WORLD TRADE ORGANIZATION

WT/DS166/AB/R
22 December 2000

(00-5593)

Original: English

UNITED STATES – DEFINITIVE SAFEGUARD MEASURES ON IMPORTS OF WHEAT GLUTEN FROM THE EUROPEAN COMMUNITIES

AB-2000-10

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities

United States, *Appellant/Appellee*
European Communities, *Appellant/Appellee*

Australia, *Third Participant*
Canada, *Third Participant*
New Zealand, *Third Participant*

AB-2000-10

Present:

Lacarte-Muró, Presiding Member
Abi-Saab, Member
Taniguchi, Member

I. Introduction

1. The United States and the European Communities appeal certain issues of law and legal interpretations in the Panel Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* (the "Panel Report").[1] The Panel was established to consider a complaint by the European Communities with respect to a definitive safeguard measure imposed by the United States on certain imports of wheat gluten.

2. On 1 October 1997, the United States International Trade Commission (the "USITC") initiated a safeguard investigation into certain imports of wheat gluten.[2] By Proclamation of the President of the United States, dated 30 May 1998, the United States imposed a definitive safeguard measure, in the form of a quantitative restriction on imports of wheat gluten, effective as of 1 June 1998.[3] Products from Canada, a partner with the United States in the North American Free-Trade Agreement ("NAFTA"), and certain other countries were excluded from the application of the safeguard measure.[4] The United States notified the initiation of the investigation, the determination of

[1]WT/DS166/R, 31 July 2000.

[2]Panel Report, para. 2.2.

[3]"Proclamation 7103 of 30 May 1998 – To Facilitate Positive Adjustment to Competition From Imports of Wheat Gluten", United States Federal Register, 3 June 1998 (Volume 63, Number 106), pp. 30359-30360; Panel Report, para. 2.7.

[4]*Ibid*., para. 2.8.

serious injury, and the decision to apply the safeguard measure to the Committee on Safeguards.[5] The factual aspects of this dispute are set out in greater detail in the Panel Report.[6]

3. The Panel considered claims by the European Communities that, in imposing the safeguard measure on imports of wheat gluten, the United States acted inconsistently with Articles I and XIX of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), and with Articles 2.1, 4, 5, 8, and 12 of the *Agreement on Safeguards*.[7]

4. In its Report, circulated to Members of the World Trade Organization (the "WTO") on 31 July 2000, the Panel concluded that:

> … the United States has not acted inconsistently with Articles 2.1 and 4 of the Agreement on Safeguards or with Article XIX:1(a) of the GATT 1994 in:
>
> > (i) redacting certain confidential information from the published USITC Report; or
> >
> > (ii) determining the existence of imports in "increased quantities" and serious injury.[8]
>
> …
>
> … the definitive safeguard measure imposed by the United States on certain imports of wheat gluten based on the United States investigation and determination is inconsistent with Articles 2.1 and 4 of the Agreement on Safeguards in that:
>
> > (i) the causation analysis applied by the USITC did not ensure that injury caused by other factors was not attributed to imports; and
> >
> > (ii) imports from Canada (a NAFTA partner) were excluded from the application of the measure after imports from all sources were included in the investigation for the purposes of determining serious injury caused by increased imports (following a separate inquiry concerning whether imports from Canada accounted for a "substantial share" of total imports and whether they "contributed importantly" to the "serious injury" caused by total imports).[9]
>
> …

[5]Panel Report, paras. 2.3, 2.5 – 2.7.

[6]*Ibid.*, paras. 2.1 – 2.10.

[7]In its request for the establishment of a panel (WT/DS166/3, 4 June 1999), the European Communities also claimed that the United States had acted inconsistently with Article 4.2 of the *Agreement on Agriculture*. The Panel found that the European Communities had "abandoned" this claim: *Ibid*., para. 8.221.

[8]*Ibid*., para. 9.1.

[9]*Ibid.*, para. 9.2.

> … the United States failed to notify immediately the initiation of the investigation under Article 12.1(a) and the finding of serious injury under Article 12.1(b) SA. We further conclude that, in notifying its decision to take the measure after the measure was implemented, the United States did not make timely notification under Article 12.1(c). For the same reason, the United States violated the obligation of Article 12.3 SA to provide adequate opportunity for prior consultations on the measure. Hence, the United States also violated its obligation under Article 8.1 SA to endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure, in accordance with Article 12.3 SA.[10]

5. Having found the United States' safeguard measure to be inconsistent with Articles 2.1 and 4.2 of the *Agreement on Safeguards*, the Panel did not deem it necessary to examine the claims of the European Communities under Article XIX of the GATT 1994, and, in addition, under Article I of the GATT 1994 and Article 5 of the *Agreement on Safeguards*.[11]

6. The Panel recommended that the Dispute Settlement Body ("DSB") request the United States to bring its measure into conformity with the *Agreement on Safeguards*.[12]

7. On 26 September 2000, the United States notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 6 October 2000, the United States filed its appellant's submission.[13] On 11 October 2000, the European Communities filed an other appellant's submission.[14] On 23 October 2000, the European Communities and the United States each filed an appellee's submission.[15] On the same day, Australia, Canada, and New Zealand each filed a third participant's submission.[16]

8. The oral hearing in the appeal was held on 3 November 2000. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

---

[10]Panel Report, para. 9.3.

[11]*Ibid.*, para. 8.220.

[12]*Ibid.*, para. 9.5.

[13]Pursuant to Rule 21 of the *Working Procedures*.

[14]Pursuant to Rule 23(1) of the *Working Procedures*.

[15]Pursuant to Rules 22 and 23(3) of the *Working Procedures*.

[16]Pursuant to Rule 24 of the *Working Procedures*.

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by the United States – Appellant*

1. Article 4.2(b) of the *Agreement on Safeguards*

9. The United States argues, on appeal, that the Panel erred in finding the United States' causation analysis to be inconsistent with Article 4.2(b) of the *Agreement on Safeguards*. For the United States, the meaning of the word "cause", used in Article XIX:1(a) of the GATT 1994 and Articles 2.1, 4.2(a) and 4.2(b) of the *Agreement on Safeguards*, is "to bring about a result, whether alone or in combination with other factors – not 'to cause on its own.' The plain meaning of 'causal link' in Article 4.2(b), first sentence, is consistent with this understanding of 'to cause.'"[17] The United States believes that the legal standard applied by the USITC satisfies this requirement.

10. The United States also maintains that the Panel did not examine adequately the meaning of the expression "under such conditions" in Article XIX:1(a) of the GATT 1994. Rather than attempt to isolate the causal effects of increased imports, the competent authorities should examine the effects of imports against the background of "the totality of attendant circumstances and existing state of affairs that lead imports to cause serious injury", "including factors that may have rendered a domestic industry more (or less) susceptible to injury."[18] The United States adds that the need to consider the industry as a whole is supported by the fact that "serious injury" refers to an industry's overall condition, rather than to some subset of injury attributable solely to increased imports.

11. Thus, in the United States' view, Article 4.2 does not require the isolation of imports, which the United States contends would, in any event, involve "subjective" speculation.[19] In its view, Article 4.2(b) requires the competent authorities to examine other causes of injury to ensure that their effects do not sever the causal link found to exist, after examining the totality of the circumstances, between increased imports and serious injury.[20] The United States asserts that the negotiating history of the *Agreement on Safeguards* bears out this reading of Article 4.2(b).

---

[17]United States' appellant's submission, para. 54.

[18]*Ibid.*, paras. 59 and 60.

[19]*Ibid.*, para. 73.

[20]*Ibid.*, para. 82.

2. Article 2.1 of the *Agreement on Safeguards*

12. The United States requests the Appellate Body to reverse the Panel's finding that the exclusion of Canadian products from the safeguard measure on wheat gluten is inconsistent with Articles 2.1 and 4.2 of the *Agreement on Safeguards.*

13. In the view of the United States, the Panel's finding that, under Articles 2.1 and 4.2 of the *Agreement on Safeguards*, "there is an implied symmetry with respect to the product that falls within the scope of a safeguard *investigation* and the product that falls within the scope of the *application* of the safeguard measure"[21] (emphasis in original), is inconsistent with the text of the *Agreement on Safeguards*. Article 9.1 of the *Agreement on Safeguards* requires that imports from developing countries be excluded from the application of a safeguard measure, but does not provide for the exclusion of such imports from the investigation, or require any finding that the imports subject to the measure, "in and of themselves," cause serious injury. Furthermore, in *Argentina – Safeguard Measures on Imports of Footwear* ("*Argentina – Footwear Safeguards*"), the Appellate Body found that "Articles 2.1 and 4.1(c) … do not resolve the matter of the scope of *application* of a safeguard measure."[22] (emphasis in original) The United States stresses that *Argentina – Footwear Safeguards* is distinguishable from this case because the USITC specifically examined the contribution of Canadian imports to the serious injury sustained by the industry and found that these imports played no significant role in that injury. The United States alleges that the Panel ignored legal provisions pertinent to the exclusion from safeguard measures of imports from partner countries in a free-trade area, namely Article XXIV of the GATT 1994 and footnote 1 of the *Agreement on Safeguards*. The United States also contends that the Panel failed to respect the requirement in Article 12.7 of the DSU to set out a "basic rationale" for its treatment of footnote 1.

3. Articles 8 and 12 of the *Agreement on Safeguards*

14. The United States requests the Appellate Body to reverse the Panel's findings regarding notification and consultation. The United States contends that its notifications under Article 12.1, subparagraphs (a), (b) and (c) were submitted "immediately" because they provided the required information at a time that allowed Members to review them through the Committee on Safeguards, and allowed interested Members to request consultations. The United States also believes that it complied with Article 12.3 by providing full information on its serious injury finding and the nature of the proposed measure, and by conducting consultations before the final decision.

[21]Panel Report, para. 8.167.

[22]Appellate Body Report, WT/DS121/AB/R, adopted 12 January 2000, para. 112.

15. The United States argues that, while the Panel correctly recognized that Articles 8.1, 12.1, 12.2 and 12.3 are interrelated, it failed to recognize that Members may employ a variety of procedures to comply with the obligations imposed under these provisions. For example, Article 12.2 envisions a process whereby Members may submit pertinent information in the Article 12.1(b) notification, in the Article 12.1(c) notification, or in both. There is no requirement that an Article 12.1(c) notification be filed before consultations, as long as prior notifications supplied the necessary information. Similarly, there is no requirement to conduct consultations after the issuance of the decision to apply a safeguard measure, as long as sufficient information was available to conduct consultations at a stage in the process where those consultations would have meaning. Through its notifications, the United States supplied all of the information specified in Article 12.2, including all relevant details of the proposed measure. The United States considers that this information was sufficient to allow for adequate consultations under Article 12.3.

B. *Arguments of the European Communities – Appellee*

1. Article 4.2(b) of the *Agreement on Safeguards*

16. The European Communities argues that the Panel correctly concluded that the United States applied a test of causation that is not consistent with Article 4.2(b) of the *Agreement on Safeguards*. The European Communities considers that the Panel did not need to consider explicitly the meaning of the term "to cause" in interpreting Article 4.2(b), since the conclusions it reached on the meaning of Article 4.2(b) are consistent with the ordinary meaning of the terms "to cause", "have caused" and "the causal link", as these terms are used in Article XIX:1(a) of the GATT 1994, and in Articles 2.1, 4.1(a) and 4.1(b) of the *Agreement on Safeguards*. The European Communities adds that the Panel correctly found that the term "under such conditions" in Article XIX:1(a) of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards* refers to the conditions of competition between imported and domestic products rather than, as the United States seems to allege, to the "other relevant factors" that have a bearing on the situation of the industry under Articles 4.2(a) and 4.2(b) of the *Agreement on Safeguards*.

17. The European Communities contends that the Panel correctly recognized that Article 4.2(b) of the *Agreement on Safeguards* requires that increased imports *per se* cause serious injury. As the Appellate Body found in *Argentina – Footwear Safeguards*, Article 4.2(b) sets out a causation analysis that is separate from, and subsequent to, the injury analysis to be undertaken pursuant to Article 4.2(a).[23] Article 4.2(b) ensures that, when a Member is considering whether to suspend fair trade, it may do so *if, and only if,* the imports are shown to cause serious injury. The practical effect

[23]Appellate Body Report, *supra*, footnote 22, para. 145.

of the United States' interpretation of Article 4.2(b), however, would allow a safeguard measure to be imposed whenever there is serious injury and imports caused *any* injury. The European Communities submits that this cannot be the case, and adds that its own interpretation of Article 4.2(b) is consistent with the object and purpose of the *Agreement on Safeguards*, with the exceptional nature of safeguard measures, and with the negotiating history of the *Agreement on Safeguards*.

18. Lastly, the European Communities submits that, even if the causation standard used by the United States could somehow be considered to be in conformity with Article 4.2(b) of the *Agreement on Safeguards*, the United States in this case nevertheless acted inconsistently with that Article because the USITC undertook no examination whatsoever to ensure that injury caused by other factors was not attributed to imports.

2. Article 2.1 of the *Agreement on Safeguards*

19. As regards the Panel's findings on the exclusion of wheat gluten imports from Canada from the application of the safeguard measure, the European Communities submits that the Panel correctly interpreted Articles 2.1 and 4.2 of the *Agreement on Safeguards* as containing a "symmetry" implied by the terms "a product", "such product" and "the product concerned" in those provisions. Contrary to the argument of the United States, Article 9.1 of the *Agreement on Safeguards* is not inconsistent with the existence of such an "implied symmetry", but is rather the exception to the *Agreement on Safeguards* that proves the rule. The European Communities asserts that the Panel properly recognized that, as in *Argentina – Footwear Safeguards*, the United States could not exclude imports from Canada on the basis of a *global* investigation concerning injury and causation that included imports of wheat gluten *from all sources*. The European Communities highlights that the Panel made a factual finding that the United States had not demonstrated that imports were causing serious injury after the exclusion of imports from Canada and that, as a legal matter, the subsequent causation analysis applied by the USITC regarding imports from Canada did not satisfy the requirements of the *Agreement on Safeguards*.

20. The European Communities adds that Article XXIV of the GATT 1994 is not relevant in this case and that, in any event, the United States has failed to establish that it has satisfied the conditions laid down by the Appellate Body in *Turkey – Restrictions on Imports of Textile and Clothing Products* for the use of Article XXIV as a defence.[24] Lastly, the European Communities considers that the Panel set out sufficient reasons for its conclusion that footnote 1 of the *Agreement on Safeguards* did not affect its conclusions in this case.

[24]Appellate Body Report, WT/DS34/AB/R, adopted 19 November 1999.

3. Articles 8 and 12 of the *Agreement on Safeguards*

21. The European Communities urges the Appellate Body to uphold the findings of the Panel that the United States did not act consistently with Articles 8 and 12 of the *Agreement on Safeguards.* According to the European Communities, the Panel rightly interpreted Article 12 as requiring that all of the procedural steps, findings and decisions set out therein must be made at a date that allows other Members to request consultations, to seek additional information, and to hold meaningful discussions. The United States failed to notify each event listed in Article 12.1 of the *Agreement on Safeguards* in a timely manner. In addition, the notification made by the United States under Article 12.1(b) was not a notification of a "proposed measure" because its title (and therefore its legal basis) was "Article 12.1(b) notification upon making a finding of serious injury or threat thereof " and it contained only non-binding recommendations of the USITC. Articles 8 and 12.3 of the *Agreement on Safeguards* impose a heavy burden regarding consultations and negotiations on a Member proposing to alter unilaterally the balance of negotiated concessions. The European Communities emphasizes that, in this case, the United States acted inconsistently with these provisions because it failed to offer any meaningful opportunity for consultations.

C. *Claims of Error by the European Communities – Appellant*

1. Article 4.2(a) of the *Agreement on Safeguards*

22. The European Communities challenges the Panel's interpretation of Articles 4.2(a) and 4.2(b) of the *Agreement on Safeguards* and, in particular, its finding that, in a safeguards investigation, the competent authorities are only required to evaluate factors that are "*clearly* raised … as relevant by the interested parties".[25] (emphasis in original) The European Communities, therefore, requests the Appellate Body to find that the Panel erred in its interpretation of the substantive requirements of Articles 4.2(a) and 4.2(b) of the *Agreement on Safeguards* and to declare, on the basis of the uncontested facts and clear record in the Panel Report, that the United States violated Articles 4.2(a) and 4.2(b) of the *Agreement on Safeguards* because the USITC Report contained no analysis of the protein content of wheat. According to the European Communities, this is the single, most important, factor determining the price of wheat gluten.

23. In the view of the European Communities, the ordinary meaning of Article 4.2(a) is that the competent authorities must gather, search, inquire into, generate and examine systematically *all* the relevant facts that are available – not only those presented to them by interested parties. It would be difficult for the competent authorities to fulfill their obligation under Article 4.2(b) to ensure that

[25]Panel Report, para. 8.69.

imports, taken alone, have caused serious injury, if those authorities were only obliged to evaluate "other factors" raised by interested parties. The European Communities considers that Articles 4.2(c) and 3.1 of the *Agreement on Safeguards* provide additional context to support its conclusion that the competent authorities are under an obligation to investigate *all* relevant factors, and notes that such a conclusion accords with the findings of a recent panel in the context of anti-dumping.[26]

2. Article 11 of the DSU

24. The European Communities argues that the Panel erred in its interpretation and application of Article 11 of the DSU. The Appellate Body has established that, pursuant to Article 11 of the DSU, the Panel was obliged to examine *all* the relevant facts and evidence, and to assess whether the USITC provided a reasoned or adequate explanation of how the facts supported the determinations that were made. The Panel, however, applied an inappropriate standard of deference, and failed to provide an adequate and reasonable explanation for its findings. The European Communities asserts that the "Panel failed in this case to make an 'objective' factual and legal assessment of all relevant evidence, because it failed to provide an adequate and reasonable explanation for its findings".[27] The European Communities provides several specific illustrations of the lack of a "sufficient basis" for the findings made.

25. First, the European Communities contends that the Panel erred in endorsing the USITC treatment of "productivity" when the Panel's assessment was based on "data" that could not be verified, and on "statements" made by the competent authorities whose "acts" were under review. In the view of the European Communities, the Panel should have concluded that the United States failed to evaluate overall industry productivity as required by Article 4.2(a) of the *Agreement on Safeguards*.

26. Second, the European Communities argues that the Panel violated Article 11 of the DSU in its review of the USITC determinations on profits and losses. The Panel did not review the financial data nor the allocation methodologies allegedly used by the producers, as these were all part of the confidential information that the United States declined to submit to the Panel. The Panel's assessment was not "objective" because it was based on "indications" given by the USITC and "clarifications" added by the United States, as well as on the Panel's refusal to "doubt the veracity" of the USITC findings or to "call into question" the scrutiny given by the USITC to data that the Panel

[26]Panel report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, circulated 28 September 2000, para. 7.236. Thailand has appealed certain issues of law and legal interpretations in that panel report, WT/DS122/4, 23 October 2000.

[27]European Communities' other appellant's submission, para. 25.

never received.[28] The European Communities emphasizes that if the Panel had correctly assessed the facts, it would have reached the conclusion that the USITC had not adequately analysed "profits and losses" in accordance with Article 4.2(a) of the *Agreement on Safeguards*.

27. Third, the European Communities alleges that the Panel erred in not finding that the USITC Report was deficient because, in its causation analysis, the USITC failed to consider the protein content of wheat as a "relevant factor", even though the European Communities' exporters submitted evidence of the relevance of this factor to the USITC, the USITC itself acknowledged the importance of the protein content of wheat, and the Panel had evidence before it of the high correlation between the protein content of wheat and the price of wheat gluten.

28. The European Communities alleges finally that the Panel acted inconsistently with its obligations under Article 11 of the DSU in failing to draw adverse inferences from the refusal of the United States to provide the Panel with information redacted from the USITC Report and other information requested by the European Communities and the Panel. The European Communities requests the Appellate Body to reverse the findings that resulted from such errors, in particular, the Panel's findings that the United States acted consistently with Articles 2.1 and 4 of the *Agreement on Safeguards* in redacting certain confidential information from the USITC Report, and in determining the existence of imports in "increased quantities" and serious injury. For the European Communities, the Panel erred in according significance to the argument of the United States that Article 3.2 of the *Agreement on Safeguards* allows it to withhold information from the Panel. The Panel's failure to obtain the information withheld by the United States on the basis of its allegedly confidential nature, coupled with its failure to draw the necessary adverse inferences from the refusal of the United States, amounted to an error of law.

3. Judicial Economy

29. The European Communities asks the Appellate Body to reverse the Panel's exercise of judicial economy in declining to rule on the claim made under Article XIX:1(a) of the GATT 1994. The European Communities argues, on the basis of the Appellate Body Reports in *Argentina – Footwear Safeguards* and *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea – Dairy Safeguard*")[29], that a safeguard investigation must include an investigation of "unforeseen developments". In this case, the USITC Report contains no analysis or demonstration of "unforeseen developments". The European Communities concludes that the Panel erred in declining to rule on the Article XIX:1(a) claim, and that the Appellate Body should itself rule on that

[28]European Communities' other appellant's submission, para. 65.

[29]Appellate Body Report, WT/DS98/AB/R, adopted 12 January 2000.

claim, because, in this case – in contrast to *Argentina – Footwear Safeguards* – the Panel found that the United States' determinations of imports in "increased quantities" and "serious injury" were *not* inconsistent with Articles 2.1 and 4.2 of the *Agreement on Safeguards*.

30. The European Communities also requests the Appellate Body to reverse the Panel's exercise of judicial economy in declining to rule on the claims made under Article I of the GATT 1994 and Article 5.1 of the *Agreement on Safeguards*, and to go on to determine, on the basis of the uncontested facts in the record, that the United States acted inconsistently with these provisions. The Panel's failure to rule on the claim under Article 5.1 of the *Agreement on Safeguards* means that the United States "could simply repeat the serious injury determination and … proceed to apply the measure in the same way."[30]

D. *Arguments of the United States – Appellee*

1. Article 4.2(a) of the *Agreement on Safeguards*

31. The United States urges the Appellate Body to reject the European Communities' appeal on the factors that the competent authorities must assess in their safeguard investigation. According to the United States, the Panel correctly determined that the only information pertinent to a panel's assessment of whether the competent authorities adequately evaluated relevant factors under Article 4.2 of the *Agreement on Safeguards* is information those authorities considered in the course of their investigation. The European Communities, in contrast, argues that the Panel should have relied on information that was not before the USITC. However, the *Agreement on Safeguards* assigns the task of carrying out investigations to competent authorities. Thus, for the United States, a panel examining the "facts of the case" under Article 11 of the DSU must examine and assess what the competent authorities did in the course of *their* investigation, *not* seek to establish additional facts on whether increased imports may or may not have caused serious injury to the domestic industry.

32. According to the United States, the position of the European Communities would undermine the investigative process set out in the *Agreement on Safeguards*, including important procedural protections built into that Agreement. The United States accepts that, in some cases, a panel will need to assess whether the competent authorities failed to discharge their responsibilities to investigate and to make determinations based on objective evidence. In this case, however, the European Communities seeks to present a panel with information that it, and its wheat gluten producers, failed

[30]European Communities' other appellant's submission, para. 108.

to present to the USITC. The United States adds that it is not clear that the USITC could itself have obtained the information that the European Communities presented to the Panel.

2. Article 11 of the DSU

33. The United States argues that the Panel acted in accordance with Article 11 of the DSU. In the view of the United States, the nature of the examination that a panel must conduct in order to make an objective assessment of the matter before it depends on the nature of the legal obligation at issue. A panel reviewing a matter arising under Article 4 of the *Agreement on Safeguards* must assess whether the competent authorities have, in *their* investigation, evaluated the relevant objective factors, demonstrated a causal link between increased imports and serious injury on the basis of objective evidence, and made a detailed analysis demonstrating the relevance of the factors examined. The only information pertinent to such an assessment is information the competent authorities considered in the course of their investigation and not, as the European Communities argues, information that was not before these authorities.

34. The United States contests the European Communities' claim that the Panel erred in finding that it had a sufficient basis to conduct an objective assessment. For the United States, this argument involves factual findings of the Panel and is thus outside the scope of appellate review. In any event, the United States argues that the Panel properly found that the USITC Report provides adequate, reasoned and reasonable explanations with respect to productivity and profits and losses. The United States contends that the Panel's findings with respect to the USITC consideration of productivity should be upheld because they were based on data and statements contained in the USITC Report regarding worker productivity and industry capital investment. Thus, the Panel correctly found that it is clear from the USITC Report that the USITC examined productivity as required by Article 4.2(a) of the *Agreement on Safeguards*. Similarly, as regards profits and losses, the USITC reviewed the allocation methodologies used by domestic producers and found them to be appropriate, and, before the Panel, the United States clarified and elaborated on the methodologies examined. In the view of the United States, the Panel was not required itself to verify the allocation of profits and losses as part of its objective assessment.

35. The United States further contends that, in its arguments on the protein content of wheat, the European Communities ignores the fact that the USITC fully examined trends in demand, including the possible impact of changes in the protein content. The USITC was only required to evaluate those factors enumerated in Article 4.2(a) of the *Agreement on Safeguards* as well as any other relevant factors "*clearly* raised" by interested parties. The competent authorities are not obliged to "guess" [31]

[31]United States' appellee's submission, para. 90.

the relevance of factors not raised by the interested parties, particularly when, as here, the interested parties have clearly argued the relevance of some factors but not of others. The United States cautions that the ability of competent authorities to conduct investigations would be undermined if one Member could rely on the failure of its exporters to inform the competent authorities of a relevant factor in order to argue that another Member acted inconsistently with the *Agreement on Safeguards*.

36. The United States considers that the Panel acted within its discretion in declining to draw adverse inferences against the United States. The Appellate Body Report in *Canada – Measures Affecting the Export of Civilian Aircraft* ("*Canada – Aircraft* ")[32] does not apply in this case, since the United States did not refuse to provide information. Rather, the USITC was obliged, under Article 3.2 of the *Agreement on Safeguards*, not to disclose confidential business information provided to it by interested parties. The United States also points out that the European Communities has not explained why an inference should have been drawn that the information requested was withheld *because* it was adverse to the United States' position in this case.

3. Judicial Economy

37. The United States submits that the Appellate Body should reject the European Communities' claims under Article XIX:1(a) of the GATT 1994, as well as under Article I of the GATT 1994 and Article 5 of the *Agreement on Safeguards*. The United States argues that the Appellate Body cannot examine either of these claims because they both involve factual matters upon which the Panel made no findings, and the relevant facts are disputed. The United States adds that, under Article XIX:1(a) of the GATT 1994, the USITC was not required to conduct a separate investigation and make a specific finding that the surge of wheat gluten imports resulted from "unforeseen developments". The United States also submits that it acted consistently with Article 5.1 and 5.2(a) of the *Agreement on Safeguards* in the application of its safeguard measure.

E. *Arguments of the Third Participants*

1. Australia

38. At the oral hearing, Australia recorded its agreement with the Panel's conclusions regarding the causation requirement set out in the *Agreement on Safeguards*, in particular the Panel's statement that "Article 4.2(a) and (b) SA require that increased imports *per se* are causing serious injury."[33] Australia considers that the approach proposed by the United States would effectively write the causation requirement out of the *Agreement on Safeguards* and undermine the effectiveness of the

[32]Appellate Body Report, WT/DS70/AB/R, adopted 20 August 1999.

[33]Panel Report, para. 8.143.

rules set out in that Agreement. Australia also urges the Appellate Body to dismiss the European Communities' appeal regarding the Panel's exercise of judicial economy in respect of the claims under Article 5 of the *Agreement on Safeguards* and Article I of the GATT 1994. Australia submits that, as a matter of law, the Appellate Body should not consider this issue unless it is necessary to resolve the dispute. However, in Australia's view, there are insufficient factual findings to allow the Appellate Body to resolve the issue.

2. Canada

39. Canada maintains that the Panel erred in concluding that the United States did not act consistently with Articles 2.1 and 4.2 of the *Agreement on Safeguards* by excluding imports of wheat gluten from Canada from the scope of its safeguard measure. Canada notes that, in *Argentina – Footwear Safeguards*, the Appellate Body said that Articles 2.1 and 4.1(c) "do not resolve the matter of the scope of *application* of a safeguard measure."[34] For Canada, it follows that, if the scope of *application* of a safeguard measure cannot be resolved with Article 2.1, then, logically, there can be no general rule of "symmetry" in that provision. The non-application of a safeguard measure to imports from a free-trade area partner is not inconsistent with Article 2.2 of the *Agreement on Safeguards* when – as in this case – a separate investigation determines that such imports are not contributing importantly to the serious injury. Such an approach ensures consistency between the scope of the measure and the products causing the serious injury, and gives the last sentence of footnote 1 to the *Agreement on Safeguards* a meaning consistent with Article XXIV of the GATT 1994. In this regard, Canada adds that the Panel should have examined the relevance of Articles XIX and XXIV of the GATT 1994.

40. As regards the appeal by the European Communities on the Panel's failure to draw adverse inferences from the refusal of the United States to provide certain requested information, Canada recalls that in *Canada – Aircraft*, the Appellate Body recognized that there are circumstances in which a refusal to provide information may be justified. Thus, Canada concludes, panels should exercise extreme prudence in drawing adverse inferences from a refusal to provide documents.

3. New Zealand

41. New Zealand submits that the Panel correctly found that the causation analysis applied by the USITC was inconsistent with Article 4.2(b) of the *Agreement on Safeguards*. For New Zealand, Article 4.2(b) requires a direct causal link between increased imports and serious injury. The second sentence of Article 4.2(b) requires that, when there are multiple causes of serious injury, injury due to

[34]Appellate Body Report, *supra*, footnote 22, para. 112.

other factors should not be counted towards, or attributed to, the injury caused by increased imports. For New Zealand, the causation analysis applied by the USITC is inconsistent with this standard because it allows injury caused by other factors to be imputed to increased imports, and licenses the USITC to ignore other factors contributing to serious injury, as long as the contribution of any individual such factor is less important than the contribution of increased imports.

42. As regards the exclusion of imports from Canada from the safeguard measure, New Zealand accepts that a member of a free-trade area may exclude its free-trade area partners from the application of safeguard measures, but insists that where a member of a free-trade area does so, it must, under the terms of the *Agreement on Safeguards*, ensure that the imports to which the safeguard measure is applied are the same imports that cause serious injury. New Zealand agrees with the Panel that, in this case, the United States failed to respect this requirement of "symmetry".

43. New Zealand argues that the Panel wrongly applied the standard of review set out in Article 11 of the DSU by excluding from its consideration evidence that would or should have been known to the competent authorities but was not specifically presented to the USITC by interested parties. New Zealand also submits that the Panel correctly interpreted Article 12 of the *Agreement on Safeguards* and concluded that the United States failed to comply with the notification and consultation requirements set out in that provision. In New Zealand's view, a notification under Article 12.1(c) of that Agreement must contain information concerning the proposed measure and be made at such time as to provide adequate opportunity for prior consultations.

III. Issues Raised in this Appeal

44. This appeal raises the following issues:

(a) whether the Panel erred in finding, in paragraph 8.69 of the Panel Report, that, under Article 4.2(a) of the *Agreement on Safeguards*, competent authorities are required to evaluate only the "relevant factors" listed in Article 4.2(a) of that Agreement as well as any other "factors" which were "*clearly* raised before [the competent authorities] as relevant by the interested parties in the domestic investigation";

(b) whether the Panel erred in interpreting Article 4.2(b) of the *Agreement on Safeguards* to mean that increased imports "alone", "in and of themselves", or "*per se*", must be capable of causing "serious injury";

(c) whether the Panel erred in finding, in paragraph 8.182 of the Panel Report, that the United States acted inconsistently with Articles 2.1 and 4.2 of the *Agreement on Safeguards*, by excluding imports from Canada from the application of the safeguard measure, after conducting an investigation embracing imports from all sources, including Canada, to determine whether increased imports of wheat gluten were causing or threatening to cause serious injury to the United States industry, and after subsequently conducting a separate examination of the importance of imports from Canada to the situation of the domestic industry;

(d) whether the Panel erred in its interpretation and application of Articles 8 and 12 of the *Agreement on Safeguards*, in particular, by finding that:

(i) the United States acted inconsistently with its obligations to make "immediate" notification under Article 12.1 of the *Agreement on Safeguards*;

(ii) the United States acted inconsistently with Article 12.3 of the *Agreement on Safeguards* by failing to provide an adequate opportunity for consultations on the measure prior to its implementation; and

(iii) the United States acted inconsistently with Article 8.1 of the *Agreement on Safeguards*;

(e) whether the Panel erred in its interpretation and application of Article 11 of the DSU, in particular:

(i) in its finding on the USITC's treatment of "productivity" in paragraph 8.46 of the Panel Report;

(ii) in its finding on the USITC's treatment of "profits and losses" in paragraph 8.66 of the Panel Report;

(iii) by failing to examine the arguments made by the European Communities concerning the overall relationship between the protein content of wheat and the price of wheat gluten; and

(iv) by declining to draw "adverse" inferences from the refusal of the United States to provide certain allegedly confidential information requested from it by the Panel under Article 13.1 of the DSU; and

(f) whether the Panel erred in its exercise of judicial economy, in paragraph 8.220 of the Panel Report, in not examining the claims of the European Communities under Article XIX:1(a) of the GATT 1994, and also under Article 5 of the *Agreement on Safeguards* and Article I of the GATT 1994.

IV. Article 4.2(a) of the *Agreement on Safeguards*

45. Before the Panel, the European Communities argued that the USITC failed to evaluate "all relevant factors", as required by Article 4.2(a) of the *Agreement on Safeguards*, because the USITC did not examine the relationship between the protein content of wheat and the price of wheat gluten. According to the European Communities, this relationship is the "single, most important, factor determining the price of wheat gluten".[35]

46. The Panel stated that Article 4.2(a) of the *Agreement on Safeguards* "requires a demonstration that the competent authorities evaluated 'all relevant factors' enumerated in Article 4.2(a) as well as other relevant factors."[36] The Panel added:

> We read this requirement in Article 4.2(a) SA as mandating that the investigating authorities evaluate those "factors" enumerated in Article 4.2(a) SA as well as any other relevant "factors" -- in the sense of factors that are *clearly* raised before them as relevant by the interested parties in the domestic investigation.[37] (underlining added)

47. The Panel observed that the USITC "considered all the factors expressly enumerated in Article 4.2(a) SA".[38] The Panel also noted that the parties "do not dispute that the USITC [also] considered wages, inventories and price."[39] However, the Panel found that the USITC was not required to examine the relationship between the protein content of wheat and the price of wheat gluten, as regards "the post-1994 segment of the period of investigation", because this issue was not "clearly raised" before the USITC by the interested parties.[40]

48. On appeal, the European Communities argues that the Panel erred in interpreting Article 4.2(a) of the *Agreement on Safeguards* to mean that the competent authorities need only evaluate the "relevant factors" listed in Article 4.2(a), as well as any other "factors" which were "*clearly* raised before them as relevant by the interested parties". According to the European

---

[35]European Communities' other appellant's submission, para. 88.

[36]Panel Report, para. 8.69.

[37]*Ibid.*

[38]*Ibid.*, para. 8.41.

[39]*Ibid.*

[40]*Ibid.*, para. 8.125.

Communities, the competent authorities should investigate "all the relevant facts that are available – and not only those presented to them – in order to conduct an assessment of the facts as a whole."[41] (underlining in original)

49. The relevant part of Article 4.2(a) of the *Agreement on Safeguards* reads:

> 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 utilization, profits and losses, and employment. (emphasis added)

50. We have already had occasion to observe 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) as well as *all other factors that are relevant to the situation of the industry concerned*.[42] (emphasis added)

51. In this appeal, we are asked to address further the scope of the competent authorities' obligation, under Article 4.2(a), to evaluate "*all* relevant factors". (emphasis added) The word "all" has a broad meaning which, if read alone, would suggest that the scope of the obligation on the competent authorities to evaluate "relevant factors" is without limits or exceptions.[43] However, the word cannot, of course, be read in isolation. As the European Communities acknowledges[44], the text of Article 4.2(a) itself imposes certain explicit qualifications on the obligation to evaluate "all relevant factors" as it states that competent authorities need only evaluate factors which are "objective and quantifiable" and which "[have] a bearing on the situation of that industry".

52. The obligation to evaluate "relevant factors" must also be interpreted in light of the duty of the competent authorities to conduct an "investigation" under the *Agreement on Safeguards*. The competent authorities must base their evaluation of the relevance, if any, of a factor on evidence that is "objective and quantifiable". The competent authorities will, in principle, obtain this evidence

---

[41]European Communities' other appellant's submission, para. 80.

[42]Appellate Body Report, *Argentina – Footwear Safeguards*, *supra*, footnote 22, para. 136.

[43]*The New Shorter Oxford English Dictionary*, (Brown, ed.) (Clarendon Press, 1993), Vol. I, p. 52, indicates that, when the word "all" is used as an adjective preceding a noun in the plural form (as in "all … factors"), it means "The entire number of; the individual constituents of, without exception."

[44]European Communities' other appellant's submission, para. 79.

during the investigation they must conduct, under Article 3.1, into the situation of the domestic industry. The scope of the obligation to evaluate "all relevant factors" is, therefore, related to the scope of the obligation of competent authorities to conduct an investigation.

53. We turn, therefore, for context, to Article 3.1 of *Agreement on Safeguards*, which is entitled "*Investigation*". Article 3.1 provides that "A Member may apply a safeguard measure only following an *investigation* by the competent authorities of that Member …". (emphasis added) The ordinary meaning of the word "investigation" suggests that the competent authorities should carry out a "systematic inquiry" or a "careful study" into the matter before them.[45] The word, therefore, suggests a proper degree of activity on the part of the competent authorities because authorities charged with conducting an inquiry or a study – to use the treaty language, an "investigation" – must actively seek out pertinent information.

54. The nature of the "investigation" required by the *Agreement on Safeguards* is elaborated further in the remainder of Article 3.1, which sets forth certain investigative steps that the competent authorities "*shall include*" in order to seek out pertinent information. (emphasis added) The focus of the investigative steps mentioned in Article 3.1 is on "interested parties", who must be notified of the investigation, and who must be given an opportunity to submit "evidence", as well as their "views", to the competent authorities. The interested parties are also to be given an opportunity to "respond to the presentations of other parties". The *Agreement on Safeguards*, therefore, envisages that the interested parties play a central role in the investigation and that they will be a primary source of information for the competent authorities.

55. However, in our view, that does *not* mean that the competent authorities may limit their evaluation of "all relevant factors", under Article 4.2(a) of the *Agreement on Safeguards*, to the factors which the interested parties have raised as relevant. The competent authorities must, in every case, carry out a full investigation to enable them to conduct a proper evaluation of all of the relevant factors expressly mentioned in Article 4.2(a) of the *Agreement on Safeguards*.[46] Moreover, Article 4.2(a) requires the competent authorities – and *not the interested parties* – to evaluate fully the relevance, if any, of "other factors". If the competent authorities consider that a particular "other factor" may be relevant to the situation of the domestic industry, under Article 4.2(a), their duties of investigation and evaluation preclude them from remaining passive in the face of possible short-comings in the evidence submitted, and views expressed, by the interested parties. In such cases, where the competent authorities do not have sufficient information before them to evaluate the possible relevance of such an "other factor", they must investigate fully that "other factor", so that

[45]*The New Shorter Oxford English Dictionary*, *supra*, footnote 43, Vol. I, p. 1410.

[46]Appellate Body Report, *Argentina – Footwear Safeguards*, *supra*, footnote 22, para. 136.

they can fulfill their obligations of evaluation under Article 4.2(a). In that respect, we note that the competent authorities' "investigation" under Article 3.1 is *not limited* to the investigative steps mentioned in that provision, but must simply "*include*" these steps. Therefore, the competent authorities must undertake additional investigative steps, when the circumstances so require, in order to fulfill their obligation to evaluate all relevant factors.

56. Thus, we disagree with the Panel's finding that the competent authorities need only examine "other factors" which were "*clearly* raised before them as relevant by the interested parties in the domestic investigation."[47] (emphasis added) However, as is clear from the preceding paragraph of this Report, we also reject the European Communities' argument that the competent authorities have an open-ended and unlimited duty to investigate all available facts that might possibly be relevant.[48]

57. In order to complete the Panel's analysis, we now examine the European Communities' claim that the USITC should have examined the overall relationship between the protein content of wheat and the price of wheat gluten as a "relevant factor", under Article 4.2(a) of the *Agreement on Safeguards.* We note that this overall relationship was not "evaluated" by the USITC as a "relevant other factor" under Article 4.2(a) of the *Agreement on Safeguards*. However, the USITC Report is not silent on the importance of the protein content of wheat. The USITC stated that:

> … *Demand for wheat gluten is closely tied to the protein content of each year's wheat crop*. Should the quantity and quality of *protein* naturally occurring in the wheat supply be *low*, then bakers *consume more wheat gluten* to supplement the lack of protein in the wheat. …[49] (emphasis added)

The USITC also noted that "when the *protein level in wheat is high, less wheat gluten is demanded* to add to the baking flour."[50] (emphasis added) The USITC observed that a steep rise, in 1994, in the demand for, and price of, wheat gluten "resulted at least in part from a weather-related deficiency in protein content in the wheat crops of the major producing countries, including the United States, during 1993."[51]

58. In our view, the USITC clearly acknowledged that the protein content of wheat has an important influence on the demand for, and the price of, wheat gluten. However, the evidence of record indicates that it is only when the protein content of wheat is *unusually* high or low that this

---

[47]Panel Report, para. 8.69.

[48]See, *supra*, para. 48, for a summary of the European Communities' argument.

[49]USITC Report, p. II-9.

[50]*Ibid.*, p. I-23.

[51]*Ibid.*, pp. I-22 and I-23.

factor merits "evaluation" as a "relevant factor" because it is only in that situation that the protein content of wheat has a noteworthy effect on fluctuations in the demand for, and price of, wheat gluten. The only year of the investigative period in which the protein content of wheat was unusually high or low was in 1993, and this resulted in increased demand and higher prices for wheat gluten solely in 1994. There is no evidence to suggest that during 1996 and 1997, when the surge in imports occurred[52], the protein content of wheat was unusual to such a degree that this factor had a noteworthy effect on fluctuations in the price of wheat gluten. It follows that there is no reason to conclude that the USITC was required to "evaluate" the protein content of wheat as a particular "relevant factor" under Article 4.2(a) of the *Agreement on Safeguards* in 1996 and 1997.

59. Accordingly, albeit for different reasons, we uphold the Panel's finding that the United States has not acted inconsistently with Articles 4.2(a) and 4.2(b) of the *Agreement on Safeguards* by not examining the overall relationship between the protein content of wheat and the price of wheat gluten with respect to the post-1994 segment of the period of investigation.[53]

V. Article 4.2(b) of the *Agreement on Safeguards*

60. In addressing causation, the Panel described the issue before it as:

> … whether … the USITC satisfied the requirements in Article 4.2(b) SA to demonstrate the causal link between the increased imports and the serious injury, and not to attribute to imports injury caused by other factors.[54]

61. The Panel observed that Article 4.2(b) of the *Agreement on Safeguards* "contains an explicit textual link to Article 4.2(a)" of that Agreement. Reading these two provisions together, the Panel opined:

[52]USITC Report, p. I-23.

[53]Panel Report, para. 8.127.

[54]*Ibid.*, para. 8.136.

> … Article 4.2(a) and (b) require a Member: (i) to demonstrate the existence of the causal link between increased imports and *serious* injury; and (ii) not to attribute injury being caused by other factors to the domestic industry at the same time to increased imports. We consider that, read together, these two propositions require that a Member demonstrate that the increased imports, under the conditions extant in the marketplace, *in and of themselves*, cause *serious* injury. This is not to say that the imports must be the sole causal factor present in a situation of serious injury. There may be multiple factors present in a situation of serious injury to a domestic industry. However, the increased imports must be sufficient, in and of themselves, to cause injury which achieves the threshold of "serious" as defined in the Agreement.[55] (underlining added)

62. The Panel reiterated this interpretation in other ways. It stated that:

> … 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 "serious" within the meaning of Article 4.1(a) of the Agreement, the conditions for imposing a safeguard measure are not satisfied.[56] (underlining added)

63. The Panel concluded that "Article 4.2(a) and (b) SA require that increased imports *per se* are causing serious injury."[57]

64. The United States argues, on appeal, that the Panel erred in interpreting Article 4.2(b) to mean that increased imports must be sufficient, in and of themselves, to cause injury that is "serious". It contends that the word "cause" means "to bring about a result, whether alone or in combination with other factors – not 'to cause on its own.' The plain meaning of 'causal link' in Article 4.2(b), first sentence, is consistent with this understanding of 'to cause'."[58] According to the United States, the last sentence of Article 4.2(b) is intended to ensure that other factors do not negate the causal link found to exist, after examining the totality of the circumstances, between increased imports and serious injury.[59]

65. The issue of causation plays a central role in any safeguards investigation. In that respect, Article 4.2(b) of the *Agreement on Safeguards* provides as follows:

---

[55]Panel Report, para. 8.138.

[56]*Ibid.*, para. 8.139.

[57]*Ibid.*, para. 8.143.

[58]United States appellant's submission, para. 54.

[59]*Ibid.*, para. 82.

> The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of *the causal link* between increased imports of the product concerned and serious injury or threat thereof. When *factors other than increased imports are causing injury* to the domestic industry at the same time, *such injury shall not be attributed to increased imports*. (emphasis added)

66. In essence, the Panel has read Article 4.2(b) of the *Agreement on Safeguards* as establishing that increased imports must make a particular contribution to causing the serious injury sustained by the domestic industry. The level of the contribution the Panel requires is that increased imports, looked at "*alone*"[60], "*in and of themselves*"[61], or "*per se*"[62], must be capable of causing injury that is "serious". It seems to us that the Panel arrived at this interpretation through the following steps of reasoning: first, under the first sentence of Article 4.2(b), there must be a "causal link" between increased imports and serious injury; second, the non-"attribution" language of the last sentence of Article 4.2(b) means that the effects caused by increased imports must be *distinguished from* the effects caused by other factors; third, the effects caused by other factors must, therefore, be *excluded* totally from the determination of serious injury so as to ensure that these effects are not "attributed" to the increased imports; fourth, the effects caused by increased imports *alone*, excluding the effects caused by other factors, must, therefore, be capable of causing serious injury.[63]

67. We begin our reasoning with the first sentence of Article 4.2(b). That sentence provides that a determination "shall not be made unless [the] investigation demonstrates … the existence of *the causal link* between increased imports … and serious injury or threat thereof." (emphasis added) Thus, the requirement for a determination, under Article 4.2(a), is that "the causal link" exists. The word "causal" means "relating to a cause or causes", while the word "cause", in turn, denotes a relationship between, at least, two elements, whereby the first element has, in some way, "brought about", "produced" or "induced" the existence of the second element.[64] The word "link" indicates simply that increased imports have played a part in, or contributed to, bringing about serious injury so that there is a causal "connection"[65] or "nexus" between these two elements. Taking these words together, the term "the causal link" denotes, in our view, a relationship of cause and effect such that increased imports contribute to "bringing about", "producing" or "inducing" the serious injury.

---

[60]Panel Report, para. 8.139.

[61]*Ibid.*, para. 8.138.

[62]*Ibid.*, para. 8.143.

[63]We base our understanding of the Panel's reasoning on paragraphs 8.138, 8.139, 8.140 and 8.143 of the Panel Report.

[64]*The New Shorter Oxford English Dictionary*, *supra*, footnote 43, Vol. I, pp. 355 and 356.

[65]*Ibid.*, p. 1598.

Although that contribution must be sufficiently clear as to establish the existence of "the causal link" required, the language in the first sentence of Article 4.2(b) does *not* suggest that increased imports be *the sole* cause of the serious injury, or that "*other* factors" causing injury must be excluded from the determination of serious injury. To the contrary, the language of Article 4.2(b), as a whole, suggests that "the causal link" between increased imports and serious injury may exist, *even though other factors are also contributing, "at the same time", to the situation of the domestic industry*.

68. It is precisely because there may be several factors, besides increased imports, contributing simultaneously to the situation of the domestic industry that the last sentence of Article 4.2(b) states that competent authorities "shall not … attribute" to increased imports injury caused by other factors. The opening clause of that sentence indicates, to us, that this sentence provides rules that apply when "increased imports" and certain "other factors" are, together, "causing injury" to the domestic industry "at the same time". The last clause of the sentence stipulates that, in that situation, the injury caused by other factors "shall not be *attributed* to increased imports". (emphasis added) Synonyms for the word "attribute" include "assign" or "ascribe".[66] Under the last sentence of Article 4.2(b), we are concerned with the proper "attribution", in this sense, of "injury" caused to the domestic industry by "factors other than increased imports". Clearly, the process of attributing "injury", envisaged by this sentence, can only be made following a separation of the "injury" that must then be properly "attributed". What is important in this process is separating or distinguishing the *effects* caused by the different factors in bringing about the "injury".

69. Article 4.2(b) presupposes, therefore, as a first step in the competent authorities' examination of causation, that the injurious effects caused to the domestic industry by increased imports are *distinguished from* the injurious effects caused by other factors. The competent authorities can then, as a second step in their examination, attribute to increased imports, on the one hand, and, by implication, to other relevant factors, on the other hand, "injury" caused by all of these different factors, including increased imports. Through this two stage process, the competent authorities comply with Article 4.2(b) by ensuring that any injury to the domestic industry that was *actually* caused by factors other than increased imports is not "attributed" to increased imports and is, therefore, not treated as if it were injury caused by increased imports, when it is not. In this way, the competent authorities determine, as a final step, whether "the causal link" exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements, as required by the *Agreement on Safeguards*.[67]

---

[66]*The New Shorter Oxford English Dictionary*, *supra*, footnote 43, Vol. I, p. 145.

[67]See, *supra*, para. 67.

70. The need to ensure a proper attribution of "injury" under Article 4.2(b) indicates that competent authorities must take account, in their determination, of the effects of increased imports *as distinguished from* the effects of other factors. However, the need to distinguish between the effects caused by increased imports and the effects caused by other factors does *not* necessarily imply, as the Panel said, that increased imports *on their own* must be capable of causing serious injury, nor that injury caused by other factors must be *excluded* from the determination of serious injury.

71. We consider that Article 4.2(a) of the *Agreement on Safeguards*, which is explicitly referred to in Article 4.2(b), indicates that "other factors" have to be taken into account in the competent authorities' determination of serious injury. Article 4.2(a) sets forth the factors which the competent authorities "*shall evaluate*" in "determin[ing] whether increased imports have caused or are threatening to cause serious injury to a domestic industry…". Under that provision, the competent authorities must evaluate "all relevant factors … having a *bearing* on the situation of [the] industry". (emphasis added) In evaluating the relevance of a particular factor, the competent authorities must, therefore, assess the "bearing", or the "influence" or "effect"[68] that factor has on the overall situation of the domestic industry, against the background of all the other relevant factors.

72. The use of the word "all" in the phrase "all relevant factors" in Article 4.2(a) indicates that the effects of *any* factor may be relevant to the competent authorities' determination, irrespective of whether the particular factor relates to imports specifically or to the domestic industry more generally. This conclusion is borne out by the list of factors which Article 4.2(a) stipulates are, "in particular", relevant to the determination. This list includes factors that relate *both* to imports specifically *and* to the overall situation of the domestic industry more generally. The language of the provision does not distinguish between, or attach special importance or preference to, any of the listed factors. In our view, therefore, Article 4.2(a) of the *Agreement on Safeguards* suggests that all these factors are to be *included* in the determination and that the contribution of each relevant factor is to be counted in the determination of serious injury according to its "bearing" or effect on the situation of the domestic industry. Thus, we consider that Article 4.2(a) does not support the Panel's conclusion that some of the "relevant factors" – those related exclusively to increased imports – should be counted towards an affirmative determination of serious injury, while others – those not related to increased imports – should be excluded from that determination.[69]

73. We believe that Articles 4.2(a) and 4.2(b) of the *Agreement on Safeguards* must be given a mutually consistent interpretation, particularly in light of the explicit textual connection between these two provisions. According to the opening clause of Article 4.2(b) – "The determination referred to in

[68]*The New Shorter Oxford English Dictionary*, *supra*, footnote 43, Vol. I, pp. 199.

[69]See, *supra*, para. 66, for our summary of the Panel's reasoning.

subparagraph (a) shall not be made unless…" – *both* provisions lay down rules governing a *single* determination, made under Article 4.2(a). In our view, it would contradict the requirement in Article 4.2(a) to evaluate – and, thereby, include in the determination – the "bearing" or effect *all* the relevant factors have on the domestic industry, if those *same* effects, caused by those *same* factors, were, with the exception of increased imports, to be excluded under Article 4.2(b), as the Panel suggested.

74. We note, in addition, that our understanding of the factors to be taken into account under Articles 4.2(a) and 4.2(b) is borne out by the definition of "serious injury" given in Article 4.1(a). The term "serious injury" is defined as "a significant *overall* impairment in the position of a domestic industry". (emphasis added) The breadth of this term also suggests that all factors relevant to the overall situation of the industry should be included in the competent authorities' determination.

75. We are further fortified in our interpretation of Articles 4.2(a) and 4.2(b) of the *Agreement on Safeguards* by our reading of Article 2.1 of that Agreement. That provision reads:

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

76. Article 2.1 reflects closely the "basic principles"[70] in Article XIX:1(a) of the GATT 1994 and also sets forth "the conditions for imposing a safeguard measure"[71], including those relating to causation. The rules on causation, which are elaborated further in the remainder of the *Agreement on Safeguards*, therefore, find their roots in Article 2.1. According to that provision, a safeguard measure may be applied if a "product is being imported … *in such increased quantities* … *and under such conditions as to cause* …" serious injury. Thus, under Article 2.1, the causation analysis embraces two elements: the first relating to increased "imports" specifically and the second to the "conditions" under which imports are occurring.

77. Each of these two elements is, in our view, elaborated further in Article 4.2(a). While Article 2.1 requires account to be taken of the "increased quantities" of imports, both in "absolute" terms and "relative to domestic production", Article 4.2(a) states, correspondingly, that "the rate and

[70]Preamble to the *Agreement on Safeguards*.

[71]Appellate Body Report, *Argentina – Footwear Safeguards*, *supra*, footnote 22, para. 112.

amount of the increase in imports of the product concerned in absolute and relative terms, [and] the share of the domestic market taken by increased imports" are relevant.

78. As for the second element under Article 2.1, we see it as a complement to the first. While the first element refers to increased imports specifically, the second relates more generally to the "conditions" in the marketplace for the product concerned that may influence the domestic industry. Thus, the phrase "under such conditions" refers generally to the prevailing "conditions", in the marketplace for the product concerned, when the increase in imports occurs. Interpreted in this way, the phrase "under such conditions" is a shorthand reference to the remaining factors listed in Article 4.2(a), which relate to the overall state of the domestic industry and the domestic market, as well as to other factors "having a bearing on the situation of [the] industry". The phrase "under such conditions", therefore, supports the view that, under Articles 4.2(a) and 4.2(b) of the *Agreement on Safeguards*, the competent authorities should determine whether the increase in imports, not alone, but in conjunction with the other relevant factors, cause serious injury.[72]

79. For these reasons, we agree with the first and second steps we identified in the Panel's reasoning; however, we see no support in the text of the *Agreement on Safeguards* for the third and fourth steps of the Panel's reasoning.[73] Therefore, in conclusion, we reverse the Panel's interpretation of Article 4.2(b) of the *Agreement on Safeguards* that increased imports "alone", "in and of themselves", or "*per se*", must be capable of causing injury that is "serious".[74] And we also reverse the Panel's conclusions on the issue of causation, summarized in paragraph 8.154 of the Panel Report, as these conclusions are based on an erroneous interpretation of Article 4.2(b).

80. As we have reversed the Panel's conclusions regarding causation, we believe that we should now complete the legal analysis on this issue on the basis of the factual findings of the Panel and the undisputed facts in the Panel record. We note that the Panel narrated the findings of the USITC on four potential factors, other than increased imports, for their bearing on the situation of the domestic industry. These were the effects of: "co-product markets", "rising input costs", "importation of wheat gluten by United States domestic producers" and "capacity utilization".[75] Of these four factors, the Panel made most mention of the last, capacity utilization.

---

[72]We do not, of course, exclude the possibility that "serious injury" could be caused by the effects of increased imports *alone*.

[73]*Supra*, para. 66.

[74]Panel Report, paras. 8.138, 8.139 and 8.143.

[75]*Ibid.*, paras. 8.147 – 8.150.

81. The uncontested facts of record relating to the capacity utilization of the domestic industry are as follows.[76] During the period of investigation, 1 July 1993 to 30 June 1997, the average available capacity of United States' producers of wheat gluten rose by a little over 68 percent, with 55 percent of that increase being available by 30 June 1995. Total United States' consumption of wheat gluten rose, during the period of investigation, by 17.8 percent. The amount of wheat gluten produced by United States' producers rose by 12 percent during the first three years of the investigative period, before declining to a closing level that was 96 percent of the starting level. In the face of the increase in average capacity and the decrease in production, United States' capacity utilization levels fell from 78.3 percent, in 1993, to 44.5 percent, in 1997. During the investigative period, the volume of imports increased by nearly 38 percent, with the market share of imports rising from 51.4 percent to 60.2 percent.

82. In evaluating increased capacity and capacity utilization levels as "other possible causes of injury", the USITC said:

> … The domestic wheat gluten market is very competitive. Producers have ample excess capacity to meet higher demand. Also, wheat gluten is a commodity product that sells primarily on the basis of price, and wheat gluten from different sources is highly interchangeable. One new domestic producer, Heartland, entered the market in 1996. In addition, the domestic industry added substantial new capacity early in the period of investigation. This increased capacity was added in anticipation of continued strong growth in domestic demand and consumption. Industry projections of continued growth in demand and consumption were largely correct, as apparent consumption increased nearly 18 percent between 1993 and 1997. As indicated above, *but for the increase in imports, the industry would have operated at 61 percent of capacity in 1997, which is much closer to the level at which the industry operated early in the investigative period when it operated reasonably profitably*. We therefore conclude that neither domestic competition nor increased domestic capacity was a more important cause of serious injury than increased imports.[77] (emphasis added)

83. In considering this same issue, the Panel noted certain "assertions" of the United States that the increase in the production capacity of the domestic industry "had a role" in the serious injury suffered by the industry.[78] The Panel then stated:

---

[76]All the relevant figures are derived from Table C-1, pp. C-3 and C-4, of the USITC Report.

[77]USITC Report, p. I-17.

[78]Panel Report, para. 8.151.

> … To us, these assertions constitute an admission by the United States that at least one factor other than increased imports also contributed to the serious injury experienced by the domestic industry. However, we see no indication in the USITC Report that imports were not also held responsible for the injury caused by this factor.[79]

84. We note that the USITC placed particular emphasis on the fact that, "but for the increase in imports", the domestic industry would have operated, in 1997, at nearly 61 percent of available capacity.[80] The USITC emphasizes this fact because, it says, at that rate of capacity utilization, the domestic industry would have been operating "much closer" to rates attained "early in the investigative period", when the industry was reasonably profitable.[81] The USITC, therefore, makes an explicit link between the profitability of the domestic industry and the rate of capacity utilization. We also note that, in arriving at the hypothetical figure of 61 percent capacity utilization, the USITC made certain assumptions which it explained in a footnote to the USITC Report.[82] These assumptions were: first, that total United States' consumption was constant at 1997 levels, representing an 18 percent increase over 1993 levels; second, that the volume of imports was constant throughout the investigative period at 128,337,000 tonnes; and, third, that United States' domestic production satisfied "*all* of the [18 percent] increase in [United States'] consumption".[83] (emphasis added) We observe that, by assuming that domestic producers would supply *all* of the 18 percent increase in consumption, the USITC also assumed a hypothetical market share for imports that *fell* from 51.4 percent to 43.6 percent.

85. At the oral hearing, we asked the participants, the United States and the European Communities, to comment on two additional scenarios, based *exclusively* on the data contained in the USITC Report, that explore further the importance of increases in average capacity and rates of capacity utilization to the situation of the domestic industry. Under the first scenario, the participants both confirmed that the rate of capacity utilization of the domestic industry would have been 74.8 percent *if the average capacity of the domestic industry had remained constant throughout the investigative period and had not increased by 68 percent*.[84] At a rate of 74.8 percent, capacity utilization would have fallen by only 3.5 percent from the 1993 rate of 78.3 percent. In other words, but for the increase in available capacity and *despite the increase in imports*, capacity utilization rates

---

[79]Panel Report, para. 8.151.

[80]USITC Report, p. I-17.

[81]*Ibid*. In 1993, the industry operated at 78.3 percent of capacity. In 1994 and 1995 the rates of capacity utilization were 67.4 percent and 56.2 percent, respectively. (USITC Report, Table C-1, p. C-4) The USITC said, at page I-28 of its Report, that the domestic industry was profitable in the period from 1993 – 1995.

[82]Footnote 51, p. I-12, USITC Report.

[83]*Ibid*.

[84]In examining this scenario, all other figures are assumed to be as they were in 1997.

would have remained extremely close to the 1993 rates which allowed the domestic industry to operate profitably.[85]

86. Under the second scenario, both participants confirmed that the rate of capacity utilization of the domestic industry would have been 54.2 percent if the United States' producers, and importers, had held, throughout the entire investigation period, a *constant* market share, by quantity, equal to their respective market shares in 1993. Thus, instead of United States producers supplying *all* of the 18 percent increase in total consumption, as the USITC assumed in reaching its figure of 61 percent, under this scenario, the increase in total consumption was shared between United States' producers and importers according to their respective 1993 market shares.[86] In other words, we assume that the percentage increase in the volume of imports is 17.8 percent, the same as the percentage increase in total United States' consumption, and not 38 percent, the figure by which imports actually increased. In that event, the capacity utilization of the domestic industry would have been, as we said, 54.2 percent. Thus, even if imports had done no more than hold their position on the market, and had increased by less than half of the actual increase, the rate of capacity utilization would have fallen significantly and would have been just about 10 percent higher than the levels actually attained in 1997.

87. Although the United States confirmed, at the oral hearing, our understanding of the rates of capacity utilization in these two additional scenarios, it argued that these figures were irrelevant to the role of increased capacity and capacity utilization as possible other causes. According to the United States, the increases in capacity were largely in place by 30 June 1995, when the surge in imports started to occur. The increase in capacity is, therefore, simply a background circumstance and is not a relevant "other factor" causing injury "at the same time" as increased imports, under Article 4.2(b) of the *Agreement on Safeguards*.

88. We note that average available capacity in the domestic industry continued to increase between 30 June 1995 and 30 June 1997, albeit at a slower rate than between 30 June 1993 and 30 June 1995.[87] Thus, increases in capacity *were* occurring at the same time as imports were increasing. However, in any event, the relevance of an "other factor", under Article 4.2(b), depends on whether that "other factor" was, or was not, "causing injury" "at the same time" as increased imports. Therefore, the possible relevance of the increases in capacity added during the period of

[85]The USITC noted, in the passage quoted above, that the domestic industry was reasonably profitable at the levels of capacity utilization attained "early in the investigative period" (*supra*, para. 82).

[86]In examining this scenario, all other figures are assumed to be as they were in 1997.

[87]Average available capacity was: 162,856,000 pounds on 30 June 1993; 253,712,000 pounds on 30 June 1995 (an increase of 55.8%); and, 273,895,000 pounds on 30 June 1997 (a total increase of 68.2%). (USITC Report, Table C-1, p. C-4)

investigation does not depend on the moment in time when the increases in capacity occurred, but on when the effects of those increases are felt, and whether they are "causing injury" "at the same time" as increased imports. Thus, we do not accept the United States' position that the data in the USITC Report on increases in capacity and on capacity utilization are not relevant under Article 4.2(b) of the *Agreement on Safeguards*.

89. In our view, the two scenarios described above offer a revealing view of the data before the USITC. The first scenario shows that, but for the increase in average capacity, the rate of capacity utilization of the domestic industry would have been only slightly lower in 1997 than it was in 1993; the second scenario shows that, even if the increase in imports had been significantly lower than it actually was, the rate of capacity utilization would, nonetheless, have been significantly lower in 1997 than it was in 1993.

90. The data before the USITC, therefore, suggest that the increases in average available capacity in the domestic industry *may* have been very important to the overall situation of the domestic industry in 1997. We do not suggest that the increase in capacity utilization was *the sole* cause of the serious injury sustained by the domestic industry. Nor do we suggest that the increase in imports had *no* relevance to the situation of the domestic industry. Rather, we submit that the data relied upon by the USITC indicate that the relationship between the increases in average capacity, the increases in imports and the overall situation of the domestic industry was far more complex than suggested by the text of the USITC Report. On this issue, the USITC simply observed that "but for the increase in imports, the [domestic] industry would have operated at 61 percent of capacity in 1997, which is much closer to the level at which the industry operated early in the investigative period when it operated reasonably profitably." [88]

91. We are not satisfied, in light of the data that was before the USITC, that the USITC adequately evaluated the complexities of this issue and, in particular, whether the increases in average capacity, during the investigative period, were causing injury to the domestic industry at the same time as increased imports. Under Article 4.2(b) of the *Agreement on Safeguards*, it is essential for the competent authorities to examine whether factors other than increased imports are simultaneously causing injury. If the competent authorities do not conduct this examination, they cannot ensure that injury caused by other factors is not "attributed" to increased imports. It follows, in this case, that the USITC has *not* demonstrated adequately, as required by Article 4.2(b), that any injury caused to the domestic industry by increases in average capacity has not been "attributed" to increased imports and, in

[88]USITC Report, p. I-17.

consequence, the USITC could not establish the existence of "the causal link" Article 4.2(b) requires between increased imports and serious injury.

92. Accordingly, we find that the United States acted inconsistently with its obligations under Article 4.2(b) of the *Agreement on Safeguards*.

VI. Article 2.1 of the *Agreement on Safeguards*

93. Before the Panel, the European Communities claimed that the United States' treatment of imports of wheat gluten from Canada, its partner in the North American Free Trade Agreement ("NAFTA"), was inconsistent with Articles 2.1 and 4.2 of the *Agreement on Safeguards*[89]. On this issue, the Panel concluded that:

> … in this case, the United States has acted inconsistently with Articles 2.1 and 4.2 SA by excluding imports from Canada from the application of the safeguard measure (following a separate and subsequent inquiry concerning whether imports from Canada accounted for a "substantial share" of total imports and whether they "contributed importantly" to the "serious injury" caused by total imports) after including imports *from all sources* in its investigation of "increased imports" of wheat gluten into its territory and the consequent effects of such imports on its domestic wheat gluten industry.[90] (emphasis in original)

94. On appeal, the United States challenges the Panel's interpretation of Articles 2.1 and 4.2 of the *Agreement on Safeguards*, and argues that the Panel failed to take sufficient account of the fact that, in this case, following its determination that imports from all sources were causing serious injury, the USITC conducted a "separate and subsequent examination"[91], as part of the same investigation, concerning Canadian imports alone. In that examination, the USITC found that, although "imports from Canada account for a substantial share of total imports", those imports were "not contributing importantly to the serious injury caused by imports".[92] On the basis of this examination, the USITC recommended that imports from Canada be excluded from any safeguard measure adopted.[93] The United States considers that, for these reasons, it was justified in excluding imports of wheat gluten from Canada from the scope of application of the safeguard measure. The United States adds that the Panel erred in failing to assess the legal relevance of footnote 1 to the *Agreement on Safeguards* and Article XXIV of the GATT 1994 to this issue.

---

[89]Panel Report, paras. 8.155 and 8.156.

[90]*Ibid*., para. 8.182.

[91]*Ibid.*, para. 8.161.

[92]USITC Report, p. I-19.

[93]*Ibid.*, p. I-29.

95. In considering the appeal of the United States on this point, we turn first to Article 2.1 of the *Agreement on Safeguards*, which provides that a safeguard measure may only be applied when "such increased quantities" of a "*product* [are] *being imported* into its territory … under such conditions as to cause or threaten to cause serious injury to the domestic industry". As we have said, this provision, as elaborated in Article 4 of the *Agreement on Safeguards*, sets forth the *conditions* for imposing a safeguard measure.[94] Article 2.2 of the *Agreement on Safeguards*, which provides that a safeguard measure "shall be applied to a *product being imported* irrespective of its source", sets forth the rules on the *application* of a safeguard measure.[95]

96. The same phrase – "product … being imported" – appears in *both* these paragraphs of Article 2. In view of the identity of the language in the two provisions, and in the absence of any contrary indication in the context, we believe that it is appropriate to ascribe the *same* meaning to this phrase in both Articles 2.1 and 2.2. To include imports from all sources in the determination that increased imports are causing serious injury, and then to exclude imports from one source from the application of the measure, would be to give the phrase "product being imported" a *different* meaning in Articles 2.1 and 2.2 of the *Agreement on Safeguards*. In Article 2.1, the phrase would embrace imports from *all* sources whereas, in Article 2.2, it would exclude imports from certain sources. This would be incongruous and unwarranted. In the usual course, therefore, the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2.[96]

97. In the present case, the United States asserts that the exclusion of imports from Canada from the scope of the safeguard measure was justified because, following its investigation based on imports from *all* sources, the USITC conducted an additional inquiry specifically focused on imports from Canada. The United States claims, in effect, that the scope of its initial investigation, *together with its subsequent and additional inquiry* into imports from Canada, did correspond with the scope of application of its safeguard measure.

98. In our view, however, although the USITC examined the importance of imports from Canada separately, it did not make any explicit determination relating to increased imports, *excluding imports from Canada*. In other words, although the safeguard measure was applied to imports from all

---

[94]See, *supra*, para. 76; Appellate Body Report, *Argentina – Footwear Safeguards*, *supra*, footnote 22, para. 112.

[95]*Ibid*.

[96]The United States relies on Article 9.1 of the *Agreement on Safeguards* in support of its argument that the scope of the serious injury investigation need not correspond exactly to the scope of application of a safeguard measure. Article 9.1 is an exception to the general rules set out in the *Agreement on Safeguards* that applies only to developing country Members. We do not consider that it is of relevance to this appeal.

sources, *excluding* Canada, the USITC did not establish explicitly that imports from these *same* sources, excluding Canada, satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*. Thus, we find that the separate examination of imports from Canada carried out by the USITC in this case was not a sufficient basis for the safeguard measure ultimately applied by the United States.

99. Lastly, we note that the United States has argued that the Panel erred in failing to address Article XXIV of the GATT 1994, and in failing to set out a "basic rationale" for finding that footnote 1 to the *Agreement on Safeguards* did not affect its reasoning on this issue. In this case, the Panel determined that this dispute does not raise the issue of whether, as a general principle, a member of a free-trade area can exclude imports from other members of that free-trade area from the application of a safeguard measure.[97] The Panel also found that it could rule on the claim of the European Communities without having recourse to Article XXIV or footnote 1 to the *Agreement on Safeguards*.[98] We see no error in this approach, and make no findings on these arguments.

100. We, therefore, uphold the Panel's finding, in paragraph 8.182 of the Panel Report, that the United States acted inconsistently with its obligations under Articles 2.1 and 4.2 of the *Agreement on Safeguards*.

VII. Articles 8 and 12 of the *Agreement on Safeguards*

101. The United States appeals the Panel's findings that the United States acted inconsistently with Articles 12.1(a), 12.1(b), 12.1(c), 12.3 and Article 8.1 of the *Agreement on Safeguards*. The United States contends that the Panel misinterpreted the requirement of "immediate" notification set forth in Article 12.1, erred in its analysis of the relationship between the various obligations set forth in Articles 12.1, 12.2, and 12.3 of the *Agreement on Safeguards*, and wrongly entwined the separate obligations set out in these provisions.

A. *Article 12.1 of the Agreement on Safeguards*

102. Article 12.1 of the *Agreement on Safeguards* provides:

[97]Panel Report, 8.183.

[98]*Ibid.*, para. 8.181.

> A Member shall immediately notify the Committee on Safeguards upon:
>
> (a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;
>
> (b) making a finding of serious injury or threat thereof caused by increased imports; and
>
> (c) taking a decision to apply or extend a safeguard measure.

Thus, Article 12.1 of the *Agreement on Safeguards* sets out three separate obligations to make notification to the Committee on Safeguards, each of which is triggered "upon" the occurrence of an event specified in one of the three subparagraphs. The chapeau to Article 12.1 stipulates that the notifications must be made "*immediately* … upon" the occurrence of the triggering events. (emphasis added)

103. Before turning to the United States' appeal of the Panel's findings under each subparagraph of Article 12.1, we begin with the meaning of the word "immediately" in Article 12.1, since it governs timeliness under all three of these subparagraphs. The Panel found that the obligation to notify "immediately" precludes a Member from "unduly delaying the notification of the decisions or findings mentioned in Article 12.1(a) through (c) SA".[99]

104. The United States argues, however, that "immediately" means "without any delay that would interfere with Members' ability to review the measure through the Safeguards Committee or would leave a Member insufficient time to decide whether to request consultations." [100]

105. As regards the meaning of the word "immediately" in the chapeau to Article 12.1, we agree with the Panel that the ordinary meaning of the word "implies a certain urgency".[101] The degree of urgency or immediacy required depends on a case-by-case assessment, account being taken of the administrative difficulties involved in preparing the notification, and also of the character of the information supplied. As previous panels have recognized, relevant factors in this regard may include the complexity of the notification and the need for translation into one of the WTO's official languages.[102] Clearly, however, the amount of time taken to prepare the notification must, in all cases, be kept to a minimum, as the underlying obligation is to notify "immediately".

---

[99]Panel Report, para. 8.194.

[100]United States' appellant's submission, para. 208.

[101]Panel Report, para. 8.193.

[102]Panel report, para. 7.128, *Korea – Dairy Safeguard*, WT/DS98/R, adopted, 12 January 2000, as modified by the Appellate Body Report, *supra*, footnote 29, quoted in para. 8.193 of the Panel Report.

106. "Immediate" notification is that which allows the Committee on Safeguards, and Members, the *fullest possible period* to reflect upon and react to an ongoing safeguard investigation. Anything less than "immediate" notification curtails this period. We do not, therefore, agree with the United States that the requirement of "*immediate*" notification is satisfied as long as the Committee on Safeguards and Members of the WTO have *sufficient* time to review that notification. In our view, whether a Member has made an "immediate" notification does not depend on evidence as to how the Committee on Safeguards and individual Members of the WTO actually use that notification. Nor can the requirement of "immediate" notification depend on an *ex post facto* assessment of whether individual Members suffered actual prejudice through an insufficiency in the notification period.

107. With this meaning of "immediately" in mind, we turn to the timeliness of the notifications made by the United States under subparagraphs (a) through (c) of Article 12.1.

1. Notification pursuant to Article 12.1(a)

108. The United States appeals the Panel's finding that the United States did not notify its initiation of a safeguard investigation "immediately", as required by Article 12.1(a) of the *Agreement on Safeguards*.[103]

109. The Panel found that the United States initiated a safeguards investigation regarding imports of wheat gluten on 1 October 1997, and notified the Committee of Safeguards on 17 October 1997 (that is, 16 days later).[104] The Panel noted the "minimal" information contained in that notification, and held that the United States had not acted consistently with its obligation under Article 12.1(a) to notify its initiation of a safeguard investigation "immediately".[105]

110. On appeal, the United States argues that the notification was submitted "immediately" because it was sufficiently prompt as to allow Members concerned to review the notification and to exercise fully their rights under the *Agreement on Safeguards*. The United States does not argue that there were any particular reasons that a period of 16 days was needed to make this notification.

111. We recall our analysis of the word "immediately".[106] In this case, the United States' notification under Article 12.1(a) consisted of a single page form attaching a notice from the USITC that it had initiated a safeguard investigation concerning wheat gluten. The USITC notice was

[103]Panel Report, para. 8.197.

[104]*Ibid.*, para. 8.191; G/SG/N/6/USA/4.

[105]*Ibid.*, para. 8.196.

[106]*Supra*, paras. 103-106.

published in the United States Federal Register on 1 October 1997.[107] That same document was not notified to the Committee on Safeguards until 17 October 1997.

112. In these circumstances, we see no basis for concluding that the Panel erred in finding that a notification period of 16 days was not "immediate". We, therefore, uphold the Panel's finding that the United States' notification of its investigation of a safeguard measure did not satisfy the requirement of "immediate" notification under Article 12.1(a) of the *Agreement on Safeguards*.[108]

2. Notification pursuant to Article 12.1(b)

113. The United States appeals the Panel's finding that the United States did not notify its determination of serious injury "immediately", as required by Article 12.1(b) of the *Agreement on Safeguards*.

114. The Panel found that the USITC made a determination of serious injury caused by increased imports on 15 January 1998, and that the United States notified the Committee on Safeguards of this determination in a communication dated 11 February 1998 (that is, 26 days later).[109] In view of the 26-day time-period taken by the United States to make its notification under Article 12.1(b), the Panel concluded that the United States had not satisfied the requirement to notify its finding of serious injury "immediately".[110]

115. On appeal, the United States makes the same arguments with respect to this finding as it made with respect to the Panel's finding under Article 12.1(a), namely that the notification was submitted "immediately" because it was sufficiently prompt as to allow Members concerned to review the notification and to exercise fully their rights under the *Agreement on Safeguards*. Once again, the United States does not offer any particular justification for the time-period of 26 days.

116. We recall again our analysis of the word "immediately".[111] We also note that the 11 February 1998 notification submitted by the United States consisted, in its entirety, of a single page in which the United States indicated that the USITC Report would follow at a later date.[112] In these circumstances, we see no basis for concluding that the Panel erred in finding that notification in

[107]United States Federal Register, 1 October 1997 (Volume 62, Number 190), pp. 51488-51489.

[108]Panel Report, para. 8.197.

[109]G/SG/N/8/USA/2.

[110]Panel Report, para. 8.199.

[111]*Supra*, paras. 103-106.

[112]G/SG/N/8/USA/2. Panel Report., para. 8.191. The USITC Report was sent to the President of the United States on 18 March 1998, and forwarded, along with a revised Article 12.1(b) notification, to the Committee on Safeguards on 24 March 1998. G/SG/N/8/USA/2/Rev.1.

a period of 26 days was not "immediate". We, therefore, uphold the Panel's finding that the notification made by the United States on 11 February 1998 did not satisfy the requirement of "immediate" notification under Article 12.1(b) of the *Agreement on Safeguards*.[113]

3. Notification pursuant to Article 12.1(c)

117. The United States also appeals the Panel's finding that the United States did not notify its decision to apply a safeguard measure "immediately", as required by Article 12.1(c) of the *Agreement on Safeguards*.

118. The Panel found that, on 30 May 1998, the President of the United States decided to apply, effective 1 June 1998, a safeguard measure on imports of wheat gluten and that, on 4 June 1998 (that is, 5 days after the decision was taken), the United States notified the Committee on Safeguards of the decision to apply a safeguard measure.[114] In assessing the timeliness of this notification, the Panel concluded that:

> … the United States notification of this decision *after the measure had been implemented*, violated the United States obligation under Article 12 SA to make timely notification under Article 12.1 (c) SA of its decision to apply a measure.[115] (emphasis added)

119. The United States appeals this finding on the ground that the Panel erred by interpreting Article 12.1(c) of the *Agreement on Safeguards* as requiring notification of a "decision to apply or extend a safeguard measure" *prior to* implementation of that decision.

120. In examining the ordinary meaning of Article 12.1(c), we observe that the relevant triggering event is the "*taking*" of a decision. To us, Article 12.1(c) is focused upon whether a "decision" has *occurred*, or has been "taken", and not on whether that decision has been *given effect*. On the face of the text, the timeliness of a notification under Article 12.1(c) depends only on whether the notification was immediate.

121. The Panel considered that Article 12.2 of the *Agreement on Safeguards*, which, in its opening clause, specifically refers to notifications made pursuant to Articles 12.1(b) and 12.1(c), provides relevant context in determining the timeliness of notifications under Article 12.1(c). Article 12.2 provides:

---

[113]Panel Report, para. 8.199.

[114]G/SG/N/10/USA/2 and G/SG/N/11/USA/2.

[115]Panel Report, para. 8.207.

> *In making the notifications referred to in paragraphs 1(b) and 1(c),* the Member *proposing* to apply or extend a safeguard measure shall provide the Committee on Safeguards with all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the *proposed* measure, proposed date of introduction, expected duration and timetable for progressive liberalization. … (emphasis added)

122. The Panel deduced from this provision that a notification under Article 12.1(c) must be of a "proposed measure" and its "proposed date of introduction", and, on that basis, concluded that a notification under Article 12.1(c) must be made *before* implementation of the "proposed" safeguard measure.[116]

123. Article 12.2 is related to, and complements, Article 12.1 of the *Agreement on Safeguards*. Whereas Article 12.1 sets forth *when* notifications must be made during an investigation, Article 12.2 clarifies *what* detailed information must be contained in the notifications under Articles 12.1(b) and 12.1(c). We do not, however, see the content requirements of Article 12.2 as prescribing *when* the notification under 12.1(c) must take place. Rather, in our view, timeliness under 12.1(c) is determined by whether a decision to apply or extend a safeguard measure is notified "immediately". A *separate* question arises as to whether notifications made by the Member satisfy the content requirements of Article 12.2. Answering this separate question requires examination of whether, in its notifications under *either* Article 12.1(b) *or* Article 12.1(c), the Member proposing to apply a safeguard measure has notified "all pertinent information", including the "mandatory components"[117] specifically enumerated in Article 12.2.

124. Thus, the obligations set forth under Articles 12.1(b), 12.1(c) and 12.2 relate to different aspects of the notification process. Although related, these obligations are discrete. A Member could notify "all pertinent information" in its Articles 12.1(b) and 12.1(c) notifications, and thereby satisfy Article 12.2, but still act inconsistently with Article 12.1 because the relevant notifications were not made "immediately". Similarly, a Member could satisfy the Article 12.1 requirement of "immediate" notification, but act inconsistently with Article 12.2 if the content of its notifications was deficient.

125. In our view, in finding that the United States acted inconsistently with Article 12.1(c) *solely because* the decision to apply a safeguard measure was notified after that decision had been implemented, the Panel confused the separate obligations imposed on Members pursuant to Article 12.1(c) and Article 12.2 and, thereby, added another layer to the timeliness requirements in

---

[116]Panel Report, paras. 8.202, 8.205 and 8.206.

[117]Appellate Body Report, *Korea – Dairy Safeguard*, *supra*, footnote 29, para. 107.

Article 12.1(c). Instead of insisting on "immediate" notification, as stipulated by Article 12.1(c), the Panel required notification to be made *both* "immediately" *and* before implementation of the safeguard measure. We see no basis in Article 12.1(c) for this conclusion.

126. In consequence, we reverse the Panel's finding that:

> … the United States notification of this decision after the measure had been implemented, violated the United States obligation under Article 12 SA to make timely notification under Article 12.1 (c) SA of its decision to apply a measure.[118]

127. Although we have reversed the Panel's finding on this issue, we believe that we should complete the legal analysis on the basis of the factual findings of the Panel or the undisputed facts in the Panel record.[119] In examining the timeliness of the United States' notification under Article 12.1(c), we recall that the United States made the notification to the Committee on Safeguards in a communication dated 4 June 1998, or 5 days after the President of the United States had "taken the decision" to apply the safeguard measure. Although the Panel did not reach the issue of whether the 4 June notification had been submitted "immediately", it nevertheless stated:

> We note in passing that the delay of 5 days between the decision to apply a safeguard measure and the notification thereof might well satisfy the requirement of immediate notification of Article 12.1 SA.[120]

128. In response to questioning at the oral hearing, the European Communities also accepted that a delay of 5 days "could have been" consistent with the obligation of "immediate" notification under Article 12.1(c).

129. We believe that notification within 5 days was, in this case, consistent with the requirement of "immediacy" contained in Article 12.1(c) of the *Agreement on Safeguards*. In this regard, we consider it relevant that notification was made the day after the decision of the President of the United

---

[118]Panel Report, para. 8.207.

[119]For example, in Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, at 18 ff; Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449, at 468 ff; Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products* ("*European Communities – Poultry*"), WT/DS69/AB/R, adopted 23 July 1998, paras. 154 ff; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, paras. 123 ff; and, Appellate Body Report, *Australia – Measures Affecting Importation of Salmon* ("*Australia – Salmon*"), WT/DS18/AB/R, adopted 6 November 1998, paras. 117 ff.

[120]Panel Report, para. 8.207.

States was published in the United States Federal Register[121], and during the course of the fourth working day following the taking of the decision.[122]

130. In sum, as regards the findings made by the Panel under Article 12.1 of the *Agreement on Safeguards*, we uphold the Panel's findings, in paragraphs 8.197 and 8.199 of the Panel Report, that the United States did not satisfy the requirements of immediate notification set out in Articles 12.1(a) and 12.1(b); and we reverse the Panel's finding, in paragraph 8.207 of the Panel Report, that the United States failed to make timely notification under Article 12.1(c) of the *Agreement on Safeguards* of its decision to apply a safeguard measure.

B. *Article 12.3 of the Agreement on Safeguards*

131. The United States further appeals the Panel's findings that the United States acted inconsistently with Article 12.3 of the *Agreement on Safeguards*. Article 12.3 provides:

> A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, *inter alia*, reviewing the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.

132. As regards the consistency of the actions taken by the United States with Article 12.3, the Panel stated:

> We found above that the United States did not provide a timely notification under Article 12.1 (c) SA of its proposed final measure since the United States notified its decision to apply a measure three days after the measure had been implemented. *For the same reason*, we find that the United States violated the obligation of Article 12.3 SA to provide adequate opportunity for prior consultations on the measure.[123] (emphasis added)

133. It is clear from the above excerpt that the Panel's conclusion that the United States acted inconsistently with Article 12.3 flowed directly ("for the same reason") from its finding that the United States acted inconsistently with Article 12.1(c). In the previous section, we determined that the Panel erred in concluding that the United States acted inconsistently with Article 12.1(c) of the

[121]United States Federal Register, 3 June 1998 (Volume 63, Number 106), pp. 30363-30364.

[122]The decision to apply the measure was taken by the United States President on 30 May, 1998, a Saturday. The measure came into effect on Monday, 1 June, and notification was made on the following Thursday, 4 June 1998.

[123]Panel Report, para. 8.219.

Agreement on Safeguards. Since we have found that the Panel erred in its interpretation of Article 12.1(c), we also believe that the Panel erred in concluding that the United States had "*[f]or the same reason* … violated the obligation of Article 12.3 SA".

134. The Panel, however, revisited the issue of the adequacy of consultations under Article 12.3 as part of its evaluation of the European Communities' claim under Article 8.1 of the *Agreement on Safeguards*. The Panel found that:

> While the parties have confirmed that consultations did take place on the basis of the United States notifications under Article 12.1(b) concerning the USITC's finding of serious injury and the USITC's recommendations on remedy, no consultations were held on the final proposed measure as approved by the United States President on 30 May 1998. Therefore, the Panel considers that, while consultations may have been held on the basis of the notifications made by the United States under Article 12.1(b) SA, the United States did not provide "an adequate opportunity for prior consultations" on this final proposed measure, within the meaning of Article 12.3 SA.[124]

135. On appeal, the United States argues that it complied with Article 12.3 because, in its notifications under Article 12.1(b) of the *Agreement on Safeguards*, the United States supplied all the information required by Article 12.2 of that Agreement. As a result, the United States contends that, prior to consultations, the European Communities knew the precise product under consideration, the evidence of serious injury caused by increased imports, and all relevant details relating to the proposed measure. The United States concludes, therefore, that it provided the European Communities with an "adequate opportunity for prior consultations", as required by Article 12.3 of the *Agreement on Safeguards*.

136. We note, first, that Article 12.3 requires a Member proposing to apply a safeguard measure to provide an "adequate opportunity for prior consultations" with Members with a substantial interest in exporting the product concerned. Article 12.3 states that an "adequate opportunity" for consultations is to be provided "with a view to": reviewing the information furnished pursuant to Article 12.2; exchanging views on the measure; and reaching an understanding with exporting Members on an equivalent level of concessions. In view of these objectives, we consider that Article 12.3 requires a Member proposing to apply a safeguard measure to provide exporting Members with sufficient information and time to allow for the possibility, through consultations, for a meaningful exchange on the issues identified. To us, it follows from the text of Article 12.3 itself that information on the *proposed* measure must be provided in *advance* of the consultations, so that the consultations can adequately address that measure. Moreover, the reference, in Article 12.3, to "the information

[124]Panel Report, para. 8.217.

provided under" Article 12.2, indicates that Article 12.2 identifies the information that is needed to enable meaningful consultations to occur under Article 12.3. Among the list of "mandatory components"[125] regarding information identified in Article 12.2 are: a precise description of the *proposed* measure, and its *proposed* date of introduction.

137. Thus, in our view, an exporting Member will not have an "adequate opportunity" under Article 12.3 to negotiate overall equivalent concessions through consultations unless, prior to those consultations, it has obtained, *inter alia*, sufficiently detailed information on the form of the proposed measure, including the nature of the remedy.

138. With these considerations in mind, we examine whether, in this case, the Panel erred in finding that the United States did not provide the European Communities with an "adequate opportunity for prior consultations" on the proposed safeguard measure, as required by Article 12.3 of the *Agreement on Safeguards*.

139. The Panel found that the United States and the European Communities held consultations on 24 April 1998 and 22 May 1998[126], and that these consultations were held *on the basis of the information provided by the United States in its notifications under Article 12.1(b)*[127], that is, on the basis of the information contained in the USITC Report. The Panel also found, as a matter of fact, that no consultations were held on the final measure that was approved by the United States President on 30 May 1998.[128]

140. We note that the USITC Report set out a number of "recommendations" to the President of the United States, including:

> … that, within the overall quantitative restriction, the President allocate separate quantitative restrictions for the European Union, Australia, and "all other" non-excluded countries, taking into account the disproportional growth and impact of imports of wheat gluten from the European Union …[129]

141. We note that the recommendations made by the USITC did *not* include specific numerical quota shares for the individual exporting Members concerned, and the recommendations imply, without providing details, that the individual quota shares could be less favourable to imports from the

---

[125]Appellate Body Report, *Korea – Dairy Safeguard*, *supra*, footnote 29, para. 107.

[126]Panel Report, para. 8.218.

[127]*Ibid.*, para. 8.217.

[128]*Ibid*.

[129]USITC Report, p. I-3. See, also, USITC Report, p. I-29.

European Communities. We consider that these "recommendations" did not allow the European Communities to assess accurately the likely impact of the measure being contemplated, nor to consult adequately on overall equivalent concessions with the United States.

142. Accordingly, we see no error in the Panel's conclusion that the United States' notifications under Article 12.1(b) did not provide a description of the measure under consideration sufficiently precise as to allow the European Communities to conduct meaningful consultations with the United States, as required by Article 12.3 of the *Agreement on Safeguards*.[130]

143. We, therefore, uphold the Panel's finding that the United States did not comply with its obligation under Article 12.3 of the *Agreement on Safeguards* to provide an adequate opportunity for prior consultations on the proposed safeguard measure.

C. *Article 8.1 of the Agreement on Safeguards*

144. The United States also appeals the Panel's finding that it acted inconsistently with its obligations under Article 8.1 of the *Agreement on Safeguards*.[131] Article 8.1 provides:

> A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure, in accordance with the provisions of paragraph 3 of Article 12. To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade.

145. Article 8.1 imposes an obligation on Members to "endeavour to maintain" equivalent concessions with affected exporting Members. The efforts made by a Member to this end must be "in accordance with the provisions of " Article 12.3 of the *Agreement on Safeguards*.

146. In view of this explicit link between Articles 8.1 and 12.3 of the *Agreement on Safeguards*, a Member cannot, in our view, "endeavour to maintain" an adequate balance of concessions unless it has, as a first step, provided an adequate opportunity for prior consultations on a proposed measure. We have upheld the Panel's findings that the United States did not provide an adequate opportunity for consultations, as required by Article 12.3 of the *Agreement on Safeguards*. For the same reasons,

---

[130]We note that, in so finding, we do not consider it necessary to determine whether the United States notified a "proposed measure" to the European Communities as required by Article 12.2 of the *Agreement on Safeguards*, as the European Communities did not argue specifically that the United States had acted inconsistently with Article 12.2.

[131]Panel Report, para. 8.219.

we also uphold the Panel's finding, in paragraph 8.219 of its Report, that the United States acted inconsistently with its obligations under Article 8.1 of the *Agreement on Safeguards*.

VIII. Article 11 of the DSU

147. At the outset of its findings in this dispute, the Panel articulated a standard of review that was based on Article 11 of the DSU.[132] The Panel said that it would not be appropriate for it to conduct a *de novo* review of the facts of the case, nor should it adopt a policy of "total deference" to the findings of the USITC.[133] Instead, the appropriate standard was an "objective assessment".

148. The European Communities agrees, as a general matter, with this articulation of the standard of review. However, it considers that the Panel failed properly to apply this standard of review. The European Communities makes a general assertion that the Panel failed to make an objective assessment "because [the Panel] failed to provide an adequate and reasonable explanation for its findings".[134] In addition, the European Communities asserts that:

> [the] Panel's failure to obtain the relevant information claimed to be confidential by the US and its decline [sic] to draw the necessary adverse inferences from the US's refusal to submit the requested information amount to an error of law that permeates several of the Panel's findings.[135]

For each of these arguments, the European Communities lists a series of paragraphs in the Panel Report which it considers are tainted by these errors.[136] Thereafter, the European Communities sets forth detailed arguments relating to four specific issues under Article 11 of the DSU which we understand are intended to substantiate the general assertions made. The four specific issues are: the treatment of "productivity" under Article 4.2(a) of the *Agreement on Safeguards*; the treatment of "profits and losses" under Article 4.2(a) of the Agreement; the treatment of the protein content of wheat under Article 4.2(a) of the Agreement; and the treatment of confidential information.

149. We note that the European Communities' appeal, insofar as it relates to the findings of serious injury, is limited to its arguments under Article 11 and the Panel's appreciation of the evidence. In addressing these arguments, we will examine the four specific issues highlighted by the European Communities to substantiate its more general assertions. We underline that we are not called upon to

---

[132]Panel Report, paras. 8.4 and 8.5.

[133]*Ibid.*, para. 8.5.

[134]European Communities' other appellant's submission, para. 25.

[135]*Ibid.*, para. 27.

[136]*Ibid.*, paras. 25 and 27.

examine whether the Panel has properly applied the exacting legal standard in the *Agreement on Safeguards* relating to "serious injury".

150. Before turning to the European Communities specific arguments under Article 11 of the DSU, we recall that, in previous appeals, we have emphasized that the role of the Appellate Body differs from the role of panels. Under Article 17.6 of the DSU, appeals are "limited to *issues of law* covered in the panel report and *legal* interpretations developed by the panel". (emphasis added) By contrast, we have previously stated that, under Article 11 of the DSU, panels are:

> … charged with the mandate to determine the *facts* of the case and to arrive at *factual findings*. In carrying out this mandate, a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof.[137] (emphasis added)

151. We have also stated previously that, although the task of panels under Article 11 relates, in part, to its assessment of the *facts*, the question whether a panel has made an "objective assessment" of the facts is a *legal* one, that may be the subject of an appeal.[138] (emphasis added) However, in view of the distinction between the respective roles of the Appellate Body and panels, we have taken care to emphasize that a panel's appreciation of the evidence falls, in principle, "within the *scope of the panel's discretion as the trier of facts*".[139] (emphasis added) In assessing the panel's appreciation of the evidence, we cannot base a finding of inconsistency under Article 11 simply on the conclusion that we might have reached a different factual finding from the one the panel reached. Rather, we must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence. As is clear from previous appeals, we will not interfere lightly with the panel's exercise of its discretion.[140]

---

[137]Appellate Body Report, *Korea – Dairy Safeguard*, *supra*, footnote 29, para. 137.

[138]Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* ("*European Communities – Hormones*"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, at 183, para. 132.

[139]Appellate Body Report, *Korea – Taxes on Alcoholic Beverages* ("*Korea – Alcoholic Beverages*"), WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, paras. 161 and 162.

[140]Appellate Body Report, *European Communities – Hormones*, *supra*, footnote 138, at 183 – 188, paras. 131 – 142; Appellate Body Report, *European Communities – Poultry*, *supra*, footnote 119, paras. 131 – 136; Appellate Body Report, *Australia – Salmon*, *supra*, footnote 119, paras. 262 – 267; Appellate Body Report, *Korea – Alcoholic Beverages*, *supra*, footnote 139, paras. 159 – 165; Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, paras. 140 – 142; Appellate Body Report, *India – Quantitative Restrictions on Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted 22 September 1999, paras. 149 and 151; and, Appellate Body Report, *Korea – Dairy Safeguard*, *supra*, footnote 29, paras. 137 and 138.

A. *USITC's Treatment of "Productivity"*

152. Article 4.2(a) of the *Agreement on Safeguards* refers to "productivity" as one of the enumerated "particular" relevant factors. Before the Panel, the European Communities claimed that the USITC failed properly to evaluate "productivity", as required by Article 4.2(a).[141] The Panel concluded, to the contrary, that "the data and statements pertaining to worker productivity, in conjunction with those on capital investments, in the overall context of the USITC Report, indicate that the USITC *considered* industry productivity as required by Article 4.2(a)."[142] (emphasis added)

153. As we understand it, the European Communities' appeal, on this point, is that the Panel erred, under Article 11 of the DSU, because the evidence before the Panel was not sufficient to support the conclusion that the "USITC *considered* industry productivity as required by Article 4.2(a)."[143] (emphasis added) In that respect, we note that neither the European Communities nor the United States appeals the Panel's interpretation of the word "productivity"[144] in Article 4.2(a) of the *Agreement on Safeguards*. Therefore, we do not address this question. We also note that the European Communities has not appealed the Panel's finding on the grounds that it erred in interpreting and applying either Articles 3.1 or 4.2(c) of the *Agreement on Safeguards*, which require the competent authorities to provide, respectively, "reasoned conclusions", as well as a "demonstration of the relevance of the factors examined". Nor does the European Communities assert that the Panel's treatment of "productivity" amounted to an error under Article 4.2(a) of the *Agreement on Safeguards*. Instead, the European Communities' appeal on this point is confined to the Panel's appreciation of the evidence under Article 11 of the DSU.

154. The European Communities submits that the Panel could not make an objective assessment of whether the USITC had evaluated "productivity" because the Panel had before it no specific numerical *data* on "productivity".[145] We recall that it is not part of our mandate to examine the facts afresh. Rather, we confine ourselves to determining whether the Panel has made an "objective assessment" of the facts under Article 11 of the DSU.[146]

155. The Panel noted that the USITC had dealt expressly with "worker productivity" and "capital investments".[147] In that respect, the USITC Report stated that worker productivity was at its "lowest

[141]Panel Report, para. 8.43.

[142]*Ibid.*, para. 8.45.

[143]*Ibid.*

[144]*Ibid.*, para. 8.44.

[145]European Communities' other appellant's submission, para. 68.

[146]See *supra*, paras. 150 and 151.

[147]Panel Report, para. 8.45.

level" during the investigative period in 1997 and that "unit labor costs almost doubled during the period examined."[148] It is also clear from the USITC Report that the domestic industry introduced considerable new capacity during the investigative period, which implies significant capital investment.[149] However, as the USITC noted, there "was a significant idling of productive facilities in the industry over the period examined", evidenced by the fall in the rate of capacity utilization.[150] We agree with the Panel that the USITC could have provided a more comprehensive analysis of "productivity".[151] However, although the evidence the Panel relied on is limited in nature, there are, in our view, insufficient grounds for concluding that the Panel erred, under Article 11 of the DSU, in finding that the USITC had "considered industry productivity as required by Article 4.2(a)."[152] We, therefore, decline the European Communities' appeal on this point.

B. *USITC's Treatment of "Profits and Losses"*

156. Article 4.2(a) of the *Agreement on Safeguards* refers to "profits and losses" as one of the enumerated "particular" relevant factors. Relying on our statement in *Argentina – Footwear Safeguards*, that Article 4.2 of the *Agreement on Safeguards* requires the competent authorities "adequately [to] explain[ ] how the facts support[ ] the determinations that were made"[153], the European Communities claimed, before the Panel, that the United States acted inconsistently with Article 4.2 because the "USITC [did] not provide an adequate explanation for the determination made" with respect to profits and losses.[154] One aspect of that claim related to the alleged failure of the USITC to explain the methodology that it had applied to allocate profits among wheat gluten, wheat starch, and derived products. These products are all produced from a single raw material input, wheat or wheat flour, using a single production line. The allocation of costs and revenues among these co-products will, therefore, have an influence on the apparent profitability (or losses) made on production of any of the co-products.

[148]USITC Report, p. I-14.

[149]*Ibid*., p. I-12.

[150]*Ibid.*

[151]Panel Report, para. 8.45.

[152]*Ibid*.

[153]Appellate Body Report, *supra*, footnote 22, para. 121.

[154]Panel Report, para. 8.47.

157. In addressing the issue of the appropriate methodology, the USITC stated:

> The Commission received usable financial data on wheat gluten operations from three of the four domestic producers of wheat gluten, Midland, Manildra, and Heartland. These three firms accounted for the substantial majority of domestic production of wheat gluten. Each of the companies produces wheat gluten and wheat starch in a joint production process. Each of the companies also produces other by-products or related products, especially alcohol. We carefully considered the arguments made by respondents with respect to the allocations made by domestic producers in providing financial data on their wheat gluten operations. *Based on a careful review of the allocation methodologies used by domestic wheat gluten producers in responding to the Commission's questionnaire, we find those allocations to be appropriate*." [155] (emphasis added)

158. After referring to this statement, the Panel observed that it had "asked the United States to clarify the nature of the 'careful review' the USITC had performed and to clarify and elaborate upon the 'allocation methodologies' referred to." [156] The Panel set out, at length, the "clarifications" provided by the United States and noted that the USITC "could have included … a more detailed explanation as to how and why the USITC considered the allocations to be 'appropriate' …".[157] However, the Panel concluded that "the *USITC Report provides an adequate, reasoned and reasonable explanation with respect to 'profits and losses'* and that the United States did not act inconsistently with Article 4.2(a) of the Agreement on Safeguards in this regard." [158] (emphasis added) In reaching this conclusion, the Panel relied on the statements in the USITC Report quoted above and the "clarifications given by the United States".[159]

159. The European Communities argues, on appeal, that the Panel erred, under Article 11 of the DSU, because it did not have sufficient facts before it to justify its conclusion on this issue. In other words, the evidence did not provide an objective basis for the Panel's conclusion. At the oral hearing, the European Communities drew particular attention to the fact that the *USITC* itself gives only a

[155]USITC Report, p. I-13. Footnote 57, attached to this paragraph of the USITC Report, provides "Report at II-20, 19-21 (supporting information on these pages of the report is confidential business information)."

[156]Panel Report, para. 8.61.

[157]*Ibid.*, paras. 8.61, 8.62 and 8.64.

[158]*Ibid.*, para. 8.66.

[159]*Ibid.*, para. 8.65.

single sentence explanation to justify its conclusion that the allocation methodologies are "appropriate".[160]

160. We recall that, under Article 3.1 of the *Agreement on Safeguards*, *the competent authorities* must "publish a *report*" which provides "reasoned conclusions" on "all pertinent issues". (emphasis added) Under Article 4.2(c), that *report* must also contain "a detailed analysis", including "a demonstration of the relevance of the factors examined". We observe that the Panel concluded, on the allocation methodologies, that it was "the *USITC Report*" which "provides an adequate, reasoned and reasonable explanation with respect to 'profits and losses'".[161] (emphasis added) Support for this conclusion must, therefore, be based on evidence drawn from the *USITC Report itself*. The only evidence, in that Report, that the Panel had to support this conclusion was the statement by the USITC that it had "carefully reviewed" and "considered" the allocation methodologies used by the producers.[162] In reaching its conclusion that the *USITC Report* gave an adequate explanation, the Panel placed considerable reliance on the "clarifications" given by the *United States* in response to the Panel's questions on "the nature of the 'careful review' the USITC had performed".[163] These subsequent clarifications obviously do *not* figure in the USITC Report.[164]

161. Although the Panel's conclusion on this issue was that the *USITC Report* contained an adequate explanation of the allocation methodologies, the Panel's reasoning discloses that the Panel clearly did not consider this to be the case. The Panel did not feel able to rely solely or, even, principally, on the explanation actually provided in the USITC Report and, instead, relied heavily on supplementary information provided by the United States in response to the Panel's questions. Indeed, the most important part of the Panel's reasoning on this issue is based on those "clarifications". We consider that the Panel's conclusion is at odds with its treatment and description of the evidence supporting that conclusion. We do not see how the Panel could conclude that the USITC Report *did* provide an adequate explanation of the allocation methodologies, when it is clear that the Panel itself saw such deficiencies in that Report that it placed extensive reliance on "clarifications" that were not contained in the USITC Report.

---

[160]In response to a question at the oral hearing the European Communities referred to the following sentence from the USITC Report: "Based on a careful review of the allocation methodologies used by domestic wheat gluten producers in responding to the Commission's questionnaire, we find those allocations to be appropriate" (USITC Report, p. I-13).

[161]Panel Report, para. 8.66.

[162]See the excerpt from the USITC Report, *supra*, para. 157.

[163]Panel Report, para. 8.61.

[164]In that respect, like the Panel, we note that the USITC could have described the nature of the "careful review" of the allocation methodologies used - as the United States did in its "clarifications" – *without* disclosing confidential *data* provided by the producers (see Panel Report, para. 8.64).

162. By reaching a conclusion regarding the USITC Report, which relied so heavily on supplementary information provided by the United States during the Panel proceedings – information not contained in the USITC Report – the Panel applied a standard of review which falls short of what is required by Article 11 of the DSU.

163. As a result we conclude that the Panel acted inconsistently with Article 11 in finding, in paragraph 8.66 of the Panel Report, that "the USITC Report provides an adequate, reasoned and reasonable explanation with respect to 'profits and losses' " and, therefore, we reverse this finding.

C. *USITC's Treatment of the Protein Content of Wheat*

164. Before the Panel, the European Communities argued that the USITC had failed to consider the overall relationship between the protein content of wheat and the price of wheat gluten as a particular "relevant factor" under Article 4.2(a) of the *Agreement on Safeguards*. According to the European Communities, this relationship is "the single, most important, factor determining the price of wheat gluten".[165] The Panel examined the evidence cited by the European Communities in support of its assertion that the issue of the protein content of wheat had been raised before the USITC. The Panel said:

> … We have examined this evidence cited by the European Community before us. While this evidence demonstrates to us that the issue of the effect of protein premiums on price during 1993-1994 was certainly raised by the EU producer respondents as relevant before the USITC, we find that the European Community has not demonstrated to us *as a matter of fact* that the EU producer respondents clearly raised the broader issue of wheat protein premiums as a possible relevant causal factor pertaining to the post-1994 segment of the period of investigation which the European Community raises in these Panel proceedings.[166] (emphasis added)

165. The European Communities alleges that, in making this finding, the Panel failed to make an objective assessment of the facts, as required by Article 11 of the DSU. According to the European Communities, the evidence before the Panel, in the form of EC-Exhibit 10, demonstrated clearly the importance of the relationship between the protein content of wheat and the price of wheat gluten. In light of this evidence, it says, the Panel should have found that the USITC was required to examine this relationship as a relevant other factor, under Article 4.2(a) of the *Agreement on Safeguards*.

---

[165]European Communities' other appellant's submission, para. 88.

[166]Panel Report, para. 8.125.

166. We recall that we have already examined the European Communities' appeal against the Panel's finding that the competent authorities need not examine "factors" that are neither listed in Article 4.2(a) of the *Agreement on Safeguards* nor clearly raised before the competent authorities as relevant by interested parties.[167] In that section of our findings, we concluded that the competent authorities may be required to evaluate "other factors" which were not "clearly raised" by the interested parties. However, we concluded that the evidence of record suggests that the overall relationship between the protein content of wheat and the price of wheat gluten becomes a relevant other factor, under Article 4.2(a), only when the protein content is *unusually* high or low. We concluded that, as the evidence indicates that the protein content of wheat was *not* unusually high or low during the post-1994 period of investigation, when the surge in imports occurred, the USITC was *not* required to "evaluate" the protein content of wheat as a particular relevant other factor under Article 4.2(a).[168]

167. It seems, to us, that this finding, under Article 4.2(a) of the *Agreement on Safeguards*, also resolves the European Communities' appeal under Article 11 regarding the protein content of wheat. The European Communities argues that the evidence before the Panel should have led the Panel to find that the USITC *was* required to evaluate the overall relationship between the protein content of wheat and the price of wheat gluten as a relevant other factor, under Article 4.2(a), during the post-1994 period of investigation. However, contrary to the European Communities' arguments on this point, we have already found that the evidence of record does *not* indicate that the USITC was required to "evaluate" that relationship as a relevant other factor for that period. We, therefore, decline the European Communities' appeal on this point.

D. *Failure to Draw the Appropriate Inferences*

168. The Panel requested that the United States supply it with certain factual information.[169] The United States did not submit this information, maintaining that it was business confidential information ("BCI") and that, under Article 3.2 of the *Agreement on Safeguards*, it was entitled to withhold the requested information. The Panel proposed to the parties two different procedures for the protection of BCI. The United States informed the Panel that it could not submit the information under either of these procedures, but would be willing to submit the information to the Panel only. The Panel ruled that it could not accept the information on that basis because, by denying the European Communities access to the information, the Panel would have engaged in *ex parte*

[167]*Supra*, Section IV, paras. 45 – 59.

[168]The details of our reasoning are set forth, *supra*, para. 58.

[169]Panel Report, para. 8.7.

communications with the United States.[170] The Panel, however, stated that it was of the view that it could dispose of the case on the basis of the factual record to which it had access.[171]

169. The European Communities argues that the "Panel should have drawn adverse inferences from the US's refusal to provide to the Panel the redacted information from the published USITC report and the other information identified by the EC."[172] The European Communities argues that the Panel should have drawn inferences adverse to the United States with respect to a number of different issues, in particular "productivity" and "profits and losses", where the Panel did not have access to specific numerical data. The European Communities notes that the Panel explicitly acknowledged that having access to the BCI would "have facilitated [its] objective assessment of the facts".

170. We begin by noting our strong agreement with the Panel that a "serious systemic issue" is raised by the question of the procedures which should govern the protection of information requested by a panel under Article 13.1 of the DSU and which is alleged by a Member to be "confidential".[173] We believe that these issues need to be addressed.

171. Next, we recall that we stated, in our original report in *Canada – Aircraft*, that Members of the WTO "are … under a *duty* and an *obligation* to 'respond promptly and fully' to requests made by panels for information under Article 13.1 of the DSU."[174] (emphasis added) In this case, despite the fact that the Panel proposed to exercise its authority, under Article 12.1 of the DSU, to determine its own procedures by adopting two different procedures for the protection of business confidential information, the United States declined to make available to the Panel, and representatives of the European Communities, certain information requested by the Panel under Article 13.1 of the DSU. As the Appellate Body said in *Canada – Aircraft*, the refusal by a Member to provide information requested of it undermines seriously the ability of a panel to make an objective assessment of the facts and the matter, as required by Article 11 of the DSU. Such a refusal also undermines the ability of other Members of the WTO to seek the "prompt" and "satisfactory" resolution of disputes under the procedures "for which they bargained in concluding the DSU."[175] In this specific case, the Panel acknowledged that having access to all of the information requested from the United States "would

[170]Panel Report, para. 8.10.

[171]*Ibid.*, para. 8.12.

[172]European Communities' other appellant's submission, para. 38.

[173]Panel Report., para. 8.11.

[174]Appellate Body Report, *supra*, footnote 32, para. 187.

[175]*Ibid.*, para. 189.

have facilitated [an] objective assessment of the facts".[176] We, therefore, deplore the conduct of the United States.

172. However, we note that the role of the Appellate Body, on this issue, is limited to determining whether the Panel has erred under Article 11 of the DSU. In that respect, we recall that, in *Canada – Aircraft*, the Appellate Body observed that:

> … The drawing of inferences is, in other words, an inherent and unavoidable aspect of a panel's basic task of finding and characterizing the facts making up a dispute.[177]
>
> …
>
> Clearly, in our view, the Panel had the legal authority and the *discretion* to draw inferences from the facts before it – including the fact that Canada had refused to provide information sought by the Panel.[178] (emphasis added)

173. We, therefore, characterized the drawing of inferences as a "discretionary" task falling within a panel's duties under Article 11 of the DSU. In *Canada – Aircraft*, which involved a similar factual situation, the panel did not draw any inferences "adverse" to Canada's position. On appeal, we held that there was no basis to find that the panel had improperly exercised its discretion since "the full *ensemble* of the facts on the record" supported the panel's conclusion.[179]

174. In its appeal, the European Communities places considerable emphasis on the failure of the Panel to draw "adverse" inferences from the refusal of the United States to provide information requested by the Panel. As we emphasized in *Canada – Aircraft*, under Article 11 of the DSU, a panel must draw inferences on the basis of *all of the facts of record* relevant to the particular determination to be made.[180] Where a party refuses to provide information requested by a panel under Article 13.1 of the DSU, that refusal will be one of the relevant facts of record, and indeed an important fact, to be taken into account in determining the appropriate inference to be drawn. However, if a panel were to ignore or disregard other relevant facts, it would fail to make an "objective assessment" under Article 11 of the DSU. In this case, as the Panel observed, there *were* other facts of record that the Panel was required to include in its "objective assessment". Accordingly, we reject the European Communities' arguments to the extent that they suggest that the Panel erred in

---

[176]Panel Report, para. 8.12.

[177]Appellate Body Report, *supra*, footnote 32, para. 198.

[178]*Ibid.*, para. 203.

[179]*Ibid.*, paras. 204 and 205.

[180]*Ibid.*

not drawing "adverse" inferences simply from the refusal of the United States to provide certain information requested from it by the Panel under Article 13.1 of the DSU.

175. In reviewing the inferences the Panel drew from the facts of record, our task on appeal is not to redo afresh the Panel's assessment of those facts, and decide for ourselves what inferences we would draw from them. Rather, we must determine whether the Panel improperly exercised its discretion, under Article 11, by failing to draw certain inferences from the facts before it. In asking us to conduct such a review, an appellant must indicate clearly the manner in which a panel has improperly exercised its discretion. Taking into account the full *ensemble* of the facts, the appellant should, at least: identify the facts on the record from which the Panel should have drawn inferences; indicate the factual or legal inferences that the panel should have drawn from those facts; and, finally, explain why the failure of the panel to exercise its discretion by drawing these inferences amounts to an error of law under Article 11 of the DSU.

176. In this appeal, the European Communities makes, what we regard to be, broad and general statements that the Panel erred by not drawing "adverse" inferences from the facts. Besides the fact that the United States refused to provide certain information requested by the Panel under Article 13.1 of the DSU, the European Communities does not identify, in any specific manner, *which facts* supported a particular inference. Nor does the European Communities identify *what inferences* the Panel should have drawn from those facts, other than that the inferences should have been favourable to the European Communities. Besides the simple refusal of the United States to provide information requested by the Panel, which we have already addressed[181], the European Communities does not offer any other specific reasons why the Panel's failure to exercise its discretion by drawing the inferences identified by the European Communities amounts to an error of law under Article 11 of the DSU. Therefore, we decline this ground of appeal.

IX. Judicial Economy

177. Before the Panel, the European Communities made a claim under Article XIX:1(a) of the GATT 1994 regarding "unforeseen developments", and also a claim under Article I of the GATT 1994 and Article 5 of the *Agreement on Safeguards* regarding the nature of the remedy. In a single paragraph covering these two claims, the Panel stated:

[181] *Supra*, para. 174.

> … having determined that the measure at issue is inconsistent with Articles 2.1 and 4.2 SA, and exercising the discretion implicit in the principle of judicial economy, we do not deem it necessary to examine whether the measure at issue is also inconsistent with Article XIX of the GATT 1994 ("unforeseen developments") nor whether the form, level and allocation of the inconsistent measure are in breach of Article 5 SA or Article I of the GATT 1994.[182]

178. The European Communities appeals the Panel's findings on judicial economy. The European Communities asserts that the failure to make a finding regarding the claim on "unforeseen developments" means that there is a flaw in the Panel's findings, under Articles 2.1 and 4.2 of the *Agreement on Safeguards*, concerning increased imports and serious injury. The European Communities also argues that, by failing to address the European Communities' claims under Article I of the GATT 1994 and Article 5 of the *Agreement on Safeguards*, "the Panel has not clarified whether the US could simply repeat the serious injury determination and then still proceed to apply the measure in the same way." [183]

179. We begin by recalling certain of the statements that the Appellate Body has already made regarding the exercise of judicial economy by panels. In *United States – Shirts and Blouses*, we opined:

> Given the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that Article 3.2 of the *DSU* is meant to encourage either panels or the Appellate Body to "make law" by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. *A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.*[184] (emphasis added)

180. However, the "discretion" that a panel enjoys to determine which claims it should address is not without limits.[185] In *Australia – Salmon*, we stated that 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 …".[186]

---

[182]Panel Report, para. 8.220.

[183]European Communities' other appellant's submission, para. 108.

[184]Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, DSR 1997:I, 323, at 340.

[185]Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, at 35, para. 87.

[186]Appellate Body Report, *Australia – Salmon*, *supra*, footnote 119, para. 223.

181. In *Argentina – Footwear Safeguards*, we were asked to address a claim on "unforeseen developments" that the panel had not examined. In that appeal, we upheld the panel's finding that Argentina's investigation "was inconsistent with the requirements of Articles 2 and 4 of the *Agreement on Safeguards*." We went on to state:

> As a consequence, there is *no legal basis* for the safeguard measures imposed by Argentina. For this reason, we do not believe that it is necessary to complete the analysis of the Panel relating to the claim made by the European Communities under Article XIX of the GATT 1994 by ruling on whether the Argentine authorities have, in their investigation, demonstrated that the increased imports in this case occurred "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … ".[187]

182. In short, we considered that since the safeguard measure at issue was inconsistent with Articles 2 and 4 of the *Agreement on Safeguards*, there was no need to go further and examine whether, in addition, the measure was also inconsistent with Article XIX:1(a) of the GATT 1994. The inconsistency, as we said, deprived the measure of legal basis.

183. In our view, the same reasoning applies in this case. The Panel found and we have upheld, albeit for different reasons, that the measure is inconsistent with Articles 2.1 and 4.2 of the *Agreement on Safeguards*. Thus, the Panel found, in effect, that the safeguard measure at issue in this case, like the measure at issue in *Argentina – Footwear Safeguard*, has no legal basis. The reasons for which the Panel found an inconsistency with Articles 2.1 and 4.2 of the *Agreement on Safeguards* do not alter that conclusion. The Panel was, therefore, entitled to decline to examine the claim of the European Communities regarding "unforeseen developments". A finding on that issue would not, in our view, have added anything to the ability of the DSB to make sufficiently precise recommendations and rulings in this dispute. We, therefore, see no error in the Panel's exercise of judicial economy as regards the European Communities claim concerning "unforeseen developments".

184. The same reasoning also holds true for the European Communities' claim under Article I of the GATT 1994 and Article 5 of the *Agreement on Safeguards*. As the Panel had found the measure to be inconsistent with Articles 2.1 and 4.2 of the *Agreement on Safeguards*, the Panel was within its discretion in declining to examine these claims. Once again, a finding on this claim would not have added anything to the ability of the DSB to make sufficiently precise recommendations and rulings in this dispute.

---

[187]Appellate Body Report, *supra*, footnote 22, para. 98.

185. Finally, the European Communities asserts that, by failing to address these claims, "the Panel has not clarified whether the US could simply repeat the serious injury determination and then still proceed to apply the measure in the same way."[188] It appears, to us, that this argument invites speculation as to how the United States might implement the recommendations and rulings of the DSB. As we said in our Report in *United States – Tax Treatment for "Foreign Sales Corporations"*, "we do not consider that it is appropriate for us to speculate on the ways in which the United States might choose to implement" the recommendations and rulings of the DSB.[189] We, therefore, see no error in the Panel's exercise of judicial economy as regards the European Communities claim concerning Article I of the GATT 1994 and Article 5 of the *Agreement on Safeguards*.

186. For these reasons, we see no error in the Panel's exercise of judicial economy in paragraph 8.220 of the Panel Report.

X. Findings and Conclusions

187. For the reasons set out in this Report, the Appellate Body:

(a) upholds the Panel's conclusion, in paragraph 8.127 of the Panel Report, that the United States has not acted inconsistently with its obligations under Articles 4.2(a) and 4.2(b) of the *Agreement on Safeguards*, by declining to evaluate the overall relationship between the protein content of wheat and the price of wheat gluten as a "relevant factor" under Article 4.2(a) of that Agreement; but, in so doing, reverses the Panel's interpretation of Article 4.2(a) of the *Agreement on Safeguards*, in paragraph 8.69 of the Panel Report, that the competent authorities are required to evaluate only the "relevant factors" listed in Article 4.2(a) of that Agreement as well as any other "factors" which were "*clearly* raised before [the competent authorities] as relevant by the interested parties in the domestic investigation";

(b) reverses the Panel's interpretation of Article 4.2(b) of the *Agreement on Safeguards* that increased imports "alone", "in and of themselves", or "*per se*", must be capable of causing "serious injury", as well as the Panel's conclusions on the issue of causation, as summarized in paragraph 8.154 of the Panel Report; finds, nonetheless, that the

[188]European Communities' other appellant's submission, para. 108.

[189]Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, para. 175.

United States acted inconsistently with its obligations under Article 4.2(b) of the *Agreement on Safeguards*;

(c) upholds the Panel's finding, in paragraph 8.182 of the Panel Report, that the United States acted inconsistently with its obligations under Articles 2.1 and 4.2 of the *Agreement on Safeguards*, by excluding imports from Canada from the application of the safeguard measure, after conducting an investigation embracing imports from all sources, including Canada, to determine whether increased imports of wheat gluten were causing or threatening to cause serious injury to the United States industry, and after subsequently conducting a separate examination of the importance of imports from Canada to the situation of the domestic industry;

(d) upholds the Panel's findings, in paragraphs 8.197 and 8.199 of the Panel Report, that the United States acted inconsistently with its obligations under Articles 12.1(a) and 12.1(b) of the *Agreement on Safeguards*;

(e) reverses the Panel's finding, in paragraph 8.207 of the Panel Report, that the United States acted inconsistently with its obligations under Article 12.1(c) of the *Agreement on Safeguards*; finds that the United States acted consistently with its obligations under Article 12.1(c) of that Agreement to notify "immediately" its decision to apply a safeguard measure;

(f) upholds the Panel's finding, in paragraph 8.219 of the Panel Report, that the United States acted inconsistently with its obligations under Article 12.3 of the *Agreement on Safeguards*, and, in consequence, upholds the Panel's finding, in paragraph 8.219 of the Panel Report, that the United States acted inconsistently with its obligations under Article 8.1 of the *Agreement on Safeguards*;

(g) finds that the Panel did not act inconsistently with Article 11 of the DSU:

(i) in concluding, in paragraph 8.45 of the Panel Report, that the USITC had "considered industry productivity as required by Article 4.2(a)" of the *Agreement on Safeguards*;

(ii) in finding, in paragraph 8.127 of the Panel Report, that the USITC was not required to evaluate the overall relationship between the protein content of wheat and the price of wheat gluten as a "relevant factor", under Article 4.2(a) of the *Agreement on Safeguards*, during the post-1994 period of investigation; and,

(iii) in declining to draw "adverse" inferences from the refusal of the United States to provide certain allegedly confidential information requested from it by the Panel under Article 13.1 of the DSU;

(h) finds that the Panel acted inconsistently with Article 11 of the DSU in finding, in paragraph 8.66 of the Panel Report, that "the USITC Report provides an adequate, reasoned and reasonable explanation with respect to 'profits and losses'" and, therefore, reverses this finding; and

(i) finds no error in the Panel's exercise of judicial economy, in paragraph 8.220 of the Panel Report, in not examining the claims of the European Communities under Article XIX:1(a) of the GATT 1994, and also under Article 5 of the *Agreement on Safeguards* and Article I of the GATT 1994.

188. The Appellate Body *recommends* that the DSB request that the United States bring its safeguard measure found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the *Agreement on Safeguards*, into conformity with its obligations under that Agreement.

Signed in the original at Geneva this 8th day of December 2000 by:

_____

Julio Lacarte-Muró
Presiding Member

_____ _____

Georges Michel Abi-Saab
Member

Yasuhei Taniguchi
Member