainants do not provide further elaboration of the nature of "prospective facts", nor concerning how such facts should be obtained or evaluated for reliability.

7.181 The complainants do not define in further detail a specific methodology for how a prospective analysis of future developments in the industry's condition should, in practice, be conducted, what kind of data or trend extrapolations would be relevant and reliable as the basis for such an analysis, and how an analysis based solely on projections of industry performance would avoid being "allegation, conjecture or remote possibility" which SG Article 4.1(b) prohibits.

7.182 The United States points as proof of the USITC's prospective analysis of future developments in the industry's condition to its causation finding, in particular to the projections obtained in the investigation that lamb meat exports from Australia and New Zealand to the United States would continue to increase in 1999. It also refers to the declining trend in import and domestic prices for lamb meat at the end of the period of investigation.

7.183 The complainants criticise the USITC approach first as inadmissible because the United States invokes elements of its causation analysis as a demonstration of the existence of a threat of injury.

7.184 We recall that the Safeguards Agreement does not set out a particular methodology to be followed by competent national authorities in determining serious injury or threat and causation. We do not consider it decisive how the USITC itself structured analytically its report on the investigation and determination, as long as the competent authority's threat and causation analysis in their totality establish the existence of threat of serious injury as well as of a causal link between increased imports and such threat consistent with the Safeguards Agreement.[209]

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[208] Question 7 from the Panel to Australia and New Zealand (Annexes 1-7 and 2-8).

[209] From a contextual perspective, we also note that "threat" determinations under the AD and SCM Agreements, too, blend the trends and projections for imports and for the domestic industry indicators.

7.185 The complainants further claim that the US reference to projections of future increases in imports in defending its threat analysis amounts to equating a "threat of increased imports" with a "threat of serious injury", which the *Argentina – Footwear* panel found not to be permissible.

7.186 We deem the reliance on the *Argentina – Footwear* findings as inapposite, because in that case imports were declining at the time that the Argentine authorities made their determination, so that the threat finding was based on a projection that imports would *begin* to increase if a safeguard measure were not imposed. The Safeguards Agreement requires of course as a basic prerequisite for the application of a measure, that imports be increasing. In the present dispute, there is no disagreement that US lamb meat imports were increasing steadily at the time of the USITC's determination. The projected increases in 1999 thus were of *further increases*, not the commencement of an increase.

7.187 We agree in general with the complainants' argument that a threat of *increased imports* as such cannot be equated with threat of *serious injury*. However, in our view, this is not what the USITC has done in this case. Moreover, we also deem it possible that imports continuing on an elevated level for a longer period without further increasing at the end of the investigation period may, if unchecked, go on to cause serious injury (i.e., may threaten to cause serious injury). That is, if increased imports at a certain point in time cause *less than* serious injury, it is not necessarily true that a threat of serious injury can only be caused by a *further* increase, i.e., *additional* increased imports. In our view, in the particular circumstances of a case, a continuation of imports at an already recently increased level may suffice to cause such threat.

7.188 In our view, the same logic applies to the complainants' arguments that the aggravated decline in other injury factors such as prices,[210] or financial performance[211] in the most recent past (i.e., 1997 and interim-1998) has to be seen in the context of the industry's "long-term secular decline"[212] or does not concern some of the firms operating in the industry. Again, we do not exclude that in the particular circumstances of a case, e.g., prices remaining at a depressed level for a longer period may be sufficient for a determination on the whole that an industry is threatened with serious injury even if a given injury factor does not show a recent, sharp and sudden decline. Also, a threat finding does not require that, e.g., financial performance of each individual firm operating in the industry show a decline. A competent national authority may arrive at a threat determination even if the majority of firms within the relevant industry is not facing declining profitability, provided that an evaluation of the injury factors as a whole indicates threat of serious injury.

(b) Relevant time-period for the threat analysis

7.189 While the USITC collected data for five full years (1993-1997 and interim-1998) and in addition for the first nine months of 1997 and 1998 (the "interim periods"), it based its determination of threat of threat of serious injury on declines at the end of that period (i.e., 1997 and interim 1998).[213]

7.190 We do not share the complainants' criticism that the time-frame used by the USITC for it is analysis is too short. More specifically, New Zealand in this connection characterises the data on which the USITC based its determination as "a single season's data", and argues that the analysis of

[210] First Written Submission of New Zealand, Annex 2-1, at paragraph 7.59.
[211] Id., and First submission of Australia, Annex 1-1, at paragraphs 153-164.
[212] First submission of New Zealand, Annex 2-1, at paragraph 7.62.
[213] The USITC report (Exh. US-1) at I-18 states that "In mid-1997, economic indicators relating to the industry began to fall. As described below, the deterioration in these indicators that occurred after 1996 confirms that the industry is threatened with serious injury".

projected import volumes and prices should have been based on a minimum of three years of past data.[214]

7.191 In this respect, we also note that, in offering their own interpretations and explanations of the USITC data, the complainants frequently refer to the investigation period as a whole. For example, the complainants argue that over that period, the increase in imports was considerably smaller than the decline in domestic production/shipments. The USITC's finding of "displacement" of domestic production by imports, however, is based on the end of the investigation period.

7.192 In our view, due to the future-oriented nature of a threat analysis, it would seem logical that occurrences at the beginning of an investigation period are less relevant than those at the end of that period. While the SG Agreement does not specify the appropriate duration of the time-period to be considered in an investigation, the Panel and Appellate Body in *Argentina – Footwear* both considered this issue to some extent. Both concluded that (for an *actual* serious injury finding) the most recent data were clearly the most relevant. In particular, the Appellate Body stated that "the relevant investigation period should not only *end* in the very recent past, the investigation period should *be* the recent past".[215]

7.193 Given that a threat of serious injury pertains to *imminent* significant overall impairment, i.e., an event to take place in the immediate future, the same principle should hold true *a fortiori* for threat determinations compared with present serious injury determinations. This supports the view that the USITC was correct to focus on the most recent data available from the end of the investigation period. We also consider that data from 1997 and interim-1998 cover an adequate and reasonable time-period if complemented by projections extrapolating existing trends into the imminent future so as to ensure the prospective analysis which a threat determination requires.

7.194 Therefore, we consider that, by basing its determination on events at the end of the investigation period (i.e., one year and nine months) rather than over the course of the entire investigation period, the USITC analysed sufficiently recent data for making a valid evaluation of whether significant overall impairment was "imminent" in the near future. By the same token, we also consider that, by basing its determination at all on data about events from the recent past, rather than relying exclusively on projections for the various industry indicators into the future, the USITC made its threat determination on the basis of objective and quantifiable facts, and "not merely on allegation, conjecture or remote possibility".

7.195 In the light of the foregoing considerations, we see no conceptual fault with the USITC's analytical approach used in its threat of serious injury determination, in particular with respect to the prospective analysis and the time-period used.

(c) Evaluation of data pertaining to the period from January 1997 to September 1998

7.196 Next, we examine whether the USITC's determination of threat of serious injury, the factual findings and explanations that the data show declines in various indicators (i.e., market share, production, shipments, profitability and prices) for the industry's performance, particularly during 1997 and interim 1998, and the projections concerning future import volumes and prices (as contained in the causation section of the USITC) are sufficiently fact-based and sufficiently forward-looking to meet the requirements of SG Article 4.1(a) and (b) and 4.2(a).

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[214] Response of New Zealand to Question 7 from the Panel (Annex 2-8).
[215] Appellate Body Report on *Argentina – Footwear*, op. cit., at footnote 130.

7.197 This review is different from the complainants' challenges against the representativeness of the data, and is separate as well from the issues raised by complainants concerning the interpretation of the data such as the time-periods that they consider most relevant, and the alternative explanations that they have put forward for the various trends in the data.

7.198 The parties are not in disagreement on the fact that the imports of lamb meat had increased significantly, especially during the latter part of the period of investigation (by 19 per cent in 1997 as well as in interim-1998), and were projected to continue to increase in 1998 and 1999.

7.199 We note that the complainants do not, as such, challenge the USITC's findings that there were declines in 1997 and interim-1998 for most of the indicators referred to by the USITC in its determination.

7.200 New Zealand appears to acknowledge explicitly that there were declines in market share, production volume and value, prices, number of growing establishments, sales by packers and breakers, and revenue of packers, breakers and feeders.[216] New Zealand also implicitly acknowledges (in pointing to an increase in gross profits of packer/breakers in interim-1998) that operating profitability declined for all segments of the industry in 1997 and interim 1998.[217] New Zealand, while acknowledging that prices in the interim period were lower than during 1997, also argues that prices rose from the latter part of 1998 and that the United States has now disclosed that those price increases continued in 1999[218]. New Zealand also cites to testimony of a professor of agricultural economics concerning USDA projections of price increases in 1999.[219] Concerning underselling, New Zealand questions the validity of the USITC's data. New Zealand argues that some of the products for which price comparisons were made by the USITC are not comparable, and thus that there was less underselling than was identified by the USITC. New Zealand nevertheless seems to acknowledge, at least as part of an argument concerning the significance of those findings, that the USITC found some underselling.[220]

7.201 With regard to the other factors examined by the USITC which it did not identify as forming part of the basis of its threat finding, the complainants view the increases in capacity and production by breakers including in 1997 and interim-1998, along with the increases in capacity of packers in these periods, as evidence of positive performance. They also point to a decrease in packers' inventories during interim 1998 as evidence of an improved ability to make sales. According to New

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[216] First Written Submission of New Zealand, Annex 2-1, at paragraph 7.56.

[217] Second Written Submission of New Zealand, Annex 2-9, at paragraph 4.23.

[218] The basis for New Zealand's argument concerning price trends in the United States in 1999 is a 7 July 1999 press release by Australia's Deputy Prime Minister denouncing the safeguard measure, in which Mr. Fischer refers to a "recent increase in lamb prices in the United States". Thus, this is not a statement by the USITC as to the trend in prices in 1999. The United States submitted this document as an exhibit in a different context. Given that we are not engaging in a *de novo* review of the national investigation, we note that this argument is not relevant to our examination of the USITC investigation, because it is based on a document dated well after the investigation was finished, which thus was not part of the record of the investigation, and because it pertains to actual events following the period of investigation, as opposed to projections concerning what would happen in the months following the investigation.

[219] Exh. NZ-16, and footnote 49 to the second written submission of New Zealand, Annex 2-9.

[220] Second Written Submission of New Zealand, Annex 2-9, at paragraphs 2.18, 4.10 and 4.11. *See*, New Zealand's statements that "meaningful comparisons are possible for only 3 of 8 products surveyed and in one of those, the domestic product actually oversold the imported product" (Second Oral Statement of New Zealand, Annex 2-10, at paragraph 36), and that "the so-called 'underselling' tended to *reduce* over the period of investigation and in any case was present *throughout* that period" (Second Written Submission of New Zealand, Annex 2-9, at paragraph 4.11. Emphasis in original.)

Zealand, the USITC "dismissed" as "mixed evidence" the data on capacity, capacity utilisation, inventories and productivity.[221]

7.202 Australia submits that for growers, production and sales increased, that productivity apparently increased, that capacity utilisation was not examined, that net income without subsidies was positive in 1998 compared with 1993-1996, and that employment increased. It appears that in making these arguments Australia is looking at the entire period of investigation, rather than the end thereof. Regarding the end of the period of investigation (interim-1998), Australia draws attention to the increase in shipments of live lambs reported in questionnaire data as well as a slight increase in shipments of lamb meat as reflected in USDA data. Australia further notes that the production figures and the number of workers employed by growers increased during interim-1998.

7.203 We note that in our view SG Article 4.1(b) and 4.2(a) do not require the competent national authority to show that each listed injury factor is declining, i.e., point in the direction of serious injury or threat thereof. The competent national authority is required to make its determination in the light of the developments of injury factors *on the whole* in order to determine whether the relevant industry's condition is facing "significant *overall* impairment" in the industry's condition is imminent. We agree with the Appellate Body's statement in *Argentina – Footwear* that:

> "it is only when the overall position of the domestic industry is evaluated, in the light of all the relevant factors having a bearing on a situation of that industry, that it can be determined whether there is 'a significant overall impairment' in the position of that industry. … An evaluation of each listed factor will not necessarily have to show that each such factor is 'declining'. In one case, for example, there may be significant declines in sales, employment and productivity that will show 'significant overall impairment' in the position of the industry, and therefore will justify a finding of serious injury. In another case, a certain factor may not be declining, but the overall picture will nevertheless demonstrate 'significant overall impairment' of the industry."[222]

7.204 Therefore, in the light of the specific evidence, explanations and prospective analysis reflected in the USITC report, we consider the USITC's reliance, among other difficulties, on factors including the domestic industry's market share, production, shipments, profitability and prices as a sufficient basis for determining whether threat of serious injury exists. We also consider that the USITC's analysis of the overall picture of trends reflected in and projected from the most recent data (especially from 1997 and interim-1998) along with the projections concerning further increases in imports (assuming *arguendo* that the data on which these trends and projections were based were representative of a major proportion of the producers forming the relevant industry),[223] seem to confirm the USITC determination that a "significant overall impairment" in the overall position of the domestic industry was clearly imminent.

(d) The complainants' alternative explanations for the decline in the US industry's condition

7.205 In their submissions, Australia and New Zealand offer a number of alternative explanations for the declines in the US industry's performance at various points during the period of investigation. Some of these explanations are the "other factors" considered by the USITC in its analysis of causation (e.g., cessation of the Wool Act subsidies, lack of an adequate marketing and promotion

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[221] First Written Submission of New Zealand, Annex 2-1, at paragraph 7.61.
[222] Appellate Body Report on *Argentina – Footwear*, op. cit., at paragraph 139.
[223] See our findings on representativeness of data below, and on industry definition above.

strategy by US lamb producers), while they derive other explanations from the investigation's record.[224]

7.206 The United States responds to these alternative explanations by stating that the complainants are asking the Panel to engage in a *de novo* review, by reweighing the evidence and substituting its own analysis and judgment for the determinations made by the USITC.

7.207 As confirmed in *Argentina – Footwear*,[225] the standard of review applicable in safeguard cases limits panels to reviewing whether the competent national authorities have examined all the relevant facts and have provided a reasoned explanation of how the facts supported their determinations. Thus, to the extent that any of the alternative explanations put forward by Australia and New Zealand are in effect new analyses of the record evidence, they are not relevant to our review. Rather, these factual and legal arguments would be relevant to our review only to the extent that they were raised in the investigation, in which case we would need to consider whether the USITC gave a reasoned explanation of why the facts supported its conclusions in respect of them, and whether that explanation is persuasive. We note in this regard that there were a number of alternative explanations for the condition of the industry that *were* raised by parties and considered by the USITC during the investigation. These were the cessation of the Wool Act subsidies, alleged failure to develop and implement an effective marketing programme for lamb meat, competition from other meats, alleged increased input costs, alleged overfeeding of lambs, and alleged concentration in the packer segment. We discuss the USITC's consideration of all of these factors under "other factors" in the section on causation below.

4. Representativeness of data collected

7.208 Australia and New Zealand claim that the data relied upon by the USITC do not represent a "major proportion" of the industry producing lamb meat as required by SG Article 4.1(c). They argue that the responses to the USITC's questionnaires provided an inadequate basis for it to render judgments about the condition of the industry (however broadly defined) as a whole.

7.209 The complainants accept that in general the coverage of responses received from packers and breakers is much more complete than for growers and feeders. However, New Zealand points out that this coverage is very inconsistent as among the different factors considered, and in particular that the United States has not provided any information as to the coverage of the questionnaire responses in respect of financial data.[226] According to New Zealand, only 49 growers, three grower/feeders, and nine feeders, representing only 5 per cent of the US lamb crop in 1997, provided data on the financial condition of the live lamb industry[227], while the feeders reporting financial data represented approximately one-third of the slaughtered lambs fed in feedlots in 1997.[228] Moreover, no financial data were provided for interim 1998 by grower/feeders.[229]

7.210 New Zealand notes that data on domestic shipments and inventories were provided in response to questionnaires from five packers, which the USITC estimated to account for 76 per cent of the sheep and lambs slaughtered in the US in 1997.[230] However, information on the financial

[224] See paragraphs 7.200-7.202, above.
[225] Appellate Body Report on *Argentina – Footwear*, op. cit., at paragraph 121.
[226] First Submission of New Zealand, Annex 2-1, at paragraphs 4.6-4.11.
[227] USITC Report, Exh. US-1, at II-24.

[228] Id.
[229] Id. at II-29.

condition of the packers was provided by only four packers, two of whom were also packer/breakers[231], and the USITC's report does not indicate which of these firms were included in the five packing firms estimated to account for 76 per cent of the sheep and lambs slaughtered in the United States in 1997.

7.211 Concerning breakers, New Zealand argues that the USITC received usable questionnaire responses from four firms,[232] yet only three firms (including two who were also packers) provided data on their financial condition,[233] and only one of these was solely a breaker. New Zealand points out that no information has been provided on the proportion of total breaker output represented by the one breaker response. As a result, according to New Zealand, the USITC made findings on the financial condition of lamb meat packers and breakers on the basis of financial data provided by five firms - two packers, two packer/breakers, and only one breaker,[234] and it is not possible to determine the percentage of each segment's operations that is represented by these questionnaires, and thus to know whether these firms represent a valid sample of packers.

7.212 The United States describes the number of usable questionnaire responses in very similar terms: Out of 74,710 growers (1997), the USITC received usable data from 57 firms or individuals accounting for an estimated 6 per cent of domestic live lamb production.[235] But the United States emphasises that the questionnaire coverage of packers and breakers was much higher than for growers and feeders. According to the United States, the five responding packers and packer/breakers accounted for approximately 76 percent, i.e., a sizeable majority, of the lambs slaughtered.[236] The United States provides no specific information on the coverage of the four breakers who provided useable data in response to the questionnaire, however. Rather, the United indicates that in total, 75 percent of lamb carcasses are processed by breakers while the remaining 25 percent are processed by packers, and that there are 16 known breakers in the United States of which four were the ones providing usable data. Neither the fact that breakers process three times as much lamb meat as packers, nor the fact that one quarter of the total *number* of known breakers provided useable questionnaire data, indicates however the percentage of total domestic output of breakers that was represented by the questionnaire data used by the USITC [237]

7.213 Thus, while in total the questionnaire responses received from packers accounted for a sizable majority of the packers segment, the coverage of the usable data received on production, capacity utilization, etc., compared with that received on financial indicators is unknown. Similarly, information on the overall representativeness of the breakers' questionnaire responses has not been provided by the United States although it was specifically requested by the Panel.[238] As noted above, the questionnaire data for growers/feeders represents only a small minority of that total segment.

7.214 The complainants further argue that the USITC picked and chose between questionnaire data and data published by the USDA in a result-oriented way.

7.215 The United States argues that the USITC relied on the USDA data to the extent they were available because they were more complete than the USITC's questionnaire data. The USITC report

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[230] Id. at II-14.
[231] Id.
[232] Id. at II-15.
[233] Id. at II-24.
[234] Id. at II-29 to II-34.
[235] Id. at I-17, II-11; US Answer to Question 14 of the Panel (Annex 3-7).
[236] US Answer to Question 14 of the Panel (Annex 3-7).
[237] US Answer to Question 14 of the Panel (Annex 3-7).
[238] US Answer to Question 14 of the Panel (Annex 3-7).

itself characterizes the sample represented by the questionnaire respondents from growers and feeders as not constituting a statistically valid sample.[239] Rather, the USITC report indicates that questionnaires were sent to 110 establishments "believed to be among the larger growers of lambs". According to the USITC report, the usable data collected through the growers, feeders and grower/feeders questionnaires represented approximately 6 percent of domestic lamb production.[240]

7.216 The USDA data used by the USITC include the data on lamb slaughter, which the USITC used to estimate US production and shipments of lamb meat (quantity and value).[241] The USITC also used USDA data on the prices of live lambs sold for slaughter as well as for certain lamb meat cuts.[242] In addition, the USITC relied on USDA data concerning the number of lamb growers for its finding that the number of growers declined during the period of investigation. For the remaining indicators of the industry's condition, the questionnaire responses were the USITC's only source of information.

7.217 While we share the complainants' concerns about the representativeness of the questionnaire response data, their criticism of the USITC's use of USDA data where available seems misplaced. The sense of SG Article 4.1(c)'s reference to the producers as a whole or those constituting a major proportion thereof is clearly in favour of the use of the most comprehensive data possible. Given that the USDA compiles and publishes data that according to the USITC have much better coverage than the questionnaire data, we see no impediment in the Safeguards Agreement to the USITC's having relied on them. Indeed, if the USITC had ignored the USDA data and relied exclusively on the scarce questionnaire data for growers and feeders, the complainants would have had stronger grounds for complaint.

7.218 Thus, in our view, the crucial problem with the data used by the USITC relates to the representativeness of the questionnaire data where they *were* used (e.g., employment, financial indicators), and not with the use of USDA data where available. In particular the low data coverage for growers and feeders (approximately six per cent), the lack of financial data for interim 1997 and 1998 for grower/feeders, and the uneven data coverage for packers and breakers (especially in the financial data as outlined above) raises serious doubts as to whether the data represent a "major proportion" of the domestic industry, in the sense of SG Article 4.1(c).

7.219 This lack of representativeness is likely compounded by the fact that the USITC defined the domestic industry broadly as including growers and feeders, as the conclusions drawn from the data pertaining to only a small proportion of US growers and feeders are central to the USITC's overall finding of threat of serious injury.

7.220 We agree with the United States that the Safeguards Agreement does not specify any particular methodology to ensure the representativeness of data collected in an investigation.[243] But we also note that the USITC itself concedes that the questionnaire responses do not constitute a statistically valid sample of the producers which, in the USITC's view, form an essential part of the domestic industry.[244] While, again accepting *arguendo* the USITC's industry definition,[245] we

[239] USITC Report, Exh. US-1, at I-17.
[240] USITC Report, Exh. US-1, at I-17; and US Answer to Question 14 of the Panel (Annex 3-7).
[241] Tables 5 and 7, USITC report, Exh. US-1, at II-17.
[242] Figures 3 and 5-10, USITC Report, Exh. US-1, at II-55, II-58-II-61.
[243] See US Answer to Question 16 of the Panel (Annex 3-7).
[244] USITC Report, Exh. US-1, at I-17.
[245] Of course, only once the relevant domestic industry has been defined consistently with SG Article 4.1(c) is it logically possible to select producers representing a "major proportion" of the collective output of the like or directly product in question, or to develop a valid statistical sample that would ensure that the data collected are representative of a major proportion of the domestic industry.

recognize that in practical terms it would have been impossible for the USITC to collect data from all of the more than 70,000 growers, we nevertheless believe that the USITC could have obtained data from a larger percentage of the growers than it did or from a statistically valid sample, so as to ensure that the data collected were representative of growers as a whole. In any case, petitioners requesting the initiation of an investigation could not automatically be taken to represent a major proportion of the domestic industry.[246]

7.221 In the light of the foregoing, we conclude that on the basis of the information made available by the United States in this dispute (and absent more detailed information on the exact coverage of the questionnaire responses), by industry segment and by injury factor, we are not persuaded that the data used as a basis for the USITC's determination in this case was sufficiently *representative* of "those producers whose collective output … constitutes a *major proportion* of the total domestic production of those products" within the meaning of SG Article 4.1(c).

5. Conclusions concerning the USITC's threat of serious injury determination in this case

7.222 In the light of the foregoing considerations, we see no conceptual fault with the USITC's analytical approach used in its threat of serious injury determination, in particular with respect to the prospective analysis and the time-period used.

7.223 We further emphasise that more thorough treatment of certain injury factors (i.e., capacity utilisation and employment) would have been better. But we also note that where the USITC did not collect data concerning a particular injury factor with respect to all industry segments, it provided an adequate explanation of how inferences can be drawn from the data collected with regard to *one* segment for *another* segment for which data were not collected, or why, in the circumstances of the particular industry segment at issue, the collection of data of an objective and quantifiable nature was not possible, or why a specific injury factor is not probative for that industry segment.

7.224 We also consider the USITC's analysis of threat of serious injury in the present investigation to be sufficiently fact-based and future-oriented, in that it relied on available factual information as to expected future developments, notably projected import increases and the likely price effects of those increases on the domestic industry. We also see no analytical flaw in the USITC's decision to rely on

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[246] Growers: "All growers in the United States were associated with petitioners, since membership in the petitioning association was automatically based upon receipt of Wool Act payments. Thus the USITC could not send questionnaires to 'unassociated' growers. Only a few growers were named individually as petitioners, as the great majority of questionnaire recipients consisted of companies with no particular known view of the safeguard proceeding. To obtain financial or other data on grower operations, [the USITC] sent questionnaires to 110 firms and individuals believed to be among the larger growers of lamb. (USITC Report, Exh. US-1, at I-20). The USITC identified questionnaire respondents in the other industry segments based on names and addresses which petitioners supplied in the petition pursuant to USITC regulation (Exhibit US-39)" *See* US response to Question 15 of the Panel (Annex 3-7).

Feeders: "Nine feeders were identified in the petition. The Commission sent questionnaires to 11 firms believed to be feeders and received responses from 18 feeder operations, including several growers that also maintain feeder operations." *See* USITC Report, Exh. US-1, at II-13.

Packers: "The packing segment of the industry is somewhat concentrated, with 5 responding firms accounting for 76 per cent (based on USDA data) of the sheep and lamb slaughtered in the United States in 1997. Questionnaires were sent to 17 firms identified as packers/slaughterers of lambs." *See* USITC Report, Exh. US-1, at II-14.

Breakers: "This segment of the industry is as concentrated as the packing segment. In addition to packers who further process lamb into cuts, there are less than 10 major firms in the United States engaged in processing lamb carcasses … Questionnaires were sent to 16 firms identified as breakers of lamb meat." *See* USITC Report, Exh. US-1, at II-15.

the most recent data (from 1997 and interim 1998) as the basis for reaching its conclusions on threat of serious injury.

7.225 However, we are not persuaded that the data used as a basis for the USITC's determination in this case were sufficiently *representative* of "those producers whose collective output … constitutes a *major proportion* of the total domestic production of those products" within the meaning of SG Article 4.1(c).

7.226 In the light of the foregoing considerations and conclusions, we find that the USITC's threat of serious injury determination in the lamb meat investigation is inconsistent with SG Article 4.1(c), and thus with SG Article 2.1.

E. CAUSATION STANDARD AND NON-ATTRIBUTION OF FACTORS OTHER THAN IMPORTS

1. Introduction

7.227 SG Article 4.2(b) requires for a determination of serious injury or threat thereof that:

> "[the] investigation demonstrates on the basis of objective evidence the existence of a *causal link* between increased imports of the product concerned and serious injury or the 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*."

7.228 In safeguard investigations, the USITC traditionally applies the so-called "substantial cause" standard embodied in the US safeguard statute, Section 202(b)(1)(B). According to this standard, the USITC determines whether the subject article is being imported in such increased quantities as to be a "substantial cause" of serious injury or threat of serious injury, i.e., a cause which is '*important* and *not less than any other cause*".

7.229 New Zealand and Australia claim that the "substantial cause" and "not less than any other cause" standard of the US safeguards legislation as it was applied in the lamb safeguard determination is inconsistent with the requirements of SG Article 4.2(b). The complainants fault this standard because, they allege, it could be met even if increased imports are only one of many causes of serious injury or threat, as long as *no single other cause* is more important than increased imports. For Australia and New Zealand, increased imports *by themselves* must be causing or threatening a degree of injury that is "serious" for the causation standard of the Safeguards Agreement to be met.

7.230 The United States contends that the complainants' claims amount in fact to a challenge of the US safeguards statute *per se*, which is not within this Panel's terms of reference. We have issued a preliminary ruling on 25 May 2000 (see above, paragraphs 5.54-5.56 and pertinent reasoning, see paragraphs 5.57-5.58) that the *application* of the US causation standard by the USITC in this lamb investigation at issue is within our terms of reference, whereas the US safeguards statute *per se* (and the causation standard as embodied therein in general terms) is not.

7.231 On the merits of these claims, the United States defends the "substantial cause" standard as applied in this investigation with the following arguments. The term "cause" as it is used in, e.g., SG Articles 2 and 4, in the US view does not imply that increased imports need to be the *sole* cause of injury as long as they are a *substantial* cause in the connection between imports and injury. Nor does the SG Article 4.2(b) require competent national authorities to examine the effects of increased imports in *isolation* from other factors. In support of that argument, the United States recalls the

reasoning of the panel on *United States – Salmon from Norway*[247], which dealt with claims under the Tokyo Round Anti-Dumping Code. That panel reasoned that there was no requirement "in addition to examining the effects of imports" that the "USITC should somehow have identified the extent of injury caused by these other factors in order to isolate the injury caused by these factors from the injury caused by the imports from Norway."[248]

2. General interpretative analysis of causation and non-attribution of "other factors"

7.232 In past disputes under concerning the WTO Safeguards Agreement,[249] panels have used a *three-step test* in applying the causation standard of SG Article 4.2(b): the analysis focused on (i) whether *upward* trends in imports coincide with *downward* trends in the injury factors, and if *not*, whether an adequate *explanation* is provided as to why nevertheless the data show causation; (ii) whether the *conditions of competition* between the imported and domestic product as analysed demonstrate the existence of a causal link between the imports and any injury; (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. While the complainants do allege that the USITC did not properly examine the conditions of competition in the marketplace[250], in our view the main focus of the causation issue in this dispute is in respect of the application of the third step, especially in the light of the United States' application of its "substantial cause" standard in this investigation.

7.233 Thus, we first consider whether, in conducting its investigation into whether increased imports were "a cause that is important and not less than any other cause" of any threat of serious injury to the domestic industry producing lamb meat, the USITC satisfied the requirements in SG Article 4.2(b)(i) to demonstrate the causal link between the increased imports and the threat of serious injury, and (ii) not to attribute to imports injury caused by other factors.

7.234 SG Article 4.2(b) limits the application of safeguard measures to circumstances where *increased imports* cause or threaten to cause serious injury. There can be, of course, no threat of serious injury attributable to imports *at all* if that threat is entirely attributable to *other* causes. However, SG Article 4.2(b) does not preclude Members from attributing threat of serious injury to increased imports where *other factors* have also contributed to that threat[251] – as long as they ensure that increased imports are not blamed for any of the injury caused by *other* factors. In this situation, the question then arises whether SG Article 4.2(b) requires that increased imports *in isolation* or *by themselves* are sufficient to cause a threat of serious injury, although "other factors" may aggravate that threat.

7.235 We recall that the relevant provisions of the Safeguards Agreement impose a dual obligation: Members are required (i) to demonstrate the existence of a causal link between increased imports and serious injury suffered by the domestic industry; and (ii) not to attribute injury being caused by other factors to increased imports.

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[247] Panel Report on *United States – Imposition of Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, BISD 41S/229, adopted by the Committee on Anti-dumping Practices on 27 April 1994.

[248] Id., at paragraph 555.

[249] See Panel Report on *Argentina - Footwear*, op. cit., at paragraph 8.229; Appellate Body Report on *Argentina – Footwear*, op. cit., at paragraph 145; Panel Report on *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* WT/DS166/R, dated 31 July 2000, appeal pending, at paragraph 8.91.

[250] *See*, e.g., First Written Submission of New Zealand, Annex 2-1, at paragraphs 7.78-7.88.

[251] The second sentence of SG Article 4.2(b) explicitly recognizes this possibility, as discussed below.

7.236 We begin our interpretative analysis with the relevant parts in SG Article 4.2's subparagraph (a), i.e., "in the investigation to determine *whether increased imports have caused or are threatening to cause serious injury to a domestic industry*" and in subparagraph (b), i.e., "[that] determination … 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*".

7.237 The word "to cause" means "effect, bring about, occasion, produce, induce, make",[252] or also "to serve as cause or occasion of". The word "the cause" means "that which produces an effect or consequence; an antecedent or antecedents followed by a certain phenomenon"; it "indicates a condition or circumstance or combination of conditions and circumstances that effectively and inevitably calls forth an issue, effect or result or that materially aids in that calling forth."[253]

7.238 We agree with the United States that the ordinary meaning of "cause" implies that increased imports need not be the *sole or single* cause of serious injury. But all these dictionary definitions indicate that *serious* injury or threat thereof must result from increased imports, regardless of whether increased imports are qualified as an "important" cause, or one that "materially aids" in generating the result. In other words, the ordinary meaning requires a showing of a link (i.e., a unifying element) between increased imports and injury or threat thereof of a "*serious*" degree. It is not enough that increased imports cause just some injury which may then be intensified to a "serious" level by factors other than increased imports. In our view, therefore, the ordinary meaning of these phrases describing the Safeguards Agreement's causation standard indicates that increased imports must not only be *necessary*, but also *sufficient* to cause or threaten a degree of injury that is "*serious*" enough to constitute a significant overall impairment in the situation of the domestic industry. We also note that there is a difference between a sole cause, on the one hand, and a necessary and sufficient cause, on the other. Any sole cause is by definition a necessary and sufficient cause, but obviously not any necessary and sufficient cause is the sole cause, it may coincide with other causes as recognised by the second sentence of SG Article 4.2(b).

7.239 We believe that the relevant context, in particular the second sentence of SG Article 4.2(b), confirms the ordinary meaning of these phrases. On the one hand, the requirement not to attribute to increased imports injury caused by other factors does not diminish the requirement of the subparagraph's first sentence that increased imports by themselves need to be *necessary* and *sufficient* to cause serious injury or threat thereof. On the other hand, the second sentence of SG Article 4.2(b) also makes clear, as noted by the United States, that increased imports need *not* be the *sole* or exclusive causal factor present in a situation of serious injury or threat thereof, as the requirement not to attribute injury caused by other factors by implication recognises that *multiple* factors may be present in a situation of serious injury or threat thereof.

7.240 Our interpretation is also in conformity with the object and purpose of the Safeguards Agreement which is to provide for temporary relief and to facilitate adjustment to import competition in emergency situations where increased imports cause serious injury or threat thereof to the domestic industry producing goods which are like or directly competitive to those imports. These objectives could not be accomplished if increased imports are not a necessary and sufficient cause for serious injury or threat thereof because applying safeguard measures against increased imports would not be a justifiable or appropriate remedy for serious injury or threat thereof which is in fact caused by other factors.

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[252] Oxford English Dictionary, at 355.
[253] Webster's New International Dictionary, at 355-356.

7.241 In other words, where a number of factors, one of which is increased imports, are sufficient *collectively* to cause a significant overall impairment of the position of the domestic industry, but increased imports *alone* are not causing injury that achieves the threshold of "seriousness" set up by SG Article 4.2(a) and 4.2(b), the conditions for imposing a safeguard measure are not satisfied. While we believe that a Member remains free to determine any appropriate method of assessing causation, any method that it selects would need to ensure that the injury caused by increased imports, considered alone, is "serious injury", i.e., causing a significant overall impairment in the situation of the domestic industry. Moreover, we cannot see how a causation standard that does not examine whether increased imports are both a *necessary* and *sufficient* cause for serious injury or threat thereof would ensure that injury caused by factors other than increased imports is not attributed to those imports.

7.242 We also believe that our interpretation is confirmed by past GATT/WTO dispute settlement practice, in particular by the panel report on *Argentina – Footwear*, and is consistent as well with the findings of the Panel in *US – Wheat Gluten* (currently on appeal).[254]

7.243 Concerning SG Article 4.2(b)'s the causation standard, the panel in *Argentina – Footwear* suggested that, if causes other than imports are subtracted, increased imports *by themselves* must still be shown to cause or threaten to cause serious injury. [255] In *Argentina - Footwear*, the Appellate Body upheld the panel's causation analysis, which included an examination of whether relevant other factors have been analysed and whether it is established that injury caused by factors other than imports has not been attributed to imports."[256]

7.244 In the recent dispute on *US – Wheat Gluten*, the EC criticised the US "substantial cause" test, arguing that it prevents the investigating authority from verifying the only important issue, i.e., whether increased imports are *per se* causing (or threatening to cause) a "significant overall impairment of the position of the domestic industry".

7.245 The *US – Wheat Gluten* panel concluded that SG Article 4.2(b)'s causation standard requires that imports *in and of themselves* must be capable of causing injury. That panel also noted that "the United States is free to determine an appropriate *method* of assessing causation" … "or how to go about ensuring that injury attributable to other factors is *not attributed* to imports", but "the method it

[254] See, Panel and Appellate Body Reports on *Argentina – Footwear*, op. cit.; Panel Report on *United States – Wheat Gluten*, op cit.; Panel Report on *United States – Imposition of Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, adopted by the Committee on Antidumping Practices on 27 April 1994, ADP/87, BISD 41S/229; and Panel Report on *United States – Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, adopted by the Committee on Subsidies and Countervailing Measures on 28 April 1994, SCM/153, BISD 41S/576.

[255] Panel Report on *Argentina - Footwear*, op. cit., at paragraph 8.229.

[256] The Appellate Body also adopted the panel's opinion that in an analysis of causation, "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" (paragraph 142, Appellate Body Report on *Argentina – Footwear*). A coincidence between increase in imports and deterioration in injury factors would normally occur if causation is present, and its absence would create serious doubts as to the existence of the causal link. Such a coincidence *by itself* cannot prove causation, there is also a need for an adequate explanation of how the facts support the determination. But an absence of such coincidence would cast doubt on the existence of a causal link, it would require a particularly convincing explanation in the 'findings and reasoned conclusions' published pursuant to Article 3.1 of the Safeguards Agreement. (*See*, Panel Report on *Argentina – Footwear*, op. cit., at paragraph 8.238.)

selects must ensure that the injury caused by increased imports, *considered alone*, is 'serious' injury."[257]

7.246 We are also of the view that our interpretation of the Safeguard Agreement's causation approach is consistent with the reasoning of the reports of the panels on *US – Salmon from Norway* under the Tokyo Round Subsidies and Antidumping Codes,[258] to the extent that these are relevant for this safeguards dispute. The United States cites these panel reports in support of its argument that there is no requirement to isolate and quantify the percentage of injury caused individually by increased imports and each of the specific other causes. We agree that this panel rejects the notion that the USITC "should somehow have identified the extent of injury caused by these other factors in order to isolate the injury caused by these factors from the injury caused by the imports from Norway." However, the panel continues in holding that "the USITC was required to conduct an examination sufficient to ensure that in its analysis of factors … it did not find that material injury was caused by imports from Norway when material injury to the domestic industry allegedly caused by imports from Norway was in fact caused by factors other than these imports".[259]

7.247 In our view, this reasoning confirms our interpretation that SG Article 4.2(b) requires that increased imports by themselves must be a necessary and sufficient cause of serious injury or threat thereof and injury caused by other factors must not be attributed to increased imports. The recent panel on *US – Wheat Gluten* shares our reading of the *US – Salmon from Norway* panels' reasoning when the former states: "[a] Member is not necessarily required to quantify on an individual basis, the precise extent of 'injury' caused by each other possible factor. However, a Member must conduct an examination that ensures that any injury caused by such other factors is not attributed to increased imports."[260]

7.248 Turning to the US "substantial cause" standard, it seems that this standard focuses on a somewhat different question than SG Article 4.2(a) and (b) as interpreted by us above. Under the "substantial cause" standard, the USITC examines whether imports are an *important* cause of injury and *no less important than any other single* cause (or put in other words, whether there is a *single cause more important* than increased imports).

7.249 As the following hypotheticals illustrate, this standard could imply, depending on circumstances, sometimes a *higher* and sometimes a *lesser* degree of causation than suggested by SG Articles 2.1 and 4.2(b): Under the US "substantial cause" standard it would seem possible that in cases where increased imports are an important cause of serious injury, no safeguard measure would be imposed where *at least one* other cause is *more important* than increased imports. By the same token, however, it would also seem possible that in cases where imports are an important cause contributing *more* injury than, or at least the *same* amount of injury as, any *other* cause *individually*, a safeguard measure could be applied because *no single other* factor individually is a *more important* cause than increased imports. In the latter situation, a safeguard measure could be imposed even if *all other* factors *in combination* cause the *predominant* part of injury, and serious injury would not have been caused by increased imports, if taken *alone*.

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[257] Panel Report on *United States – Wheat Gluten*, op. cit., at paragraph 8.140.

[258] Panel Report on *United States – Imposition of Anti-dumping Duties on Imports of Fresh Chilled Atlantic Salmon from Norway*, op. cit., and Panel Report on *United States – Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, op. cit.

[259] Panel Report on *United States – Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, op. cit., at paragraph 321.

[260] Panel Report on *US - Wheat Gluten*, op. cit., at paragraph 8.142.

7.250 Thus, when the USITC applies its "substantial cause" test, the question of whether increased imports by themselves are necessary and sufficient to cause a degree of injury or threat that is "serious" within the meaning of SG Article 4.2(b) is not addressed by the United States' "substantial cause" standard, and thus can only be answered on a case-by-case, fact-specific basis. Similarly, the US "substantial cause" standard as such does not address the issue of ensuring in all cases that no injury caused by other factors is attributed to increased imports.

3. The USITC's investigation of causation and non-attribution of "other factors"

7.251 In the light of our interpretation of the Safeguard Agreement's causation standard and our considerations about the US "substantial cause" standard, the question arises whether the USITC determined in the lamb investigation that increased imports were by themselves a necessary and sufficient cause for threat of serious injury and whether injury caused by factors other than increased imports, if any, was not attributed to those imports.

7.252 During the panel proceeding, the United States has argued that the USITC determined that no factor other than increased imports contributed in any significant way to the threat of serious injury faced by the domestic industry. If the facts before us confirm this argumentation, then even the application of a causation standard which does not in all cases ensure consistency with the causation standard of the Safeguards Agreement could have resulted in no substantive error as far as the USITC's determination in the lamb investigation is concerned. Thus, it is important for us to review the precise wording of the report of that determination published by the USITC and the pertinent argumentation of the parties in their submissions.

(a) USITC determination of a causal link between increased imports and threat of serious injury

7.253 We note in respect of causation that the USITC determined that "lamb meat is being imported into the United States in such increased quantities as to be a substantial cause of the threat of serious injury to the domestic industry producing an article like or directly competitive with the imported article". Thus, the USITC determination clearly states that in the view of the USITC, a causal link existed between the threat of serious injury that it found and the increased imports of lamb meat.

7.254 Specifically, the USITC found, concerning imports and their past effects, that import volumes had increased, reaching record levels in 1996 and surpassing those levels thereafter, and that that their unit values had declined and were continuing to drop. The USITC also found that the increase in imports had caused prices to fall, given the inability of growers and feeders to reduce their production in the short run. As a result, the USITC found, the financial performance of the various industry segments worsened due to declining sales and falling prices.[261]

7.255 The USITC also found, concerning the likely future effects of imports, that further increases in import volume were likely to have further negative effects on the domestic industry's prices, shipment volumes and financial condition in the imminent future. Additional increases in imports were expected, as exporters from Australia and New Zealand projected further increases in exports to the United States for 1998-1999.

7.256 The complainants argue that the USITC failed to establish any causal link whatsoever between increased imports and any threat of serious injury experienced by the US industry. In making these arguments, the complainants point to a number of alternative explanations for the declining condition of the US industry, the most important being the termination of the Wool Act

[261] USITC Report, Exh. US-1, at I-23-24.

subsidies, and the long-term contraction in US sheep production and in US consumption of lamb meat. They argue as well that there was little direct competition between imported and domestic lamb meat.

7.257 While many of the complainants' alternative explanations may conceivably contain some element of truth, this by no means amounts to a demonstration that imports played *no* role whatsoever in the condition of the US industry. In our view, the complainants have brought forward no proof of a complete absence of a causal link between the increased imports and the condition of the industry. We recall in this respect that under our standard of review, we are precluded from performing a *de novo* review of the domestic investigation, and from substituting our own judgement for that of the USITC.

7.258 By the same token, however, we recall our conclusion that, for the requirements of SG Article 4.2(b) to be met, increased imports must by themselves be a necessary and sufficient cause of threat of a degree of injury that could be characterized as *serious*. Although we find no basis to conclude that imports had *no* effect on the condition of the domestic industry, this does not mean that the USITC's conclusions cited above amount to a finding that imports by themselves were necessary and sufficient to threaten to cause serious injury. Thus, as noted above, we must also consider whether in this particular case the USITC found that there was no other factor that contributed in any appreciable way to the declining condition of the industry. If not, we also have to examine whether the United States did ensure that none of any injury caused by such other factors was attributed to increased imports. For this, we must turn to the USITC's determination concerning each of the "other factors" that it examined.

(b) USITC determination concerning the non-attribution of "other factors"

7.259 As discussed above, SG Article 4.2(b) requires consideration of whether any "factors other" than increased imports could have caused threat of serious injury, and also requires that any injury caused by such other factors not be attributed to increased imports. The USITC identified and investigated six such potential other causes: (i) the termination of the US Wool Act payments; (ii) competition from other meat products; (iii) increased input costs; (iv) overfeeding of lambs; (v) alleged concentration in the packer segment of the industry; and (vi) the lack of an effective industry marketing programme.

7.260 In this following section, we discuss whether with respect to these six "other factors" identified in the USITC's investigation, the language of the report published by the USITC confirms the argumentation of the United States in its submissions to the Panel. In particular, we note that the United States argues in its submissions that the USITC found that none of the "other factors" made *any appreciable* contribution to the threat of serious injury found to exist. According to the "substantial cause" standard applied by the USITC, however, the USITC is required to determine whether each of the potential "other factors" *individually* is a *less important* cause of threat of serious injury than increased imports.

7.261 In this respect, we recall our above consideration that, even if *no one* factor *individually* is a more important cause of a threat of serious injury than are increased imports, this does not exclude the possibility that *all* other factors *collectively* could contribute to this threat to such an extent that the threat of injury caused by increased imports in and of themselves does *not* rise to the requisite level of "*seriousness*" any more. In that case (and assuming that injury caused by other factors is not attributed to increased imports), the residual threat attributable to increased imports does not constitute a necessary and sufficient cause for threat of serious injury and thus no imposition of a safeguard measure is justified.

7.262 Thus, we must carefully review the exact nature of the USITC's determinations in respect of each of the identified possible "other factors". If the USITC did not find that none of these factors made more than a negligible contribution to the threat of serious injury, and if it did not ensure the non-attribution of injury caused by such other factors to increased imports, then we would have to conclude that the United States has not fulfilled the requirements of SG Article 4.2(b).

7.263 The USITC's causation determination concerning the "other factors" is as follows:

(i) Termination of payments under the National Wool Act of 1954

7.264 The USITC report states that the phasing out of the wool subsidies forced some growers to liquidate stocks, decreased availability and increased prices (e.g., 30 per cent decrease in domestic supply and associated decreases in breeding stock created difficulty in meeting demand).[262] The report indicates that the growers earned a small profit in 1997, which the petitioners cited as evidence of recovery from the termination of the Wool Act payments. Concerning the termination of the Wool Act payments, the USITC states in the causation determination:

> "As required by the statute, we considered whether any other causes might be a more important cause of the threat of serious injury than increased imports. First, we examined whether termination of payments under the National Wool Act of 1954 ('Wool Act') might be a more important cause. Congress enacted legislation ending the Wool Act in 1993, and the support payments were phased out largely in 1994 and 1995, before the increase in imports that began in 1996. Petitioners claim that the loss of the payments had been largely absorbed by the growers and feeders before the increase in imports. Respondents assert that the industry cannot be expected to absorb so quickly the effects of the loss of such a longstanding payment programme.
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> "We have no doubt that the loss of Wool Act payments hurt lamb growers and feeders and caused some to withdraw from the industry. We also believe that it is unrealistic to conclude that the effects of the termination of Wool Act payments had completely disappeared as of 1997. However, the industry had experienced some recovery since full termination in 1996, and the effects of termination of Wool Act payments can be expected to recede further with each passing month. In addition, the termination of the Wool Act could only have had an indirect effect on the financial condition of the packers and breakers, who never received payments under the Wool Act. We find *that in the imminent future*, the recent loss of Wool Act payments *is a less important cause of the threat of serious injury than imports of lamb meat."*[263]

7.265 Before the Panel, the United States argues based on the above USITC statement that the effects of termination of wool subsidies were expected to "recede further with each passing month", that the USITC found that termination of wool subsidies ceased to be relevant as an "other factor" as of 1997. We note, however, that the determination quoted above in fact states that it was "unrealistic to conclude that the effects of the termination of Wool Act payments had completely disappeared as of 1997",[264] and that the termination was merely a "less important" cause than increased imports of the threat of serious injury. Thus, we cannot see how the USITC's determination could indeed constitute a finding that the termination of the Wool Act payments did not contribute to any appreciable extent to the threat of serious injury that the USITC found to exist.

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[262] Id. at II-79.
[263] Id. at I-24-I-25. Footnotes omitted, emphasis added.
[264] Id. at I-24.

(ii) Competition from other meat products and demand side factors

7.266 Another causal factor discussed by the USITC is the decline in lamb meat consumption due to changing consumer tastes and preferences, price ratios between lamb meat and substitute products (e.g., beef, pork and poultry), and changes in consumer income. In this regard, the USITC made the following finding:

> "We also considered whether competition from other meat products … might be a *more important cause of the threat of serious injury.* Although such products appear to compete with lamb to a certain extent, we find no evidence that such competition is *more important cause* ..than imports of lamb meat. As noted above, per capita consumption of lamb meat has been relatively steady since 1995."[265]

7.267 This finding by the USITC appears to acknowledge that competition from other meats plays some role in the condition of the domestic lamb industry. In our view, therefore, this finding that competition from other meats was *not a more important cause* than increased imports cannot be understood as a finding that such competition made *no* appreciable contribution to the threat of serious injury.

(iii) Increased input costs

7.268 The USITC noted that expenses for growers increased at a modest rate and then fell in interim 1998, that expenses for feeders increased at a faster pace but not at a dramatic pace, and that input costs for packers and breakers rose moderately in line with production. The USITC concluded that "[t]hus, there has been no significant increase in input costs that explains the sharp decline in industry profits, and no increase is predicted in the imminent future."[266]

7.269 Unlike its findings on factors (i) and (ii), here the USITC's determination on its face does appear to say that the USITC in fact did find that increased input costs played and were expected to play no appreciable role in the condition of the industry. That is, the USITC did not couch this finding in the statutory language of increased input costs not being a "more important" cause than imports of the threat of serious injury. We view this difference in the wording of the USITC's determination on this factor, as compared with the first two, as undercutting the US argument that the USITC had in fact determined that *none* of the "other factors" had had any impact, but that the USITC was constrained by the language of the US statute to use the formal construction thereof in setting forth that determination.

(iv) Alleged overfeeding of lambs

7.270 Before the USITC, respondents alleged that in 1997 some US feeders held lambs unduly long in feed lots in order to maximise revenue while prices were high, and that these lambs were heavier than usual when slaughtered, which pulled down prices generally. In this respect, the USITC found that "even if we accept respondents' arguments, these 'fat' lambs would have accounted for no more than a small share of total domestic lamb production. In any event, respondents do not allege that overfeeding is currently taking place or represents a future threat."[267]

7.271 As with increased input costs (factor (iii)), the nature of the USITC's determination in respect of alleged overfeeding appears to be expressed in different terms than for the factors (i) and (ii). That

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[265] Id. at I-25. Footnotes omitted, emphasis added.
[266] Id. at I-25.
[267] Id. at I-25. Footnotes omitted.

is, we view the USITC as in fact determining that the contribution of overfeeding to the industry's condition during 1997, if any, was minimal and that there was no evidence that any overfeeding was taking place at the time of the determination or would take place in the future. Thus, again, the fact that the USITC explicitly made such a finding in respect of this factor, but not in respect of all of the "other factors" again undercuts the US argument that the use of the statutory language is simply a required formality. If this were in fact the case, that language would have been used in respect of *all* of the "other factors" examined.

(v) Alleged concentration in the packer segment of the industry

7.272 The USITC also considered whether concentration in the packer segment of the industry might be a "more important cause" of the threat of serious injury than increased imports, and cited USDA data indicating that nine packers accounted for 85 percent of the sheep and lambs slaughtered in 1997. According to the USITC, "an undue level of concentration" would have suggested that packers were sheltered from the effects of low-priced imports, and would have been able to pass through lower prices more readily to feeders and growers. The USITC noted that petitioners had claimed that concentration in the packer segment had actually decreased during the period of investigation, and the USITC further found that packers, "like other segments of the lamb meat industry", had experienced deteriorating profits in the latter part of the period of investigation, and had operated at a loss in interim 1998. The USITC concluded that "concentration in the packer segment of the industry *is a less important cause* of the threat of serious injury than increased imports."[268]

7.273 The USITC did not define what it meant by an "undue" level of concentration, and rather looked to the financial performance of the packers as the basis for its finding that concentration in this segment was a *less important cause* of threat than were increased imports. Moreover, the fact that the USITC returned to the statutory language in rendering its determination concerning this factor (i.e., that this "other factor" is a *less important* cause than increased imports) suggests that the nature of its conclusion was qualitatively different than for the two preceding "other factors" (i.e., increased input costs and overfeeding). Here again, we do not believe that the USITC determination that this cause was less important than increased imports can be understood as a finding that such concentration in the packer segment played no role in the threat of serious injury.

(vi) Failure to develop and implement an effective marketing programme for lamb meat

7.274 Finally, the USITC also identified, considered as an "other factor", and made a finding in respect of, whether the failure to develop and implement an effective marketing programme for lamb meat was a *more important cause* of the threat of serious injury than increased imports, "particularly in light of the repeal of the longstanding Wool Act payment programme".[269] The USITC concluded that:

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[268] Id. at I-25-26. Footnotes omitted, emphasis added.

[269] In its interim review comments, the United States argues that the failure to develop and implement an effective marketing programme for lamb meat is not a factor that falls within the scope of SG Article 4.2(b), citing its answer to one of our questions. (*See*, US Answer to Panel Question 11, Annex 3-7, at paragraph 85: "The USITC was not required to assume that it was appropriate to consider the absence of such a program to be a factor causing injury under Article 4.2(b) as opposed to a possible adjustment measure to address injury."). We note that the language of SG Article 4.2(b) is open-ended as to what sorts of "other factors" might potentially be causing injury in a given investigation, by implication leaving it to investigating authorities to identify such potential "other factors" in the light of the facts of each particular case. In this regard, we note that it was the USITC that decided to investigate the lack of a marketing programme as one among several possible

> "while an effective marketing program could have had an important impact on the industry, in view of the foregoing discussion, we do not find that failure to implement such a program is a *more important cause* of the threat of serious injury than increased imports." [270]

7.275 The USITC does not elaborate on which parts of the "foregoing discussion" lead to its conclusion concerning the lack of an effective marketing programme, or on how that discussion demonstrates that the absence of an effective marketing programme was a less important cause than increased imports of the threat of serious injury. We note that in respect of this factor, the USITC again returned to the statutory language in setting forth its determination. As in the case of the termination of wool subsidies, competition from other meats, and alleged concentration in the packer segment, we do not believe that the USITC determination that the lack of an effective marketing programme was not more important than increased imports can be understood as a finding that such competition made *no* appreciable contribution to the threat of serious injury.

4. Conclusions on causation and non-attribution of "other factors"

7.276 In the light of the foregoing, we conclude that the United States has, in applying the "substantial cause" test (i.e., "*important* cause and *not less* than any other cause") in the lamb investigation, not shown, pursuant to SG Article 4.2(b), that increased imports were by themselves a *necessary* and *sufficient* cause of threat of serious injury.

7.277 We also conclude, as a matter of fact, that the determinations by the USITC in respect of four of the six "other factors" examined do not constitute determinations that these factors made no appreciable contribution to the threat of serious injury. Rather, the USITC found that these four factors were "less important" causes than increased imports of the threat of serious injury, which in our view means that they were contributing in a more than insignificant way to that threat. Therefore, we conclude that the USITC's application of the "substantial cause" test in the lamb meat investigation as reflected in the USITC report did not ensure that threat of serious injury caused by other factors has not been attributed to increased imports.

7.278 Finally, we recall our preliminary ruling of 25 May 2000 and the pertinent reasoning contained in paragraphs 5.54-5.58 above that the US safeguard statute *per se* is not within this Panel's terms of reference, and that, consequently, our findings are limited to an examination of the US causation standard *as applied* in this investigation concerning imports of lamb meat.

7.279 In the light of the foregoing considerations and conclusions, we find that the USITC's determination of a causal link between increased imports and threat of serious injury as well as its determination on "other factors" in this lamb meat investigation is inconsistent with SG Article 4.2(b), and thus also with SG Article 2.1.

F. CLAIMS UNDER SG ARTICLES 2, 3, 5, 8, 11 AND 12, AND GATT 1994 ARTICLES I AND II

7.280 Bearing in mind the statements of the Appellate Body on "judicial economy" in the disputes on *United States – Shirts and Blouses* and *Australia – Salmon*,[271] we believe that in the foregoing

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"other factors" that might be threatening to cause injury to the domestic industry. In the light of this decision by the USITC, and given that we are precluded from engaging in a *de novo* review of the case, we believe that we can only assess the USITC's determination in respect of this factor on its own terms, i.e., as a finding in respect of a possible "other factor" within the meaning of SG Article 4.2(b).

[270] USITC Report, Exh. US-1, at I-26. Emphasis added.

[271] *See* paragraph 7.119 and footnotes 156-157.

sections we have addressed all those claims and issues which we considered necessary for the resolution of the matter in order to enable to DSB to make sufficiently precise recommendations and rulings for the effective resolution of the dispute before us. Therefore, we see no need to rule on the complainants' claims under SG Articles 2.2, 3.1, 5.1 and GATT 1994 Articles I and II, or on Australia's claims under SG Articles 8, 11 and 12.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 On the basis of the foregoing considerations, we conclude:

(a) that the United States has acted inconsistently with Article XIX:1(a) of GATT 1994 by failing to demonstrate as a matter of fact the existence of "unforeseen developments";

(b) that the United States has acted inconsistently with Article 4.1(c) of the Agreement on Safeguards because the USITC, in the lamb meat investigation, defined the domestic industry as including input producers (i.e., growers and feeders of live lamb) as producers of the like product at issue (i.e. lamb meat);

(c) that the complainants failed to establish that the USITC's analytical approach to determining the existence of a threat of serious injury, in particular with respect to the prospective analysis and the time-period used, is inconsistent with Article 4.1(b) of the Agreement on Safeguards (assuming *arguendo* that the USITC's industry definition was consistent with the Agreement on Safeguards);

(d) that the complainants failed to establish that the USITC's analytical approach (see paragraphs 7.223-7.224) to evaluating all of the factors listed in Article 4.2(a) of the Agreement on Safeguards when determining whether increased imports threatened to cause serious injury with respect to the domestic industry as defined in the investigation is inconsistent with that provision (assuming *arguendo* that the USITC's industry definition was consistent with the Agreement on Safeguards and that the data relied upon by the USITC were representative within the meaning of Article 4.1(c) of the Agreement on Safeguards);

(e) that the United States has acted inconsistently with Article 4.1(c) of the Agreement on Safeguards because the USITC failed to obtain data in respect of producers representing a major proportion of the total domestic production by the domestic industry as defined in the investigation;

(f) that the United States has acted inconsistently with Article 4.2(b) of the Agreement on Safeguards because the USITC's determination in the lamb meat investigation in respect of causation did not demonstrate the required causal link between increased imports and threat of serious injury, in that the determination did not establish that increased imports were by themselves a necessary and sufficient cause of threat of serious injury, and in that the determination did not ensure that threat of serious injury caused by "other factors" was not attributed to increased imports;

(g) that by virtue of the above violations of Article 4 of the Agreement on Safeguards, the United States also has acted inconsistently with Article 2.1 of the Agreement on Safeguards.

8.2 We therefore recommend that the Dispute Settlement Body request the United States to bring its safeguard measure on imports of lamb meat into conformity with its obligations under the WTO Agreement on Safeguards and the GATT of 1994.