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

AB-2001-1

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia

United States, *Appellant/Appellee*
Australia, *Appellant/Appellee*
New Zealand, *Appellant/Appellee*

European Communities, *Third Participant*

AB-2001-1

Present:

Ehlermann, Presiding Member
Bacchus, Member
Ganesan, Member

I. Introduction

1. The United States, Australia and New Zealand appeal certain issues of law and legal interpretations in the Panel Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* (the "Panel Report").[1] The Panel was established to consider complaints by Australia and New Zealand with respect to a definitive safeguard measure imposed by the United States on imports of fresh, chilled and frozen lamb meat.[2]

2. On 7 October 1998, the United States International Trade Commission (the "USITC") initiated a safeguard investigation into imports of lamb meat.[3] By Proclamation of the President of the United States, dated 7 July 1999, the United States imposed a definitive safeguard measure, in the form of a tariff-rate quota, on imports of fresh, chilled and frozen lamb meat, effective as of 22 July 1999.[4] The factual aspects of this dispute are set out in greater detail in the Panel Report.[5]

3. The Panel considered claims by Australia and New Zealand that, in imposing the safeguard measure on imports of lamb meat, the United States acted inconsistently with Articles I, II, and XIX

[1]WT/DS177/R, WT/DS178/R, 21 December 2000.

[2]Panel Report, paras. 1.1 – 1.10.

[3]*Ibid*., para. 2.2; G/SG/N/6/USA/5, 5 November 1998.

[4]"Proclamation 7208 of 7 July 1999 – To Facilitate Positive Adjustment to Competition From Imports of Lamb Meat", United States Federal Register, 9 July 1999 (Volume 64, Number 131), pp. 37387-37392; Panel Report, para. 2.6.

[5]Panel Report., paras. 2.1 – 2.8.

of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), and with Articles 2, 3, 4, 5, 8, 11, and 12 of the *Agreement on Safeguards*.[6]

4. In its Report, circulated to Members of the World Trade Organization (the "WTO") on 21 December 2000, the Panel concluded:

> (a) that the United States has acted inconsistently with Article XIX:1(a) of GATT 1994 by failing to demonstrate as a matter of fact the existence of "unforeseen developments";
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> (b) that the United States has acted inconsistently with Article 4.1(c) of the Agreement on Safeguards because the USITC, in the lamb meat investigation, defined the domestic industry as including input producers (i.e., growers and feeders of live lamb) as producers of the like product at issue (i.e. lamb meat);
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> (c) that the complainants failed to establish that the USITC's analytical approach to determining the existence of a threat of serious injury, in particular with respect to the prospective analysis and the time-period used, is inconsistent with Article 4.1(b) of the Agreement on Safeguards (assuming *arguendo* that the USITC's industry definition was consistent with the Agreement on Safeguards);
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> (d) that the complainants failed to establish that the USITC's analytical approach (see paragraphs 7.223-7.224) to evaluating all of the factors listed in Article 4.2(a) of the Agreement on Safeguards when determining whether increased imports threatened to cause serious injury with respect to the domestic industry as defined in the investigation is inconsistent with that provision (assuming *arguendo* that the USITC's industry definition was consistent with the Agreement on Safeguards and that the data relied upon by the USITC were representative within the meaning of Article 4.1(c) of the Agreement on Safeguards);
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> (e) that the United States has acted inconsistently with Article 4.1(c) of the Agreement on Safeguards because the USITC failed to obtain data in respect of producers representing a major proportion of the total domestic production by the domestic industry as defined in the investigation;

[6]WT/DS177/4 and WT/DS178/5, 15 October 1999 and WT/DS178/5/Corr.1, 29 October 1999. See, also, Panel Report, paras. 3.1 – 3. 4.

> (f) that the United States has acted inconsistently with Article 4.2(b) of the Agreement on Safeguards because the USITC's determination in the lamb meat investigation in respect of causation did not demonstrate the required causal link between increased imports and threat of serious injury, in that the determination did not establish that increased imports were by themselves a necessary and sufficient cause of threat of serious injury, and in that the determination did not ensure that threat of serious injury caused by "other factors" was not attributed to increased imports;
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> (g) that by virtue of the above violations of Article 4 of the Agreement on Safeguards, the United States also has acted inconsistently with Article 2.1 of the Agreement on Safeguards.[7]

5. As the Panel was of the view that it had addressed those claims and issues that it considered necessary to enable the Dispute Settlement Body ("DSB") to make sufficiently precise recommendations and rulings for the effective resolution of the dispute, the Panel exercised "judicial economy" and declined to rule on the claims made under Articles I and II of the GATT 1994, and under Articles 2.2, 3.1, 5.1, 8, 11 and 12 of the *Agreement on Safeguards*.[8]

6. The Panel recommended that the DSB request the United States to bring its safeguard measure on imports of lamb meat into conformity with its obligations under the *Agreement on Safeguards* and the GATT 1994.[9]

7. On 31 January 2001, 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 12 February 2001, the United States filed its appellant's submission.[10] On 15 February 2001, Australia and New Zealand each filed an other appellant's submission.[11] On 26 February 2001, Australia, New Zealand and the United States each filed an appellee's submission.[12] On the same day, the European Communities filed a third participant's submission.[13]

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[7]Panel Report, para. 8.1.

[8]*Ibid.*, para. 7.280.

[9]*Ibid.*, para. 8.2.

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

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

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

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

8. On 26 February 2001, the Appellate Body received letters from Canada and Japan indicating that they would not be filing written submissions in this appeal.[14] Canada stated that it "reserve[d] the right to intervene, as appropriate, during the oral hearing" and Japan indicated that it wished "to reserve its right to present its views at the oral hearing." On 6 March 2001, the Appellate Body Secretariat replied to Canada and Japan that the Division hearing this appeal wished to have clarification as to whether Canada and Japan wanted to attend the oral hearing simply as "passive observers" or to participate actively in the oral hearing. By their letters dated 9 March 2001, Canada stated that it wished to attend the oral hearing as a "passive observer", while Japan stated that it "would like to hear the arguments made by the parties to the dispute, and to intervene when necessary and [when] given an opportunity to do so by the Appellate Body."

9. On 9 March 2001, the Appellate Body Secretariat informed the participants and third participants that the Division hearing this appeal was "inclined to allow Canada and Japan to attend the oral hearing as passive observers, if none of the participants or third participants object." No such objection was received. On 14 March 2001, the Division hearing this appeal informed Canada, Japan, the participants and the European Communities, that Canada and Japan would be allowed to attend the oral hearing as passive observers, that is, to hear the oral statements and responses to questioning by Australia, the European Communities, New Zealand and the United States.

10. The oral hearing in the appeal was held on 22 and 23 March 2001. The participants and the European Communities, as third participant, presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

II. Arguments of the Participants and Third Participant

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

1. Unforeseen Developments

11. The United States appeals the Panel's finding that the United States acted inconsistently with Article XIX:1(a) of the GATT 1994 with respect to the issue of "unforeseen developments". In the view of the United States, the Panel erred in reading words into the text of Article XIX and thereby nullified the distinction between "conditions" for applying a safeguard measure, and "circumstances" which must be demonstrated as a matter of fact in order to apply a safeguard measure, in a manner that is inconsistent with the Appellate Body reports in *Argentina – Safeguard Measures on Imports of*

[14]Canada and Japan reserved their rights to participate as third parties in the proceedings before the Panel; Panel Report, para. 1.10.

Footwear ("*Argentina – Footwear Safeguard*")[15] and *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea – Dairy Safeguard*").[16]

12. The United States emphasizes the fact that, according to the Panel, the United States breached Article XIX:1(a) of the GATT 1994 because the published report of the USITC (the "USITC Report") did not include a "conclusion" demonstrating the existence of unforeseen developments. However, Article XIX:1(a) contains neither the word "conclusion" nor any guidance as to how a Member should approach the issue of unforeseen developments. The Panel *implied* the "conclusion" requirement from an erroneous interpretation of Article 3.1 of the *Agreement on Safeguards*, which it viewed as relevant context for interpreting Article XIX of the GATT 1994. However, while the "context" of a provision may help to understand the meaning of a term, such "context " cannot serve as the basis for *copying* or *reading* an obligation from one provision of an agreement into another provision in a different agreement. Furthermore, even as context, Article 3.1 of the *Agreement on Safeguards* does not support the Panel's conclusion, since the scope of competent authorities' obligations to investigate "pertinent issues" and reach "reasoned conclusions" under that Article is bound by the scope of the investigation to be conducted under the *Agreement on Safeguards.* Neither Article 2.1, nor Article 4.2, nor any other provision in the *Agreement on Safeguards* suggests that, in addition to the requirements set out in that Agreement, competent authorities must also conduct an investigation and reach a "reasoned conclusion" on the issue of unforeseen developments. The United States emphasizes that such an obligation would elevate "unforeseen developments" into a "condition" additional to those explicitly set forth in Article 2.1 of the *Agreement on Safeguards*.

13. In the view of the United States, a panel's role is to consider whether the Member taking the safeguard action has demonstrated the existence of unforeseen developments as a matter of fact, and not whether the competent authorities presented those facts in their report, as a separate finding, a "reasoned conclusion", or in any other form. The United States invokes the practice of contracting parties under the GATT 1947 and the negotiating history of the *Agreement on Safeguards* in support of its position, and considers that the Report of the Working Party in *Hatters' Fur* suggests that specific developments in the marketplace leading to an injurious import surge will not normally be "foreseen" by negotiators at the time of making tariff concessions.[17] The United States adds that, to

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

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

[17]*Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under the Terms of Article XIX*, ("*Hatters' Fur*"), GATT/CP/106, adopted 22 October 1951. The United States argues, on the basis of this case, that the unforeseen character of relevant developments "will be implicit in the result they have produced." (United States' appellant's submission, para. 43).

the extent that the factual record in the instant case is clear and uncontested, the USITC's Report demonstrated the existence of unforeseen developments as a matter of fact.

2. Domestic Industry

14. The United States argues that the Panel erred in finding that the United States' definition of the domestic industry, which included growers and feeders of live lambs, as well as packers and breakers of lamb meat, was inconsistent with Article 4.1(c) of the *Agreement on Safeguards*. In the view of the United States, where there is both a continuous line of production and a coincidence of economic interests among various segments contributing to the production of a finished product, the term "producer" in Article 4.1(c) of the *Agreement on Safeguards* may properly be read to include the producers making the primary contribution to the value of the finished product. In this regard, the United States points out that most sheep and lambs are meat-type animals kept primarily for the production of meat, and that the value added by the growers and feeders of live lambs accounts for about 88 per cent of the wholesale cost of lamb meat in the United States. A definition of "domestic industry" that excluded the growers and feeders would, therefore, be artificial, and would render the determination of serious injury or a threat thereof meaningless. In support of its arguments, the United States relies on the term "producers as a whole" in the definition set forth in Article 4.1(c) of the *Agreement on Safeguards* and takes the position that this phrase allows the national competent authorities some flexibility to define "domestic industry" on the facts and circumstances of each case.

15. The United States suggests that the term "producer" must be construed in terms of how the competent authorities will conduct their injury analysis. Article 4.2(a) of the *Agreement on Safeguards* requires competent authorities to evaluate "all relevant factors" bearing on the situation of the industry. This requires an authority to analyze all aspects of the industry, which in some industries may include factors affecting the product in its raw stage. Limiting the definition of "producer" to only those processors contributing very limited value-added at the final stage of a continuous line of production would create an artificial "domestic industry" and improperly restrict the injury analysis. On the facts of this case, to limit the domestic industry only to breakers and packers would have required the USITC to examine only the portion of production responsible for approximately 12 percent of the value of the like product, and to ignore the effects of the imports of lamb meat on producers whose economic interests were closely intertwined with those of the breakers and packers and whose financial health was similarly likely to be affected by lamb meat imports.

16. The United States argues that, in its findings on this issue, the Panel relied on panel reports under the GATT 1947 that are not apposite to this case, and erroneously concluded that the United States' approach would allow competent authorities to devise an unfairly "open-ended" definition of

the domestic industry. In fact, the USITC has developed principles that do effectively limit the inclusion of particular producers in the definition of the domestic industry, and, in applying its two-pronged test, the USITC has only rarely included both processors and growers in the same domestic industry. Finally, the United States contends that the Panel's determination that the United States violated Article 2.1 of the *Agreement on Safeguards* was based on its erroneous finding that the United States had violated Article 4 of the *Agreement on Safeguards* and should, for that reason, be reversed.

3. Threat of Serious Injury

17. The United States requests the Appellate Body to reverse the Panel's finding that the USITC's data collection was inconsistent with Article 4.1(c) of the *Agreement on Safeguards*. The United States asserts that, before the Panel, Australia and New Zealand did not establish a *prima facie* case that the USITC's data collection was inconsistent with Article 4.1(c), as they did not make any such claim, and did not adduce any evidence or argument in support of such a claim. The United States also points out that none of the participants in the proceedings before the USITC argued that the data was biased or inaccurately portrayed the condition of growers.

18. The United States maintains that, in addition to basing its finding on a claim that neither complainant advanced, the Panel misinterpreted the provisions of the *Agreement on Safeguards* applicable to competent authorities' evaluation of the data collected in a safeguard investigation. Neither Article 4.1(c) nor any other provision of the *Agreement on Safeguards* imposes a standard of "representativeness" on competent authorities conducting safeguard investigations. The United States adds that the USITC acted consistently with the provisions of the *Agreement on Safeguards* that *are* relevant to the issue of data collection, namely, Articles 4.2(a) and 4.2(b), which simply require competent authorities to evaluate all factors of "an objective and quantifiable nature" having a "bearing" on the state of the industry, and to determine the existence of the causal link on the basis of "objective evidence". Lastly, the United States contends that the Panel's finding regarding Article 2.1 of the *Agreement on Safeguards* was based on its erroneous finding that the United States had violated Article 4 of the *Agreement on Safeguards* and should, for that reason, be reversed.

4. Causation

19. The United States submits that the Panel erred in finding that the USITC's causation analysis violated Article 4.2(b) of the *Agreement on Safeguards*. The Panel's analysis was, and was acknowledged by the Panel to be, nearly identical to the approach of the panel in *United States – Definitive Safeguard Measure on Imports of Wheat Gluten from the European Communities*

("*United States – Wheat Gluten Safeguard*")[18], which was reversed by the Appellate Body. The Panel found that the USITC had not acted consistently with Article 4.2(b) of the *Agreement on Safeguards* because it had failed to demonstrate that: (i) increased lamb meat imports were themselves a "necessary and sufficient" cause of serious injury to the U.S. lamb meat industry; and (ii) they alone accounted for a degree of injury that met the threshold of "seriousness" required under Article 4.2(a) and 4.2(b). In *United States – Wheat Gluten Safeguard*, the Appellate Body reversed that panel's finding "that increased imports 'alone', 'in and of themselves', or '*per se*', must be capable of causing injury that is 'serious'".[19] The Appellate Body found that Article 4.2(b) does not suggest that increased imports must be the sole cause of the serious injury, or that 'other factors' causing injury must be excluded from the determination of serious injury. This reasoning applies equally in this case, and, according to the United States, demonstrates that the Panel erred in its approach.

20. The United States is of the view that the factual findings made by the Panel are not sufficient to enable the Appellate Body to complete the analysis and determine whether the USITC properly applied the causation standard mandated by the *Agreement on Safeguards*. In particular, the Panel did not make factual findings necessary to determine whether the complainants had shown that the USITC failed to demonstrate a genuine and substantial cause-and-effect relationship between lamb meat imports and serious injury. Should the Appellate Body disagree, the United States submits that the USITC met the requirements identified by the Appellate Body in its Report in *United States – Wheat Gluten Safeguard*. The USITC first demonstrated that increased lamb meat imports were an important cause of threat of serious injury to the domestic lamb meat industry. In determining that imports were a no less important cause of the threat of serious injury than any other cause, the USITC analyzed all other relevant factors. Through this process, the USITC ensured that injury arising from other causes was not attributed to imports and that the evidence on which it established causation by increased imports reflected a genuine and substantial causal link. The United States adds that the Panel's further finding under Article 2.1 of the *Agreement on Safeguards* was based on its erroneous finding that the United States had violated Article 4 of the *Agreement on Safeguards* and should, for that reason, be reversed.

[18]Panel Report, WT/DS166/R, adopted 19 January 2001, as modified by the Appellate Body Report, WT/DS166/AB/R.

[19]Appellate Body Report, WT/DS166/AB/R, adopted 19 January 2001, para. 79.

B. *Arguments of Australia – Appellee*

1. Unforeseen Developments

21. Australia requests the Appellate Body to uphold the finding of the Panel that the United States acted inconsistently with Article XIX:1(a) of the GATT 1994. The Panel interpreted Article XIX:1(a) of the GATT 1994 in a manner that gave meaning and effect to all the applicable provisions, including the clause "unforeseen developments", and correctly concluded that the USITC Report did not contain the required conclusion on "unforeseen developments". Should the Appellate Body reverse the Panel's interpretation of Article XIX of the GATT 1994, Australia requests the Appellate Body to complete the analysis and find that the United States failed to satisfy the "unforeseen developments" requirement in Article XIX:1(a) of the GATT 1994.

22. Australia points out that Article 11.1(a) of the *Agreement on Safeguards* requires Members taking safeguard action under Article XIX of the GATT 1994 to ensure that such measures conform with the provisions of the *Agreement on Safeguards*. Members applying safeguard measures must, therefore, satisfy the requirements of both Article XIX of the GATT 1994 and the *Agreement on Safeguards*, including Article 3.1 of the *Agreement on Safeguards*, which requires competent authorities to provide "reasoned conclusions" on "all pertinent issues of fact and law". The Appellate Body has held that "unforeseen developments" are "circumstances that must be demonstrated as a matter of fact". Therefore, Australia submits that Article XIX:1(a) of the GATT 1994, read in the context of Article 3.1 of the *Agreement on Safeguards*, requires competent authorities to reach a reasoned conclusion demonstrating the existence of "unforeseen developments".

23. Australia contests the United States' view that Members are only required to demonstrate the existence of unforeseen developments on an *ex post facto* basis in a WTO dispute settlement proceeding. This would allow an issue that was not investigated, examined or even considered by the USITC to be discerned from its report. Australia also rejects the United States' argument that the Panel's approach elevates the "unforeseen developments" requirement into an "independent condition" for the application of a safeguard measure. To satisfy the "*conditions*" imposed under Articles 2 and 4 of the *Agreement on Safeguards*, competent authorities must make a *determination* that includes an *evaluation* of "*all relevant factors*" and, as Article 4.2(c) explicitly provides, must also publish a "detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined". On the other hand, Australia maintains, in order to satisfy the "unforeseen developments" requirement, competent authorities need only examine the existence of unforeseen developments based on the factual evidence before them at the time of the investigation, reach a

conclusion based on that evidence that demonstrates the existence of "unforeseen developments" as a matter of fact, and present that conclusion, in some manner, in the published report.

2. Domestic Industry

24. Australia requests the Appellate Body to uphold the Panel's finding that the USITC's inclusion of growers and feeders of live lambs in the definition of producers of lamb meat was inconsistent with Article 4.1(c) of the *Agreement on Safeguards*. The United States' approach to defining the domestic industry has no support in Article 4.1(c) of the *Agreement on Safeguards*, interpreted in its context and in light of its object and purpose, or in previous panel decisions.

25. Australia believes that the meaning of "producer of a like product" is clear. The producers *of an article* are simply those who make *that* article. The term "as a whole" in Article 4.1(c) of the *Agreement on Safeguards* refers to the comprehensiveness of the investigation that must be conducted *once the domestic industry has been identified*, but does not go to the issue of how to define the scope of the domestic industry. Accepting the United States' standard would leave it to the discretion of importing Members to choose "how far upstream and/or downstream [in] the production chain of a given 'like' end product" they could go to define the "domestic industry".[20] Australia adds that even if criteria such as vertical integration, continuous lines of production, economic interdependence or substantial coincidence of economic interests were relevant, the Panel made findings of fact which reveal that these criteria were not present in the United States' lamb meat industry.

3. Threat of Serious Injury

26. Australia requests the Appellate Body to uphold the finding of the Panel with respect to the sufficiency of the data. Although the United States seeks to characterize this issue as one of data *collection*, the Panel's finding relates to the *representativeness* of the data rather than to data collection. Australia submits that the Panel correctly concluded that the data used by the USITC in making its determination was not sufficiently representative of "those producers whose collective output … constitutes a major proportion of the total domestic production of those products" within the meaning of Article 4.1(c) of the *Agreement on Safeguards* and that the USITC's determination was, as a result, inconsistent with Article 2.1 of that Agreement.

[20]Australia's appellee's submission, para. 111.

27. Before the Panel, Australia claimed that the safeguard measure imposed by the United States breached Article 4.2 of the *Agreement on Safeguards* and, therefore, also breached Article 2.1 of the *Agreement on Safeguards*. The inadequacy of the data was noted in Australia's submission, was also acknowledged in the USITC Report, and was reflected in the Panel Report. Thus, Australia did establish a *prima facie* case that the data relied upon by the USITC was not sufficiently representative of the domestic industry.

28. Contrary to the United States' assertion that the *Agreement on Safeguards* only requires that the factors evaluated be "objective and quantifiable", and bear on the state of the industry, Australia supports the reasoning of the Panel that Article 4.1(c) implicitly requires that the sample data used be sufficiently representative of the producers as a whole. The failure of the United States to consider sufficiently representative data means that the state of the "domestic industry" has not been properly evaluated. Furthermore, even if the Appellate Body reverses the Panel's finding under Article 4.1(c), and even accepting the test suggested by the United States, Australia maintains that relying on statistically invalid, incomplete or absent data, as the USITC did, cannot be objective or have any meaningful bearing on the factors that must be evaluated under Article 4.2(a) of the *Agreement on Safeguards*. Australia, therefore, submits that the USITC did not properly evaluate the relevant factors as required under that provision.

4. Causation

29. Australia contends that the Panel correctly found that the USITC's causation analysis did not comply with Article 4.2(b) of the *Agreement on Safeguards*, and that the Panel's findings are consistent with the Appellate Body Report in *United States – Wheat Gluten Safeguard*. The requirement that there be a "genuine and substantial relationship" of cause and effect between increased imports and the threat of serious injury implies more than a mere contribution to a threat of serious injury. The Panel's test of "necessary and sufficient cause" seeks to articulate such a standard, even if imports need not *by themselves* cause a threat of serious injury. Australia stresses that the Panel was careful to distinguish its "necessary and sufficient" test from a "sole cause" test.

30. Australia submits that, in any event, the United States failed to meet the causation standard set out by the Appellate Body in *United States – Wheat Gluten Safeguard* because the United States failed to demonstrate as a matter of fact that any threat of serious injury caused by other factors had not been attributed to imports. The USITC limited itself to examining other factors individually and simply considering whether each such factor was a "less important cause" of injury than imports. The USITC, however, failed to assess the aggregate effect of the factors other than increased imports, and failed to demonstrate that the injury caused by these other factors was not attributed to imports.

Australia adds that, independently of whether the USITC met the obligation of non-attribution, it did not make a valid determination of whether a "causal link" existed between increased imports and the threat of serious injury. Specifically, since the USITC only found that increased imports were an *important* cause and a cause that was not less than any other cause, it did not ensure that the evidence on which it established causation reflected a "genuine and substantial relationship" of cause and effect.

C. *Arguments of New Zealand – Appellee*

1. Unforeseen Developments

31. New Zealand considers that the Panel correctly found that the United States acted inconsistently with Article XIX:1(a) of the GATT 1994. The United States seems to criticize the Panel for interpreting Article XIX in light of the provisions of the *Agreement on Safeguards*, despite the fact that the *Agreement on Safeguards* itself, as well as previous decisions of the Appellate Body, clearly establish that the *Agreement on Safeguards* and Article XIX must be read together. Article 11.1(a) of the *Agreement on Safeguards* requires that Article XIX be applied in conformity with the provisions of the *Agreement on Safeguards*. Article 3.1 of the *Agreement on Safeguards* clearly requires "reasoned conclusions" on "*all* pertinent issues of fact or law". The Appellate Body has found that "unforeseen developments" are "circumstances that must be demonstrated as a matter of fact in order for a safeguard measure to be applied". Thus, New Zealand reasons, the failure of the USITC to provide a "conclusion" on unforeseen developments is a clear breach of Article XIX:1(a) of the GATT 1994.

32. New Zealand does not agree with the United States that the Panel's approach effectively transformed a circumstance requiring demonstration as a fact into an independent condition for the application of a safeguard measure. The Panel explicitly recognized the distinction between such circumstances and conditions and, in pointing out that it was not essential for the competent authorities, in their conclusions, to use the precise terminology of "unforeseen developments", revealed its awareness that it was the factual demonstration, rather than the fulfilment of some condition, that was specifically required. New Zealand also contests the United States' argument that "unforeseen developments" could be *assumed* from a determination of threat of serious injury. Such an approach would render ineffective the requirement to *demonstrate* unforeseen developments. New Zealand adds that the USITC did not demonstrate the existence of unforeseen developments as a matter of fact. It is clear from the USITC Report that the USITC never even considered, much less demonstrated, the existence of unforeseen developments. The United States is effectively attempting to rewrite the USITC Report to reflect what it *should* have said, but did not. In any event,

New Zealand suggests, the descriptive statements contained in the USITC Report, that the United States relies upon, relate to circumstances that were entirely foreseeable and foreseen.

2. Domestic Industry

33. New Zealand contends that the Panel correctly found that the USITC's definition of the domestic industry producing lamb meat was inconsistent with Article 4.1(c) and Article 2.1 of the *Agreement on Safeguards*. The ordinary meaning of Article 4.1(c) is clear and unambiguous. The "producers" of the "like product" constitute the "domestic industry" for the purposes of a safeguard investigation. As there was no dispute that the "like product" in this case was lamb meat, the function of the USITC was to determine the domestic industry based on who produced lamb meat. As the USITC did not do this, the Panel correctly held that the United States acted inconsistently with the *Agreement on Safeguards*. New Zealand adds that the term "as a whole" in Article 4.1(c) relates to a quantitative requirement for the application of a safeguard measure and does not justify extending the scope of the domestic industry beyond those who produce the like product.

34. New Zealand further observes that : (i) the degree of vertical integration in the present case remains highly contested and, in any event, as the Panel pointed out, a safeguard measure that assists producers of a finished product will also benefit upstream producers; (ii) the United States is unable to counter the Panel's concern with the open-endedness of the USITC's approach, and, moreover, the historical evidence of how the USITC has applied its principles is irrelevant to the question of consistency with the *Agreement on Safeguards*; and (iii) contrary to the United States' claims, the GATT cases discussed by the Panel provide strong support for the approach of the Panel.

3. Threat of Serious Injury

35. New Zealand requests that the Appellate Body uphold the finding of the Panel that the data used as a basis for the USITC's determination was not sufficiently representative within the meaning of Article 4.1(c) of the *Agreement on Safeguards*, and that, therefore, the United States breached Article 2.1 of that Agreement. Contrary to the United States' suggestion, the Panel did not find that United States' *data collection* was inconsistent with Article 4.1(c). Rather, the Panel found that the data relied upon by the USITC in making its determination of threat of serious injury was not sufficiently representative of "those producers whose collective output ... constitutes a major proportion of the total domestic production of those products" within the meaning of Article 4.1(c), and, thus, that the USITC's threat of serious injury finding was inconsistent with Article 2.1 of the *Agreement on Safeguards*.

36. New Zealand recalls that, before the Panel, it claimed that the safeguard measure imposed by the United States breached Article 2.1 of the *Agreement on Safeguards* because of flaws in the safeguard investigation conducted by the USITC, including the inadequacy of the data relied upon by the USITC in making its determination of threat of serious injury. The information provided by New Zealand in its first submission to the Panel clearly established a *prima facie* case in this regard.

37. New Zealand considers that, in its arguments on this issue, the United States ignores the fact that Article 4.1(c) of the *Agreement on Safeguards* refers to the number of producers that must be included in an investigation: either "producers as a whole" or "those whose collective output ... constitutes a major proportion of domestic production". The Panel focused on this quantitative aspect in making its findings on the representativeness of the data and correctly interpreted Article 4.1(c) of the *Agreement on Safeguards*. With respect to the United States' arguments that the sufficiency of data is only relevant under Articles 4.2(a) and 4.2(b) of the *Agreement on Safeguards*, New Zealand contends that the reliance by the USITC on questionnaire data in the present case was also inconsistent with those provisions. Article 4.2(a) requires an examination of factors as they affect the "domestic industry". The USITC's failure to consider sufficiently representative data means, at the outset, that the state of the "domestic industry" has not properly been evaluated. Furthermore, the terms "objective" and "quantifiable" in Article 4.2(a) of the *Agreement on Safeguards* themselves imply a threshold regarding the representativeness of data relied upon by competent authorities in evaluating relevant factors and making determinations under the *Agreement on Safeguards* which, in the view of New Zealand, the United States did not meet.

4. Causation

38. New Zealand requests that the Appellate Body uphold the Panel's finding that the USITC's causation analysis failed to comply with Article 4.2(b) of the *Agreement on Safeguards*, and that, by virtue of failing to comply with Article 4 of the *Agreement on Safeguards*, the United States also acted inconsistently with Article 2.1 of the *Agreement on Safeguards*. The approach of the Panel to causation was consistent with the Appellate Body's approach in *United States – Wheat Gluten Safeguard*. New Zealand argues that, in any event, application of the test enunciated by the Appellate Body in *United States – Wheat Gluten Safeguard* must lead to a conclusion that the United States acted inconsistently with Article 4.2(b) of the *Agreement on Safeguards* because the United States has failed to demonstrate that the USITC complied with any of the three steps of the process for determining causation mentioned by the Appellate Body in that case.

39. New Zealand argues, first, that the USITC failed to distinguish properly the injurious effects caused by increased imports from the injurious effects caused by other factors. Despite the attempt of the United States to portray the USITC Report as making such a distinction, the USITC's analysis contains no overall assessment of the effects of the other factors causing serious injury, which would have allowed them to be distinguished from the effects of increased imports. Second, although it acknowledged that a number of factors were also causing a threat of serious injury, the USITC failed to attribute injury to increased imports on the one hand, and to all other relevant factors on the other hand. The non-attribution requirement of the *Agreement on Safeguards* is not met where the competent authorities merely *identify* different effects of other factors in the market. Rather, having found that a number of factors other than imports were contributing in a significant way to serious injury, the USITC was required to demonstrate that the injury caused by those other factors was not *attributed* to increased imports. Finally, the USITC failed to address the question whether there was a genuine and substantial relationship of cause and effect between increased imports and serious injury. A finding on the existence of a "genuine and substantial" relationship is clearly different from a finding that increased imports are "an important cause and one that is no less important than any other cause". New Zealand adds that, since the USITC failed to show that it had not attributed to increased imports injury caused by other factors, it was not in a position to make any finding of a "genuine and substantial" relationship.

40. Were the Appellate Body to conclude that the Panel's reasoning on causation was incorrect, New Zealand requests the Appellate Body to complete the analysis, and to conclude that the United States failed to meet its obligations under Article 4.2(b) of the *Agreement on Safeguards*. New Zealand submits that, contrary to the assertions of the United States, the Panel's factual findings and the factual evidence on the record provide an ample basis for the Appellate Body to do so.

D. *Claims of Error by Australia – Appellant*

1. Unforeseen Developments

41. If the Appellate Body reverses the Panel's ultimate conclusion on Article XIX:1(a) of the GATT 1994, then Australia appeals the Panel's finding that a change in the product mix and/or cut size of imported lamb meat could qualify as "unforeseen developments" within the meaning of that provision. The Panel's finding was based on an erroneous interpretation of the Working Party report in *Hatters' Fur*. That report provides no support for the conclusion that a simple change in the structure of imports, in and of itself, can constitute an "unforeseen development". As the changes in the product mix and/or the cut size of imported lamb meat are the only factors which the United States argues constitute "unforeseen developments", Australia requests the Appellate Body to find that the

United States failed to demonstrate as a matter of fact the existence of unforeseen developments, as required by Article XIX:1(a) of the GATT 1994.

2. Threat of Serious Injury

(a) Standard of Review

42. Australia appeals the Panel's interpretation and application of the standard of review. Australia claims that the Panel erred in its interpretation and application of Article 11 of the DSU, and showed inappropriate deference to the USITC. Australia submits that, in interpreting its standard of review, the Panel wrongly believed that it was sufficient that the necessary findings and conclusions could be *discerned* from the totality of the USITC Report examined in light of the arguments made by the United States to the Panel. Australia adds that, because the Panel indicated that it would proceed by "taking at face value, *arguendo*, the data and reasoning contained in the USITC's report"[21], a number of assertions made by the United States about the evidence and the conclusions drawn from it were not tested through the process of "objective assessment" that panels are required to undertake pursuant to Article 11 of the DSU. Australia believes that this led the Panel to draw favourable inferences from gaps in the data on the basis of assertions made by the United States, whereas the Panel should have assessed objectively whether the USITC Report contained an adequate explanation of how the facts supported its determination of "threat of serious injury". Australia argues that the standard of review articulated by the Panel in paragraph 7.141 would allow competent authorities to avoid their obligation to evaluate all relevant factors under Article 4.1(a) of the *Agreement on Safeguards* simply by stating that it would be difficult to obtain relevant data. Finally, as set forth in further detail below, Australia appeals the Panel's application of the standard of review to the USITC's determination of the existence of a threat of serious injury.

(b) Evaluation of Relevant Factors

43. Australia claims that the Panel made a number of errors in its interpretation and application of the relevant legal standard for determining "threat of serious injury". First, the Panel erred in its application of the legal standard in determining that a "significant overall impairment" was "clearly imminent". The Panel adopted a lower standard than that required in the *Agreement on Safeguards* and showed inappropriate deference to the USITC. Second, although the Panel correctly stated that a threat analysis should examine whether serious injury would occur *unless safeguard action was taken*, the Panel ignored the fact that the USITC never undertook such an examination. Third, the Panel erred in finding, based on certain explanations given by the United States to the Panel, that the

[21]Panel Report, para. 7.138.

USITC had satisfied the requirement of making a "prospective analysis", when in fact the only prospective analysis undertaken by the USITC was that imports would increase. Fourth, the Panel wrongly deferred to the USITC's determination that serious injury was "imminent" even though the USITC did not make any finding or express any opinion on what was meant by "imminent". Fifth, the Panel wrongly accepted the fact that the USITC relied on data only from the recent past. However, in order to assess whether serious injury is clearly imminent, it is necessary to measure the alleged "significant overall impairment" against the base position of the domestic industry, and therefore, a threat determination may need to take into account the longer term state of that industry. In this case, the USITC wrongly focused only on declines following a spike in prices that occurred in the latter part of the period of investigation. Sixth, the data relied on by the USITC was insufficient for its determination of a threat of serious injury.

44. Australia also maintains that the Panel erred in finding that the USITC had evaluated all relevant factors listed in Article 4.2(a) of the *Agreement on Safeguards*. In particular, according to Australia, the USITC did not evaluate capacity utilization, employment, productivity or profits and losses.

3. Conditional Appeals

45. Australia requests the Appellate Body, in the event that it reverses any of the conclusions reached by the Panel based on the arguments made by the United States, to complete the analysis for which the Panel exercised judicial economy; specifically, this relates to Australia's claims under Articles 2.2, 3.1, 5.1, 8.1, 11.1(a), and 12.3 of the *Agreement on Safeguards*.

E. *Claims of Error by New Zealand – Appellant*

1. Threat of Serious Injury

(a) Standard of Review

46. New Zealand claims that the Panel erred in its interpretation and application of Article 11 of the DSU, and adopted an approach of inappropriate deference to the USITC. The Panel wrongly *interpreted* the appropriate standard of review by limiting its consideration to evidence and arguments contained in the published report of the USITC. The Panel considered that alternative explanations for the declines in the United States industry's performance put forward by New Zealand and Australia were relevant "only to the extent that they were raised in the investigation".[22] New Zealand submits, however, that in order to make an "objective assessment" as required by

[22]Panel Report, para. 7.207.

Article 11 of the DSU, a panel must examine evidence and arguments that will allow it to determine whether the actions of a Member are in conformity with the covered agreements, and this may require the panel to go beyond the confines of a published report and the evidence collected by the competent authorities. The Panel also wrongly *applied* the standard of review. Despite the evidence on prices, in particular the high price levels in 1996 and early 1997, the improvement in prices in 1998, and the projection of increased domestic prices in 1999, there was no reasoned or adequate explanation of how these facts supported the USITC's determination of a threat of serious injury. Therefore, New Zealand submits, the Panel erred in finding that the USITC's analysis provided a reasoned or adequate explanation of how the facts supported its determination that increased imports threatened to cause serious injury.

(b) Evaluation of Relevant Factors

47. New Zealand claims that the Panel erred in its interpretation and application of the relevant legal standard for determining a "threat of serious injury", and, as a result, erroneously concluded that the USITC's analytical approach to the determination of threat of serious injury and to the evaluation of all relevant factors was not inconsistent with the *Agreement on Safeguards*. New Zealand requests the Appellate Body to reverse the Panel's conclusions on these issues.

48. New Zealand submits that the Panel erred, first, in relying solely on data from the recent past. In order reliably to predict what will happen in the future, data from the recent past, while important, cannot be examined in isolation, particularly when information from an earlier period forms part of the investigation by the competent authorities and is relevant to the determination of whether increased imports have threatened to cause serious injury. By allowing the USITC to ignore data from the beginning of the period of investigation, the Panel excluded evidence which may have had a bearing on the situation of the domestic industry, contrary to Article 4.2(a) of the *Agreement on Safeguards*. Furthermore, New Zealand submits, by simply assuming, without further analysis, that the future will mirror the recent past, the Panel allowed the USITC to base its threat determination on "conjecture", contrary to Article 4.1(b) of the *Agreement on Safeguards*.

49. New Zealand argues that the Panel further erred in finding that the USITC's determination was based on "fact-based projections concerning developments in the industry's condition". The USITC looked *only* at projections concerning imports. However, in order to determine what is soon to happen, projections of "all relevant factors" that have a bearing on the situation of the industry must be considered. In New Zealand's view, by looking at projections of imports alone, the USITC and the Panel failed to take account of "all relevant factors" as required under Article 4.2(a) of the *Agreement on Safeguards*.

50. New Zealand contends that the Panel applied the wrong legal standard in assessing the USITC's determination that increased imports threatened to cause serious injury and, in effect, lowered the threshold for making such a determination. New Zealand refers to the Panel's statement that a continuation of imports at an already increased level "may suffice"[23] to threaten serious injury, and to its statement that serious injury may be threatened "even if the majority of firms within the relevant industry is not facing declining profitability".[24] These statements demonstrate that the Panel was too lax in its application of the standard for assessing threatened significant overall impairment. New Zealand also challenges the Panel's assessment of the requirement that serious injury be "clearly imminent", since the Panel, like the USITC, did not require a demonstration of urgent need for a safeguard measure.

2. Judicial Economy

51. New Zealand appeals the Panel's application of judicial economy to its claim under Article 5.1 of the *Agreement on Safeguards*. The Panel's rulings relate solely to the safeguard *investigation*, not to the safeguard *measure*. A further ruling on the safeguard measure itself is needed to ensure a positive solution to this dispute. New Zealand recalls that the measure applied by the United States differed from the measure recommended by the USITC, and argues that the measure applied is inconsistent with Article 5.1 of the *Agreement on Safeguards* because it is more trade restrictive than the alternative proposed by the USITC, and because it is not necessary to facilitate adjustment in the United States' lamb meat industry.

3. Conditional Appeals

52. If the Appellate Body were to find against New Zealand on matters relating to the USITC's safeguard investigation, then New Zealand requests that the Appellate Body complete the analysis in relation to its claims under Articles 2.2, 3.1 and 5.1 of the *Agreement on Safeguards*, and Articles I and II of the GATT 1994, which the Panel did not consider for reasons of judicial economy.

F. *Arguments of the United States – Appellee*

1. Unforeseen Developments

53. The United States requests the Appellate Body to dismiss Australia's appeal on "unforeseen developments". In its appeal, Australia appears to view the Working Party report in *Hatters' Fur* as

[23]Panel Report, para. 7.187.

[24]*Ibid*., para. 7.188.

establishing *as a matter of law* that a change in the structure of imports can *never* constitute an unforeseen development. However, there is no basis for reading such a limitation into the text of Article XIX:1(a) of the GATT 1994. The United States also contests Australia's argument that the United States failed to demonstrate the existence of unforeseen developments as a matter of fact. As the complainant, Australia had the burden of demonstrating that the developments in the marketplace that the USITC identified in its report were not "unforeseen" developments, and it had failed to do so. The United States maintains that, to the extent that the factual record in the instant case is clear and uncontested, it demonstrates the existence of unforeseen developments as a matter of fact.

2. Threat of Serious Injury

(a) Standard of Review

54. The United States requests the Appellate Body to dismiss the appeal of Australia and New Zealand under Article 11 of the DSU regarding the standard of review. The Appellate Body has made it clear that an appellant seeking to rely on Article 11 must overcome a high hurdle.[25] The challenge by Australia and New Zealand to the Panel's interpretation and application of the standard of review does not provide any basis whatsoever for finding a violation of Article 11 of the DSU. On the contrary, the Panel properly interpreted the standard of review as precluding it from conducting a *de novo* examination of the USITC's determination. The Panel objectively assessed the matter before it by evaluating the USITC's investigation and published report, and judging whether the USITC had examined all the relevant facts and had provided a reasoned explanation of how the facts supported its determination. Thus, the United States concludes, the Panel Report demonstrates that the Panel approached its task in good faith, and that it took into account the arguments of Australia and New Zealand in reaching its determination.

(b) Evaluation of Relevant Factors

55. The United States urges the Appellate Body to dismiss the appeal of Australia and New Zealand that the Panel erred in interpreting and applying the legal standard for determining "threat of serious injury". The Panel properly interpreted and applied the legal standards for assessing "significant overall impairment in the position of the industry" and "clearly imminent". The examples of error cited by New Zealand are anecdotal and ignore the fact that the USITC and the Panel both

[25]The United States refers in particular to: 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; Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998; and Appellate Body Report, *Australia – Measures Affecting Importation of Salmon* ("*Australia – Salmon*"), WT/DS18/AB/R, adopted 6 November 1998.

recognized that what is critical in a "threat" case is that the *overall* economic condition of the domestic industry is likely to be seriously injured as a result of increased imports. The USITC and the Panel conducted their analysis accordingly. As for the "clearly imminent" standard, the United States submits that the *Agreement on Safeguards* does not require competent authorities to make a "finding" on the meaning of that phrase, that the Panel properly identified and applied the definition of "clearly imminent", and that, in this case, there was, in fact, an urgent need for a safeguard measure.

56. The United States contests the argument by Australia and New Zealand that the Panel erred in upholding the USITC's heavy reliance on data covering the latter part of the period of investigation. In fact, neither the Panel nor the USITC relied "solely" on post-1996 data. The USITC collected and examined data on imports and the condition of the domestic industry for a five year period, but focused on data from January 1997 through September 1998, which it found to be the most probative in determining the threat of serious injury. The United States considers this approach to be consistent with the Appellate Body's reasoning in *Argentina – Footwear Safeguard*.

57. The United States asserts that the Panel also correctly found that the USITC had conducted a valid prospective analysis. Contrary to the claims of Australia and New Zealand, the USITC did not base its analysis solely on projections of increased imports. Rather, the USITC made projections for factors other than imports and assessed the relevant factors as a whole in determining that serious injury was imminent. The United States adds that the appeals on this issue appear to invite the Appellate Body to revisit factual questions, and, thereby, to exceed the scope of appellate review.

58. Finally, in response to Australia's claim that the Panel erred in upholding the USITC's reliance on the available data to make factual findings and draw reasonable inferences about the "relevant factors", the United States argues that the Panel correctly found that the USITC properly considered the evidence, explained why it could not collect certain data or did not find such data to be probative, and evaluated the "relevant factors", in accordance with the requirements of Article 4.2(a) of the *Agreement on Safeguards*.

3. Judicial Economy

59. The United States urges the Appellate Body to dismiss New Zealand's appeal of the Panel's decision to exercise judicial economy with respect to New Zealand's Article 5.1 claim. This case cannot be distinguished from other cases where the Appellate Body concluded that panels had exercised judicial economy properly. Furthermore, the factual record is insufficient to support a finding that New Zealand has satisfied its burden of proof under Article 5.1. The United States adds

that New Zealand's appeal is based on a misinterpretation of the *Agreement on Safeguards*, since Article 5.1 does not require a Member to identify and apply the measure that is the "least trade restrictive".

4. Conditional Appeals

60. Should the Appellate Body reach this issue, the United States argues that it should reject all of the conditional appeals made by Australia and New Zealand. The United States argues that, as demonstrated in its arguments before the Panel, the United States complied with its obligations under Articles 2.2, 3.1, 8, 11 and 12 of the *Agreement on Safeguards*, and under Articles I and II of the GATT 1994.

G. *Arguments of the European Communities – Third Participant*

1. Unforeseen Developments

61. The European Communities considers that the Panel correctly found that the United States acted inconsistently with Article XIX:1(a) of the GATT 1994 since the USITC Report did not contain *any* ascertainable and conclusive demonstration of the existence of unforeseen developments. While the Panel correctly stated that the demonstration of "unforeseen developments" does not require the precise terminology of "unforeseen developments" to be used, it is nevertheless necessary that the circumstances referred to in Article XIX:1(a) of the GATT 1994 are in substance identified as such, namely: (i) circumstances which constitute developments leading to an injurious import surge; and (ii) circumstances which show that such developments were unforeseen. Such a demonstration cannot be made *ex post facto*. In this regard, the European Communities agrees with the Panel's use of Article 3.1 of the *Agreement on Safeguards* as relevant context. Article 3.1 refers broadly to "all pertinent issues of fact" and, therefore, its scope is not limited to issues arising under the *Agreement on Safeguards*. If an issue is pertinent, by virtue of Article XIX:1(a) of the GATT 1994, it must also be "pertinent" in the context of Article 3.1 of the *Agreement on Safeguards*. The European Communities reasons that any other reading would effectively read the provisions of Article XIX out of the "*inseparable package* of rights and disciplines" that govern safeguard measures.[26]

2. Causation

62. The European Communities requests the Appellate Body to uphold the Panel's articulation of the standard of causation. The European Communities cautions that the interpretation of the causation

[26]Appellate Body Report, *Argentina – Footwear Safeguard*, *supra*, footnote 15, para. 81.

standard suggested by the United States is inconsistent with the object and purpose of the *Agreement on Safeguards*, would allow the imposition of trade restrictions against imports to remedy difficulties of the domestic industry which are not related to imports, and would result in a lower injury standard being applied in safeguard actions than in anti-dumping and countervailing duty actions.

63. The European Communities stresses that the legal structure governing safeguard measures in WTO law emphasizes an *exclusive* link between the import surge and the serious injury to the domestic industry, as shown in Article 2.1 of the *Agreement on Safeguards* and the first sentence of Article 4.2(b). In the view of the European Communities, the second sentence of Article 4.2(b) means that the process of assessing "serious injury" as a legally defined standard does not end with the assessment of the "relevant factors" listed in Article 4.2(a) of the *Agreement on Safeguards*, but further requires that the "non-attribution" process be completed. No determination under Article 4.2(a) of the *Agreement on Safeguards* can be made unless and until the effects of factors other than imports have been disregarded. While it is correct to say that imports will not be alone in contributing to the situation of the domestic industry, and that the *Agreement on Safeguards* does not require that only imports should have contributed to the state of the domestic industry, a "serious injury" finding under Article 4 of the *Agreement on Safeguards* must be based on the *sole* impact of imports. The European Communities concludes that this is precisely what the Panel meant by referring to imports as the "*necessary* and *sufficient*" cause of serious injury.[27]

III. Issues Raised in this Appeal

64. This appeal raises the following issues:

(a) whether the Panel erred in finding, in paragraph 8.1(a) of the Panel Report, that the United States acted inconsistently with Article XIX:1(a) of the GATT 1994 by failing to demonstrate, as a matter of fact, the existence of "unforeseen developments"; and, if so, whether changes in the product mix of imported lamb meat and/or in the cut size of imported lamb meat constitute "unforeseen developments" within the meaning of Article XIX:1(a) of the GATT 1994;

(b) whether the Panel erred in finding, in paragraphs 7.118 and 8.1(b) of the Panel Report, that, by defining the relevant domestic industry for purposes of its safeguard investigation to include growers and feeders of live lambs, the United States acted

[27]Panel Report, para. 7.239.

inconsistently with Article 4.1(c) of the *Agreement on Safeguards* and, in consequence, also with Article 2.1 of that Agreement;

(c) whether the Panel erred in its review of the USITC's determination that there existed a "threat of serious injury", in particular, in the Panel's interpretation and application of the appropriate standard of review under Article 11 of the DSU, and in its interpretation and application of the requirement in Article 4.2(a) of the *Agreement on Safeguards* to "evaluate all relevant factors";

(d) whether the Panel erred in finding, in paragraph 8.1(f) of the Panel Report, that the examination of causation by the USITC was inconsistent with Article 4.2(b) of the *Agreement on Safeguards* and, in consequence, also with Article 2.1 of that Agreement;

(e) whether the Panel erred in its exercise of judicial economy, in particular in declining to rule on New Zealand's claim under Article 5.1 of the *Agreement on Safeguards*; and

(f) if the Appellate Body finds that the Panel erred in finding the United States' safeguard measure to be inconsistent with Articles 2.1, 4.1(c) and 4.2(b) of the *Agreement on Safeguards*, whether that safeguard measure is inconsistent with Articles I and II of the GATT 1994, and with Articles 2.2, 3.1, 5.1, 8.1, 11.1(a) and 12.3 of the *Agreement on Safeguards*.

IV. Unforeseen Developments

65. Before the Panel, Australia and New Zealand claimed that the United States failed to comply with the requirements of Article XIX:1(a) of the GATT 1994 regarding "unforeseen developments". The Panel found:

> Article XIX:1 read in the context of SG Article 3.1 requires the competent national authority, in its determination, to reach a conclusion demonstrating the existence of "unforeseen developments" in the sense of GATT Article XIX:1.[28]

66. The Panel was of the view that the USITC's statements concerning the "changes in product mix" or the "increase in cut size" of imported lamb meat were "simple descriptive statements", and

[28]Panel Report, para. 7.31.

that those statements did not constitute "a conclusion" on the existence of unforeseen developments, in the sense of Article XIX:1 of the GATT 1994.[29] On this reasoning, the Panel concluded that the United States had acted inconsistently with Article XIX:1(a) of the GATT 1994 by "fail[ing] to demonstrate as a matter of fact the existence of unforeseen developments".[30]

67. The United States argues on appeal that the Panel made two significant errors.[31] First, the United States argues that the Panel erred in finding that Article XIX:1(a) requires the competent authorities, in demonstrating the existence of "unforeseen developments", to set forth in their report a finding or a "conclusion" with respect to those "unforeseen developments". According to the United States, it is sufficient for purposes of Article XIX:1(a) that the existence of unforeseen developments can be inferred from the factual record of the investigating authority, and that the existence of such developments can be "demonstrated during" dispute settlement proceedings in the WTO. The United States maintains that there is no basis for "copying into" or "reading into" Article XIX of the GATT 1994 the requirements from Article 3.1 of the *Agreement on Safeguards* relating to the publication of a "report" by the "competent authorities".[32] Second, the United States argues that, in any event, the Panel erred in finding that the USITC Report failed to demonstrate, as a matter of fact, the existence of "unforeseen developments" under Article XIX:1(a); in the view of the United States, the existence of unforeseen developments, namely, the shift in product mix from frozen to fresh lamb meat, and from smaller to larger cuts, may be discerned from the contents of the USITC Report. In this regard, we note that, at the oral hearing, the United States confirmed that its appeal on this issue is limited to the Panel's finding that the United States acted inconsistently with Article XIX:1(a) of the GATT 1994 because the Report did not contain a "reasoned conclusion" on unforeseen developments.[33]

[29]Panel Report, paras. 7.42 and 7.43.

[30]*Ibid*., paras. 7.44 and 7.45.

[31]United States' appellant's submission, para. 11.

[32]*Ibid*., paras. 17 and 18.

[33]In making its principal finding under Article XIX:1(a), the Panel also made certain other findings, for example, that Article XIX:1(a) does not require a "two-step" causation approach (Panel Report, paras. 7.13-7.16 and 7.31). It also made a finding regarding the meaning of "unforeseen", as opposed to "unforeseeable", developments (Panel Report, paras. 7.22 and 7.24). As none of these other findings are appealed, we will not address them.

68. We begin by noting that the claim made by both Australia and New Zealand before the Panel was that the United States acted inconsistently with its obligation in Article XIX:1(a) of the GATT 1994 relating to "unforeseen developments". Article XIX:1(a) of the GATT 1994 reads:

> If, as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions, any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the Member shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

69. In our Reports in *Argentina – Footwear Safeguard* and *Korea – Dairy Safeguard*, we examined the relationship between Article XIX of the GATT 1994 and the *Agreement on Safeguards* and, in particular, whether, with the entry into force of the *Agreement on Safeguards*, Article XIX continues to impose obligations on WTO Members when they apply safeguard measures. We observed in those two appeals that "the provisions of Article XIX of the GATT 1994 *and* the provisions of the *Agreement on Safeguards* are *all* provisions of one treaty, the *WTO Agreement*", and we said that these two texts must be read "harmoniously" and as "an inseparable package of rights and disciplines".[34] We derived support for this interpretation from Articles 1 and 11.1(a) of the *Agreement on Safeguards*. We observed, in both the Reports, that:

> Article 1 states that the purpose of the *Agreement on Safeguards* is to establish "rules for the application of safeguard measures which shall be understood to mean *those measures provided for in* Article XIX of GATT 1994." (emphasis added) The ordinary meaning of the language in Article 11.1(a) – "unless such action conforms with the provisions of that Article applied in accordance with this Agreement" – is that any safeguard action *must conform* with the provisions of Article XIX of the GATT 1994 *as well as* with the provisions of the *Agreement on Safeguards*. Thus, any safeguard measure imposed after the entry into force of the *WTO Agreement* must comply with the provisions of *both* the *Agreement on Safeguards* and Article XIX of the GATT 1994.[35]

[34]Appellate Body Report, *Argentina – Footwear Safeguard*, *supra*, footnote 15, para. 81; see, also, *Korea – Dairy Safeguard*, *supra*, footnote 16, para. 75.

[35]Appellate Body Report, *Korea – Dairy Safeguard*, *supra*, footnote 16, para. 77; see, also, Appellate Body Report, *Argentina – Footwear Safeguard*, *supra*, footnote 15, para. 83.

70. We reiterate: Articles 1 and 11.1(a) of the *Agreement on Safeguards* express the full and continuing applicability of Article XIX of the GATT 1994, which no longer stands in isolation, but has been clarified and reinforced by the *Agreement on Safeguards*.

71. Based on this interpretation of the relationship between Article XIX of the GATT 1994 and the *Agreement on Safeguards*, we found in both these previous Reports:

> The first clause in Article XIX:1(a) – "as a result of unforeseen developments and of the obligations incurred by a Member under the Agreement, including tariff concessions … " – is a dependent clause which, in our view, is linked grammatically to the verb phrase "is being imported" in the second clause of that paragraph. Although we do not view the first clause in Article XIX:1(a) as establishing independent *conditions* for the application of a safeguard measure, additional to the *conditions* set forth in the second clause of that paragraph, we do believe that the first clause describes certain *circumstances* which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994. In this sense, we believe that there is a logical connection between the circumstances described in the first clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … " – and the conditions set forth in the second clause of Article XIX:1(a) for the imposition of a safeguard measure.[36] (underlining added)

72. Although we stated in these two Reports that, under Article XIX:1(a) of the GATT 1994, unforeseen developments "must be demonstrated as a matter of fact", we did not have occasion, in those two appeals, to examine when, where or how that demonstration should occur. In conducting such an examination now, we note that the text of Article XIX provides no express guidance on this issue. However, as the existence of unforeseen developments is a prerequisite that must be demonstrated, as we have stated, "in order for a safeguard measure to be applied"[37] consistently with Article XIX of the GATT 1994, it follows that this demonstration must be made *before* the safeguard measure is applied. Otherwise, the legal basis for the measure is flawed. We find instructive guidance for where and when the "demonstration" should occur in the "logical connection" that we observed previously between the two clauses of Article XIX:1(a). The first clause, as we noted, contains, in part, the "circumstance" of "unforeseen developments". The second clause, as we said,

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[36]Appellate Body Report, *Korea – Dairy Safeguard*, *supra*, footnote 16, para. 85; see, also, Appellate Body Report, *Argentina – Footwear Safeguard*, *supra*, footnote 15, para. 92. As we noted in those Reports, the "conditions" set forth in the second clause of Article XIX:1(a) are precisely the conditions reiterated in Article 2.1 of the *Agreement on Safeguards*.

[37]Appellate Body Report, *Korea – Dairy Safeguard*, *supra*, footnote 16, para. 85; see, also, Appellate Body Report, *Argentina – Footwear Safeguard*, *supra*, footnote 15, para. 92.

relates to the three "conditions" for the application of safeguard measures, which are also reiterated in Article 2.1 of the *Agreement on Safeguards*. Clearly, the fulfilment of these conditions must be the central element of the report of the competent authorities, which must be published under Article 3.1 of the *Agreement on Safeguards.*[38] In our view, the logical connection between the "conditions" identified in the second clause of Article XIX:1(a) and the "circumstances" outlined in the first clause of that provision dictates that the demonstration of the existence of these circumstances must also feature in the same report of the competent authorities. Any other approach would sever the "logical connection" between these two clauses, and would also leave vague and uncertain how compliance with the first clause of Article XIX:1(a) would be fulfilled.

73. In this case, we see no indication in the USITC Report that the USITC addressed the issue of "unforeseen developments" at all. It is true that the USITC Report identifies two changes in the type of lamb meat products imported into the United States. These were: the proportion of imported fresh and chilled lamb meat increased in relation to the proportion of imported frozen lamb meat; and, the cut size of imported lamb meat increased. The USITC Report mentions the first of these changes in examining the "like products" at issue, and mentions both changes under the heading "causation" while describing the substitutability of domestic and imported lamb meat in the domestic marketplace.[39] However, we observe that the USITC Report does not discuss or offer any explanation as to why these changes could be regarded as "unforeseen developments" within the meaning of Article XIX:1(a) of the GATT 1994. It follows that the USITC Report does not *demonstrate* that the safeguard measure at issue has been applied, *inter alia*, "… as a result of unforeseen developments …".

74. The USITC's failure to address the existence of unforeseen developments, in the USITC Report of April 1999, is not surprising, as the USITC is not obliged by any United States legislation, regulation, or other domestic rule, to examine the existence of unforeseen developments in its investigation into the situation of a domestic industry. Although the United States has subsequently modified its position on this issue[40], we recall that, as a third participant in both *Korea – Dairy Safeguard* and *Argentina – Footwear Safeguard*, the United States argued that the omission of unforeseen developments from the *Agreement on Safeguards* meant that it was no longer necessary

[38]At the oral hearing before us, all participants agreed that the fulfilment of these three conditions must feature in the report of the competent authorities.

[39]USITC Report, pp. I-11, I-22, and I-23.

[40]At the oral hearing, the United States indicated that it is no longer of the view that it is unnecessary to demonstrate the existence of unforeseen developments.

to demonstrate the existence of unforeseen developments.[41] Our Reports in *Korea – Dairy Safeguard* and *Argentina – Footwear Safeguard*, in which we found that unforeseen developments must be demonstrated as a matter of fact, were circulated on 14 December 1999, that is to say, more than seven months *after* the report of the USITC on the domestic lamb meat industry was published in April 1999. Our two Reports were, therefore, not known to the USITC when it rendered its report in the present case.

75. Accordingly, although we do not agree with every aspect of the Panel's reasoning, we uphold the Panel's conclusion, in paragraphs 7.45 and 8.1(a) of the Panel Report, "that the United States has failed to demonstrate as a matter of fact the existence of unforeseen developments as required by Article XIX:1(a) of GATT 1994". In view of this finding, we do not find it necessary to examine Australia's conditional appeal on the issue of whether a change in the product mix and/or the cut size of imported lamb meat could qualify as "unforeseen developments" within the meaning of Article XIX:1(a) of the GATT 1994; the condition on which that issue is appealed has not been fulfilled.

76. We emphasize that neither Australia nor New Zealand has claimed that the United States acted inconsistently with Article 3.1 of the *Agreement on Safeguards* with respect to unforeseen developments.[42] We do not, therefore, rule on whether the USITC, and, hence, the United States, acted inconsistently with Article 3.1 of the *Agreement on Safeguards* because the USITC failed to "set[] forth … findings and reasoned conclusions" on this issue. Nonetheless, we observe that Article 3.1 requires competent authorities to set forth findings and reasoned conclusions on "all pertinent issues of fact and law" in their published report. As Article XIX:1(a) of the GATT 1994 requires that "unforeseen developments" must be demonstrated, as a matter of fact, for a safeguard measure to be applied, the existence of "unforeseen developments" is, in our view, a "pertinent issue[] of fact and law", under Article 3.1, for the application of a safeguard measure, and it follows that the published report of the competent authorities, under that Article, must contain a "finding" or "reasoned conclusion" on "unforeseen developments".

[41]Appellate Body Report, *Korea – Dairy Safeguard*, *supra*, footnote 16, paras. 64 – 66; see, also, Appellate Body Report, *Argentina – Footwear Safeguard*, *supra*, footnote 15, paras. 60 – 63.

[42]Both Australia and New Zealand identified Article 3 in their request for the establishment of a panel. However, in their arguments on unforeseen developments, they did not assert an inconsistency with Article 3.1 of the *Agreement on Safeguards*. Instead, they claimed solely under Article XIX:1(a) of the GATT 1994. At the oral hearing before us, Australia and New Zealand confirmed that their claim regarding unforeseen developments was made under Article XIX:1(a) and not Article 3.1 of the *Agreement on Safeguards*, although they indicated that they had made arguments under Article 3.1 in developing their claim under Article XIX.

V. Domestic Industry

77. The USITC defined the domestic industry in this case to include growers and feeders of live lambs, as well as packers and breakers of lamb meat. The USITC did so because it considered that there was a "continuous line of production from the raw to the processed product", and that there was a "substantial coincidence of economic interests" between and among the growers and feeders of live lambs, and the packers and breakers of lamb meat.[43]

78. Before the Panel, Australia and New Zealand claimed that the USITC had improperly interpreted the term "domestic industry" by including in that industry growers and feeders of live lambs, even though they did not produce the product at issue, lamb meat. In assessing this claim, the Panel examined the definition of the term "domestic industry" in Article 4.1(c) and stated that:

> We find no basis in the text of this phrase ["producers … of the like or directly competitive products"] for considering that a producer that does not itself make the product at issue, but instead makes a raw material or input that is used to produce that product, can nevertheless be considered a producer of the product.
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> …
>
> … *the relevant industry consists of producers that themselves have "output" of the "like" or "directly competitive" products.*[44] (emphasis added)

79. The Panel added that the phrase "producers as a whole", which forms part of the definition in Article 4.1(c), offered no support for the broader approach adopted by the USITC.[45] The Panel also examined previous GATT panel reports which had addressed this issue, and concluded that these reports supported its reading of Article 4.1(c) of the *Agreement on Safeguards*.[46]

80. On the basis of this reasoning, the Panel found:

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[43]USITC Report, pp. I-12 – I-14.

[44]Panel Report, paras. 7.67 and 7.68.

[45]*Ibid*., para. 7.74.

[46]The GATT panel reports examined by the Panel were: *United States – Definition of Industry Concerning Wine and Grape Products* ("*United States – Wine and Grapes*"), adopted 28 April 1992, BISD 39S/436; *Canada – Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC* ("*Canada – Beef*"), 13 October 1987, unadopted, SCM/85; and *New Zealand – Imports of Electrical Transformers from Finland* ("*New Zealand – Transformers*"), adopted 18 July 1985, BISD 32S/55.

> … that the USITC's inclusion in the lamb meat investigation of input producers (i.e., growers and feeders of live lamb) as producers of the like product at issue (i.e. lamb meat) is inconsistent with Article 4.1(c), and thus also with Article 2.1 of the Agreement on Safeguards.[47]

81. The United States appeals this finding and argues that the USITC's determination of "domestic industry" is correct, in particular, in its reliance on the criteria of a "continuous line of production" and a "coincidence of economic interests" to assess which producers make up the domestic industry. The United States argues that the *Agreement on Safeguards* allows Members some discretion when defining the term "producers" in the light of the facts and circumstances of each case. Moreover, the United States argues that the Panel's own criteria for determining the scope of the domestic industry are devoid of a textual basis. In this respect, the United States asserts that the Panel incorrectly stated that the USITC had found growers and feeders to be producers of a product separate and distinct from lamb meat. The United States maintains that the USITC's approach in this case is appropriate in order to capture in full the affected domestic industry.

82. As a preliminary matter, we note that the USITC clearly stated in its report that the issue of whether the producers of an input product could be included in the domestic industry producing the processed product is not addressed in the United States safeguard statute.[48] In response to questioning at the oral hearing, the United States confirmed that the two-pronged test applied by the USITC in deciding this issue is not mandated either by the United States safeguard statute or by any provision of the United States Code of Federal Regulations that applies to safeguard investigations and determinations. The United States also confirmed, at the oral hearing, that the USITC has adopted this test for defining a "domestic industry" in safeguard actions as a matter of practice in the evolution of its own case law; for safeguard actions, the test has not been enacted into law or promulgated as a regulation.

83. We begin our analysis with the definition of the term "domestic industry" in Article 4.1(c) of the *Agreement on Safeguards*, which reads:

> (c) in determining injury or threat thereof, a "domestic industry" shall be understood to mean the *producers* as a whole *of the like or directly competitive products* operating within the territory of a Member, or those whose collective output *of the like or directly competitive products* constitutes a major proportion of the total domestic production of *those products*." (emphasis added)

[47]Panel Report, para. 7.118.

[48]USITC Report, p. I-12.

84. The definition of "domestic industry" in this provision refers to two elements. First, the industry consists of "producers". As the Panel indicated, "producers" are those who grow or manufacture an article; "producers" are those who bring a thing into existence.[49] This meaning of "producers" is, however, qualified by the second element in the definition of "domestic industry". This element identifies the particular products that must be produced by the domestic "producers" in order to qualify for inclusion in the "domestic industry". According to the clear and express wording of the text of Article 4.1(c), the term "domestic industry" extends solely to the "producers … *of the like or directly competitive* products". (emphasis added) The definition, therefore, focuses exclusively on the producers of a very specific group of products. Producers of products that are *not* "like or directly competitive products" do not, according to the text of the treaty, form part of the domestic industry.

85. This definition of "domestic industry" in Article 4.1(c) of the *Agreement on Safeguards* is further supported by Article 2.1 of that Agreement, which forms part of the relevant context and which establishes the basic "conditions" for the imposition of a safeguard measure. According to Article 2.1:

> 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)

86. Thus, a safeguard measure is imposed on a specific "*product*", namely, the imported product. The measure may only be imposed if that specific product ("such *product*") is having the stated effects upon the "domestic industry *that produces like or directly competitive products*." (emphasis added) The conditions in Article 2.1, therefore, relate in several important respects to *specific products*. In particular, according to Article 2.1, the legal basis for imposing a safeguard measure exists *only* when imports of a specific product have prejudicial effects on domestic producers of products that are "like or directly competitive" with that imported product. In our view, it would be a clear departure from the text of Article 2.1 if a safeguard measure could be imposed because of the prejudicial effects that an imported product has on domestic producers of products that are *not* "like or directly competitive products" in relation to the imported product.

[49]Panel Report, para. 7.69.

87. Accordingly, the first step in determining the scope of the domestic industry is the identification of the products which are "like or directly competitive" with the imported product. Only when those products have been identified is it possible then to identify the "producers" of those products.

88. There is no dispute that in this case the "like product" is "lamb meat", which is the imported product with which the safeguard investigation was concerned. The USITC considered that the "domestic industry" producing the "like product", lamb meat, includes the growers and feeders of live lambs. The term "directly competitive products" is not, however, at issue in this dispute as the USITC did not find that there were any such products in this case.[50]

89. The United States argues, nevertheless, that it is permissible, on the facts and circumstances of this case, to include in the "domestic industry" the growers and feeders of live lambs because, as the USITC has found: (1) there is a "continuous line of production" from the raw product, live lambs, to the end-product, lamb meat; and (2) there is a "substantial coincidence of economic interests" between the producers of the raw product and the producers of the end-product.

90. This interpretation may well have a basis in the USITC case law, but there is no basis for this interpretation in the *Agreement on Safeguards*. The text of Article 4.1(c) defines the "domestic industry" exclusively by reference to the "producers … of the like or directly competitive product". There is no reference in that definition to the two criteria relied upon by the United States. In our view, under Article 4.1(c), input products can only be included in defining the "domestic industry" if they are "like or directly competitive" with the end-products. If an input product and an end-product are not "like" or "directly competitive", then it is irrelevant, under the *Agreement on Safeguards*, that there is a continuous line of production between an input product and an end-product, that the input product represents a high proportion of the value of the end-product, that there is no use for the input product other than as an input for the particular end-product, or that there is a substantial coincidence of economic interests between the producers of these products. In the absence of a "like or directly competitive" relationship, we see no justification, in Article 4.1(c) or any other provision of the *Agreement on Safeguards*, for giving credence to any of these criteria in defining a "domestic industry".

[50]We note that two Commissioners (Askey and Crawford) did not join in the findings of the USITC on this point. These two Commissioners both found that *live lambs*, produced by growers and feeders, are directly competitive with lamb *meat* and that, accordingly, the "domestic industry" includes the producers of these competing products. USITC Report, pp. I-8 and I-9, footnotes 7 (Commissioner Askey) and 8 (Commissioner Crawford). The United States has not argued, before the Panel or before us, that *live lambs* are directly competitive with lamb *meat*, and that issue as we stated earlier, does not form part of this appeal.

91. In this respect, we are not persuaded that the words "as a whole" in Article 4.1(c), appearing in the phrase "producers as a whole", offer support to the United States' position. These words do not alter the requirement that the "domestic industry" extends only to producers of "like or directly competitive products". The words "as a whole" apply to "producers" and, when read together with the terms "collective output" and "major proportion" which follow, clearly address the *number* and the *representative nature* of producers making up the domestic industry. The words "as a whole" do not imply that producers of *other* products, which are *not* like or directly competitive with the imported product, can be included in the definition of domestic industry. Like the Panel, we see the words "as a whole" as no more than "a *quantitative* benchmark for the proportion of producers … which a safeguards investigation has to cover."[51] (emphasis added)

92. The Panel examined in some detail the GATT panel reports in *United States – Wine and Grapes*, *Canada – Beef*, and *New Zealand – Transformers*. We agree largely with the Panel's analysis that these cases support the Panel's interpretation, with which we have also recorded our agreement, of Article 4.1(c) of the *Agreement on Safeguards*. We do, however, have one reservation worth mentioning. In the course of examining the panel report in *Canada – Beef*, the Panel considered the importance to be attached to the degree of integration of the production process for a product. Based on statements of the panel in *Canada – Beef*, the Panel made the following observation:

> We agree that the factors of vertical integration or common ownership are not in themselves determinative or even particularly relevant for the scope of the domestic industry. Rather, the issue is (i) whether the products at various stages of production are *different forms of a single like product* or have become *different products*; and (ii) whether it is possible to *separately identify* the production process for the like product at issue, or whether instead common ownership results in *such complete integration* of production processes that *separate identification and analysis of different production stages is impossible*.[52] (underlining added)

[51]Panel Report, para. 7.74.

[52]*Ibid*., para. 7.95. We note that the dispute in *Canada – Beef* involved claims under the Tokyo Round *Agreement on Interpretation and Application of Articles VI, XVI and XXII of the General Agreement on Tariffs and Trade*. The panel, in that dispute, was called upon to interpret Article 6.6 of that Agreement, which explicitly required "the separate identification of production" in assessing the effects of subsidized imports on the domestic industry. Accordingly, in that dispute, it was appropriate for the panel to examine the separate production processes. However, there is no such provision in the *Agreement on Safeguards*.

93. The Panel went on to examine whether the production process of lamb meat involved separate products or different forms of a single like product. The Panel took the view that the USITC itself had found that live lambs and lamb meat *were* separate products, and that it *was* possible to identify separate stages of their production processes.[53]

94. Although we do not disagree with the Panel's analysis of the USITC Report, nor with the conclusions it drew from that analysis, we have reservations about the role of an examination of the degree of integration of production processes for the products at issue.[54] As we have indicated, under the *Agreement on Safeguards*, the determination of the "domestic industry" is based on the "producers … of the like or directly competitive products". The focus must, therefore, be on the identification of the *products*, and their "like or directly competitive" relationship, and not on the *processes* by which those products are produced.[55]

95. We recall that, in this case, the USITC determined that the like products at issue were domestic and imported lamb *meat* and that the USITC did not find that *live lambs* or any other products were directly competitive with lamb *meat*. On the basis of this finding of the USITC, we consider that the "domestic industry" could *only* include the "producers" of lamb *meat*. By expanding the "domestic industry" to include producers of other products, namely, *live lambs*, the USITC defined the "domestic industry" inconsistently with Article 4.1(c) of the *Agreement on Safeguards*.

96. As a result, the imposition of the safeguard measure at issue was based on a determination of serious injury caused to an industry other than the relevant "domestic industry". In addition, that measure was imposed without a determination of serious injury to the "domestic industry", which, properly defined, should have been limited only to packers and breakers of lamb meat. Accordingly, we uphold the Panel's finding, in paragraph 7.118 of the Panel Report, that the safeguard measure at issue is inconsistent with Articles 2.1 and 4.1(c) of the *Agreement on Safeguards*.

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[53]Panel Report, para. 7.96.

[54]*Ibid*., para. 7.95.

[55]We can, however, envisage that in certain cases a question may arise as to whether two articles are *separate products*. In that event, it may be relevant to inquire into the production processes for those products.

VI. Threat of Serious Injury

A. *Standard of Review*

97. At the outset of its findings, the Panel considered the standard of review appropriate for examination of the claims made by Australia and New Zealand. After citing our Report in *Argentina – Footwear Safeguard*, the Panel formulated the standard in the following terms:

> … the standard of review that applies in safeguard disputes, as set out above, requires us to refrain from a *de novo* review of the evidence reflected in the report published by the competent national authorities. Our task is limited to a review of the determination made by the USITC and to examining whether the published report provides an adequate explanation of how the facts as a whole support the USITC's threat determination.[56]

98. When the Panel came to examine the specific claims of Australia and New Zealand under Article 4.2, the Panel stated:

> In examining the USITC's threat of serious injury determination we examine, first, whether the USITC evaluated "*all* relevant factors of an objective and quantifiable nature having a bearing on the situation of [the] industry", in particular, the factors listed in SG Article 4.2(a), as well as any other relevant factors. Second, we examine whether the *approach* followed by the USITC consisted of a fact-based, future-oriented consideration of increased imports and of the condition of the US domestic industry.[57] (emphasis in original)

99. Australia and New Zealand challenge two aspects of the Panel's standard of review. First, they argue that the Panel erred in its *interpretation*, and, therefore, formulation, of the legal standard to be used to review the determinations made by competent authorities in safeguard investigations. Second, they assert that, in reviewing the USITC's determination of a threat of serious injury, the Panel erred in its *application* of the standard of review.

100. As the Panel noted, we had occasion to examine, in *Argentina – Footwear Safeguard*, the standard of review appropriate to a panel's examination of claims made under the *Agreement on Safeguards*. In that appeal, we observed that:

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[56]Panel Report, para. 7.3.

[57]*Ibid*., para. 7.140.

> [t]he *Agreement on Safeguards* … is silent as to the appropriate standard of review. Therefore, Article 11 of the DSU, and, in particular, its requirement that "… a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements", sets forth the appropriate standard of review for examining the consistency of a safeguard measure with the provisions of the *Agreement on Safeguards*.[58]

101. As regards the standard of review contained in Article 11 of the DSU, we recall that, in *European Communities – Hormones*, we stated that "the applicable standard is neither *de novo* review as such, nor 'total deference', but rather the 'objective assessment of the facts' ".[59]

102. In our Report in *Argentina – Footwear Safeguard*, we gave certain indications as to the *application* of the standard of review in Article 11 of the DSU in disputes where claims are made under Article 4 of the *Agreement on Safeguards*:

> … with respect to its *application* of the standard of review, we do not believe that the Panel conducted a *de novo* review of the evidence, or that it substituted its analysis and judgement for that of the Argentine authorities. Rather, the Panel examined whether, as required by Article 4 of the *Agreement on Safeguards*, the Argentine authorities had considered all the relevant facts and had adequately explained how the facts supported the determinations that were made. Indeed, far from departing from its responsibility, in our view, the Panel was simply fulfilling its responsibility under Article 11 of the DSU in taking the approach it did. To determine whether the safeguard investigation and the resulting safeguard measure applied by Argentina were consistent with Article 4 of the *Agreement on Safeguards*, the Panel was obliged, by the very terms of Article 4, to assess whether the Argentine authorities had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination.[60] (underlining added)

103. Thus, an "objective assessment" of a claim under Article 4.2(a) of the *Agreement on Safeguards* has, in principle, two elements. First, a panel must review whether competent authorities have evaluated *all relevant factors*, and, second, a panel must review whether the authorities have provided a *reasoned and adequate explanation* of how the facts support their determination.[61] Thus,

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[58]Appellate Body Report, *supra*, footnote 15, para. 120.

[59]Appellate Body Report, *supra*, footnote 25, para. 117.

[60]Appellate Body Report, *supra*, footnote 15, para. 121.

[61]Clearly, a claim under Article 4.2(a) might not relate at the same time to both aspects of the review envisaged here, but only to one of these aspects. For instance, the claim may be that, although the competent authorities evaluated all relevant factors, their explanation is either not reasoned or not adequate.

the panel's objective assessment involves a *formal* aspect and a *substantive* aspect. The formal aspect is whether the competent authorities have evaluated "all relevant factors". The substantive aspect is whether the competent authorities have given a reasoned and adequate explanation for their determination.

104. This dual character of a panel's review is mandated by the nature of the specific obligations that Article 4.2 of the *Agreement on Safeguards* imposes on competent authorities. Under Article 4.2(a), competent authorities must, as a formal matter, evaluate "all relevant factors". However, that evaluation is not simply a matter of form, and the list of relevant factors to be evaluated is not a mere "check list". Under Article 4.2(a), competent authorities must conduct a substantive evaluation of "the '*bearing*', or the '*influence*' or '*effect*'"[62] or "*impact*" that the relevant factors have on the "situation of [the] domestic industry". (emphasis added) By conducting such a substantive evaluation of the relevant factors, competent authorities are able to make a proper overall determination, *inter alia*, as to whether the domestic industry is seriously injured or is threatened with such injury as defined in the Agreement.

105. It follows that the precise nature of the examination to be conducted by a panel, in reviewing a claim under Article 4.2 of the *Agreement on Safeguards*, stems, in part, from the panel's obligation to make an "objective assessment of the matter" under Article 11 of the DSU and, in part, from the obligations imposed by Article 4.2, to the extent that those obligations are part of the claim. Thus, as with any claim under the provisions of a covered agreement, panels are required to examine, in accordance with Article 11 of the DSU[63], whether the Member has complied with the obligations imposed by the particular provisions identified in the claim. By examining whether the explanation given by the competent authorities in their published report is reasoned and adequate, panels can determine whether those authorities have acted consistently with the obligations imposed by Article 4.2 of the *Agreement on Safeguards*.

106. We wish to emphasize that, although panels are not entitled to conduct a *de novo* review of the evidence, nor to *substitute* their own conclusions for those of the competent authorities, this does *not* mean that panels must simply *accept* the conclusions of the competent authorities. To the contrary, in our view, in examining a claim under Article 4.2(a), a panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate *only* if the panel critically examines that explanation, in depth, and in the light of the facts before the panel. Panels

[62]Appellate Body Report, *United States – Wheat Gluten Safeguard*, *supra*, footnote 19, para. 71.

[63]We note, however, that Article 17.6 of the *Anti-Dumping Agreement* sets forth a special standard of review for claims under that Agreement.

must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation. Thus, in making an "objective assessment" of a claim under Article 4.2(a), panels must be open to the possibility that the explanation given by the competent authorities is not reasoned or adequate.

107. In this respect, the phrase "*de novo* review" should not be used loosely. If a panel concludes that the competent authorities, in a particular case, have *not* provided a reasoned or adequate explanation for their determination, that panel has not, thereby, engaged in a *de novo* review. Nor has that panel substituted its own conclusions for those of the competent authorities. Rather, the panel has, consistent with its obligations under the DSU, simply reached a conclusion that the determination made by the competent authorities is inconsistent with the specific requirements of Article 4.2 of the *Agreement on Safeguards*.

108. In this case, as we have noted, the Panel formulated the standard of review by reference to our Report in *Argentina – Footwear Safeguard*, and the Panel also, explicitly, rejected any standard implying a *de novo* review of the evidence. Indeed, the Panel quoted the passage in our Report in *Argentina – Footwear Safeguard* to which we have just referred, and specifically drew attention to our statement, in that passage, that panels must examine whether competent authorities have examined all relevant factors and whether those authorities have provided a reasoned and adequate explanation for their determination.[64] Accordingly, we find that the Panel correctly *interpreted* the standard of review appropriate to the examination of the claims by Australia and New Zealand.

109. It will be recalled, though, that Australia and New Zealand have also appealed the Panel's *application* of the standard of review. For the most part, their appeal on the *application* of the standard of review is related to these participants' respective appeals that the Panel erred in finding that the USITC had acted consistently with Article 4.2 of the *Agreement on Safeguards* in determining that there existed a threat of serious injury to the United States' domestic lamb meat industry. We will, therefore, examine most of these arguments when we consider the issues relating to the existence of a threat of serious injury.

[64]Panel Report, para. 7.1.

110. However, one aspect of New Zealand's appeal on the application of the standard of review raises a general procedural question we will address now. This pertains to the *arguments* that a panel is entitled to consider in reviewing competent authorities' determinations. The Panel said in this regard:

> … to the extent that any of the alternative explanations put forward by Australia and New Zealand are in effect new analyses of the record evidence, they are not relevant to our review. Rather, *these factual and legal arguments would be relevant to our review only to the extent that they were raised in the investigation*, in which case we would need to consider whether the USITC gave a reasoned explanation of why the facts supported its conclusions in respect of them, and whether that explanation is persuasive.[65] (emphasis added)

111. Thus, the Panel confined its *own* review of the competent authorities' determination to an examination of that determination in terms of the *factual and legal arguments* put forward by the interested parties *during the domestic investigation* conducted under Article 3.1 of the *Agreement on Safeguards*.

112. In our report in *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel H-Beams from Poland,* in the course of our examination of the specificity of Poland's request for the establishment of a panel under Article 6.2 of the DSU, we said:

> The Panel's reasoning seems to assume that there is always continuity between claims raised in an underlying anti-dumping investigation and claims raised by a complaining party in a related dispute brought before the WTO. This is not necessarily the case. *The parties involved in an underlying anti-dumping investigation are generally exporters, importers and other commercial entities, while those involved in WTO dispute settlement are the Members of the WTO*. Therefore, *it cannot be assumed that the range of issues raised in an anti-dumping investigation will be the same as the claims that a Member chooses to bring before the WTO in a dispute*.[66] (emphasis added)

113. Although the claim under examination in that appeal was different, the same reasoning applies in respect of the relationship between domestic investigations culminating in the imposition of a safeguard measure, and dispute settlement proceedings under the DSU regarding that safeguard measure. In arguing claims in dispute settlement, a *WTO Member* is not confined merely to rehearsing arguments that were made to the competent authorities by the *interested parties* during

[65]Panel Report, para. 7.207.

[66]Appellate Body Report, WT/DS122/AB/R, adopted 5 April 2001, para. 94.

the domestic investigation, even if the WTO Member was itself an interested party in that investigation. Likewise, panels are not obliged to determine, and confirm themselves the nature and character of the arguments made by the interested parties to the competent authorities. Arguments before national competent authorities may be influenced by, and focused on, the requirements of the national laws, regulations and procedures. On the other hand, dispute settlement proceedings brought under the DSU concerning safeguard measures imposed under the *Agreement on Safeguards* may involve arguments that were not submitted to the competent authorities by the interested parties.

114. Furthermore, we recall that, in *United States – Wheat Gluten Safeguard*, we reversed a finding by the panel that *competent authorities* are obliged to evaluate only those other relevant factors, under Article 4.2(a), which were actually raised by the interested parties during the investigation before it.[67] We said there that competent authorities have an *independent* duty of investigation and that they cannot "remain[] passive in the face of possible short-comings in the *evidence* submitted, and *views* expressed, by the *interested parties*."[68] (emphasis added) In short, competent authorities are obliged, in some circumstances, to go beyond the arguments that were advanced by the interested parties during the investigation. As *competent authorities* themselves are obliged, in some circumstances, to go beyond the arguments of the interested parties in reaching their own determinations, so too, we believe, *panels* are not limited to the arguments submitted by the interested parties to the competent authorities in reviewing those determinations in WTO dispute settlement.

115. We wish to emphasize that the discretion that WTO Members enjoy to argue dispute settlement claims in the manner they deem appropriate does not, of course, detract from their obligation, under Article 3.10 of the DSU, "to engage in dispute settlement procedures 'in good faith in an effort to resolve the dispute'."[69] It follows that WTO Members cannot improperly withhold arguments from competent authorities with a view to raising those arguments later before a panel. In any event, as a practical matter, we think it unlikely that a Member would do so.

116. At the oral hearing before us, New Zealand indicated that, in its view, the Panel had failed to consider the econometric arguments it had set forth in Exhibit NZ-13 on the ground that these arguments had not been presented to the USITC. In view of our findings below, we do not find it necessary to examine the significance of Exhibit NZ-13.

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[67]Appellate Body Report, *supra*, footnote 19, para. 56.

[68]*Ibid*., para. 55.

[69]See, Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, para. 166.

B. *The Determination of a "Threat of Serious Injury"*

1. Background

117. Before the Panel, Australia and New Zealand both claimed that the USITC's determination of a threat of serious injury was inconsistent with Article 4.2(a) of the *Agreement on Safeguards* because the USITC did not properly evaluate "all relevant factors", as required by Article 4.2(a). As part of this claim, the parties asserted that the USITC did not have sufficient data to allow it to make a proper evaluation of the situation of the domestic industry.

118. The Panel found, first, that the USITC had "investigated" all the relevant factors mentioned in Article 4.2(a) of the *Agreement on Safeguards*.[70] The Panel next considered the approach the USITC took in determining whether there existed a "threat" of serious injury. The Panel concluded that there was "no conceptual fault with the USITC's analytical approach" and that this approach was "sufficiently fact-based and future-oriented".[71] However, the Panel was "not persuaded" that the data used as a basis for the USITC's determination in this case was sufficiently *representative* of the domestic industry[72], and the Panel, therefore, concluded:

> … that the United States has acted inconsistently with Article 4.1(c) of the Agreement on Safeguards because the USITC failed to obtain data in respect of producers representing a major proportion of the total domestic production by the domestic industry as defined in the investigation.[73]

Consequently, the Panel also found that the USITC's determination of a threat of serious injury was inconsistent with Article 2.1 of the *Agreement on Safeguards*. Australia and New Zealand appeal certain aspects of the Panel's findings on the threat of serious injury. So, too, does the United States, with respect to another aspect of these findings.

119. Although not identical in all respects, the appeals by Australia and New Zealand on this issue both challenge the Panel's interpretation and application of the term "threat of serious injury". Their arguments on the misapplication of this term are closely entwined with their arguments that the Panel erred, under Article 4.2(a), first, in concluding that the USITC had evaluated "all relevant factors" and, second, in concluding that the USITC had adopted a proper analytical approach to the evaluation

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[70]Panel Report, para. 7.177.

[71]*Ibid*., paras. 7.222 and 7.224.

[72]*Ibid*., para. 7.225.

[73]*Ibid*., para. 8.1(e).

of the data in a case of alleged "threat" of serious injury. Both participants assert that in reaching these conclusions, the Panel showed undue deference to the USITC. Accordingly, they argue that the Panel failed to apply the appropriate standard to its review of the USITC's determination.

120. For its part, the United States appeals the Panel's finding that, because the data before the USITC was not sufficiently *representative* of the domestic industry, the United States acted inconsistently with Article 4.1(c) of the *Agreement on Safeguards*. The United States argues that Article 4.1(c) simply defines the term "domestic industry" and does not impose any obligation on Members regarding the sufficiency of data about a "domestic industry". In any event, the United States adds, the USITC complied with the relevant obligations on data collection. As the United States sees it, Article 4.2(a) requires no more than that competent authorities evaluate all relevant factors of an "objective and quantifiable nature" having a "bearing" on the situation of the domestic industry, while Article 4.2(b) requires that those authorities' determination of the causal link be made on the basis of "objective evidence". The United States contends that the *Agreement on Safeguards* does not require that the data collected by competent authorities be representative of a particular proportion of the domestic industry.

121. Before addressing these appeals, we note that the Panel's analysis of these issues was based on the assumption that the USITC's findings on the definition of the "domestic industry" were consistent with the *Agreement on Safeguards*.[74] We have found that the Panel correctly concluded that the USITC improperly defined the "domestic industry". Even so, as the relevant findings of the Panel on the "threat of serious injury" have in fact been appealed, we think it appropriate for us to examine the "issues of law" and "legal interpretations" raised in this appeal regarding these findings. In doing so, we will use the same assumption employed by the Panel.

2. Meaning of the Term "Threat of Serious Injury"

122. We first address, briefly, the interpretation of the term "threat of serious injury", which is defined in Article 4.1(b) of the *Agreement on Safeguards* as follows:

> (b) "threat of serious injury" shall be understood to mean *serious injury that is clearly imminent*, in accordance with the provisions of paragraph 2. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility; (emphasis added)

[74]Panel Report, para. 7.119.

123. An integral element of this definition is the reference to "serious injury", which is defined in Article 4.1(a) of the *Agreement on Safeguards* as follows:

> (a) "serious injury" shall be understood to mean a *significant overall impairment* in the position of a domestic industry; (emphasis added)

124. The standard of "serious injury" set forth in Article 4.1(a) is, on its face, very high. Indeed, in *United States – Wheat Gluten Safeguard*, we referred to this standard as "exacting".[75] Further, in this respect, we note that the word "injury" is qualified by the adjective "serious", which, in our view, underscores the extent and degree of "significant overall impairment" that the domestic industry must be suffering, or must be about to suffer, for the standard to be met. We are fortified in our view that the standard of "serious injury" in the *Agreement on Safeguards* is a very high one when we contrast this standard with the standard of "material injury" envisaged under the *Anti-Dumping Agreement*, the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*") and the GATT 1994.[76] We believe that the word "serious" connotes a much higher standard of injury than the word "material".[77] Moreover, we submit that it accords with the object and purpose of the *Agreement on Safeguards* that the injury standard for the application of a safeguard measure should be higher than the injury standard for anti-dumping or countervailing measures, since, as we have observed previously:

> [t]he application of a safeguard measure does not depend upon "unfair" trade actions, as is the case with anti-dumping or countervailing measures. Thus, the import restrictions that are imposed on products of exporting Members when a safeguard action is taken must be seen, as we have said, as extraordinary. And, when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account.[78]

125. Returning now to the term "*threat* of serious injury", we note that this term is concerned with "serious injury" which has *not* yet occurred, but remains a future event whose actual materialization cannot, in fact, be assured with certainty. We note, too, that Article 4.1(b) builds on the definition of

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[75]Appellate Body Report, *supra*, footnote 19, para. 149.

[76]"Material injury" is the standard provided for in Article VI of the GATT 1994, Articles 5 (footnote 11) and 15 (footnote 45) of the *SCM Agreement*, and Article 3 (footnote 9) of the *Anti-Dumping Agreement*.

[77]We find support for our view that the standard of "serious injury" is higher than "material injury" in the French and Spanish texts of the relevant agreements, where the equivalent terms are, respectively, *dommage grave* and *dommage important*; and *daño grave* and *daño importante*.

[78]Appellate Body Report, *Argentina – Footwear Safeguard*, *supra*, footnote 15, para. 94.

"serious injury" by providing that, in order to constitute a "threat", the serious injury must be "*clearly imminent*". The word "imminent" relates to the moment in time when the "threat" is likely to materialize. The use of this word implies that the anticipated "serious injury" must be on the very verge of occurring. Moreover, we see the word "clearly", which qualifies the word "imminent", as an indication that there must be a high degree of likelihood that the anticipated serious injury will materialize in the very near future. We also note that Article 4.1(b) provides that any determination of a threat of serious injury "shall be based on facts and not merely on allegation, conjecture or *remote possibility*." (emphasis added) To us, the word "clearly" relates also to the *factual* demonstration of the existence of the "threat". Thus, the phrase "clearly imminent" indicates that, as a matter of fact, it must be manifest that the domestic industry is on the brink of suffering serious injury.

126. We recall that, in *Argentina – Footwear Safeguard*, we stated that "it is essential for a panel to take the definition of 'serious injury' in Article 4.1(a) of the *Agreement on Safeguards* into account in its review of any determination of 'serious injury'."[79] The same is equally true for the definition of "threat of serious injury" in Article 4.1(b) of that Agreement. Thus, in making a determination on either the existence of "serious injury", or on a "threat" thereof, panels must always be mindful of the very high standard of injury implied by these terms.

3. Evaluation of Relevant Factors under Article 4.2(a) of the *Agreement on Safeguards*

127. So far, we have examined the interpretation of the term "threat of serious injury" in the abstract. However, the *Agreement on Safeguards* also imposes obligations on competent authorities with respect to the *process* by which they arrive at a determination of serious injury or threat thereof. Article 4.2(a) of the Agreement provides that, in making an injury determination, the competent authorities must "evaluate all relevant factors". This appeal raises two general interpretive questions concerning the way in which competent authorities actually conduct their "evaluation" of "all relevant factors". The first of these questions is whether the "evaluation" by the competent authorities, under Article 4.2(a), must be based on *data that is sufficiently representative* of the domestic industry. The second question is whether there is an appropriate *temporal focus* for the competent authorities' "evaluation" of the data in determining that there is a "threat" of serious injury in the imminent future.

[79] *Supra*, footnote 15, para. 139.

(a) Sufficiency of the Data

128. The Panel found that, in order to make a determination regarding the "domestic industry", as defined in Article 4.1(c) of the *Agreement on Safeguards*, competent authorities must rely on data that is sufficiently representative of that industry.[80] The United States appeals this interpretation and asserts that the sole requirements in the *Agreement on Safeguards* on data collection are that the factors to be evaluated must be "of an objective and quantifiable nature" and that these factors have a "bearing on the situation of [the domestic] industry".

129. We note that no provision of the *Agreement on Safeguards* specifically addresses the question of the extent of data collection, and in particular, whether competent authorities must have before them data that is representative of the domestic industry. However, we note as well that, under Article 4.2(a) of the *Agreement on Safeguards*, competent authorities are required to investigate whether the "domestic industry" is facing a situation of "serious injury". To do so, competent authorities are obliged to "evaluate" all relevant factors of an "objective and quantifiable" nature. Moreover, in conducting this evaluation, Article 4.2(a) requires competent authorities to evaluate the "bearing" that the relevant factors have on the "situation of [the domestic] industry". On this basis, competent authorities must make an "overall" determination as to whether the "*domestic industry*" is seriously injured, or threatened with such injury.[81]

130. We recognize that the clause "of an objective and quantifiable nature" refers expressly to "factors", but not expressly to data. We are, however, convinced that factors can only be "of an objective and quantifiable nature" if they allow a determination to be made, as required by Article 4.2(b) of the *Agreement on Safeguards*, on the basis of "objective evidence". Such evidence is, in principle, objective data. The words "factors of an objective and quantifiable nature" imply, therefore, an evaluation of objective *data* which enables the measurement and quantification of these factors.

131. The term "domestic industry" is defined as meaning, *at least*, the producers of "a major proportion of the total domestic production" of the products at issue. In our view, the requirement for competent authorities to evaluate the "bearing" that the relevant factors have on the "*domestic industry*" and, subsequently, to make a determination concerning the overall "situation of that *industry*", means that competent authorities must have a *sufficient* factual basis to allow them to draw reasoned and adequate conclusions concerning the situation of the "domestic industry". The

[80]Panel Report, para. 7.221.

[81]Appellate Body Report, *Argentina – Footwear Safeguard*, *supra*, footnote 15, para. 139.

need for such a sufficient factual basis, in turn, implies that the data examined, concerning the relevant factors, must be representative of the "domestic industry". Indeed, a determination made on the basis of insufficient data would not be a determination about the state of the "domestic industry", as defined in the Agreement, but would, in reality, be a determination pertaining to producers of something less than "a major proportion of the total domestic production" of the products at issue. Accordingly, we agree with the Panel that the data evaluated by the competent authorities must be sufficiently representative of the "domestic industry" to allow determinations to be made about that industry.

132. We do not wish to suggest that competent authorities must, in every case, actually have before them data pertaining to *all* those domestic producers whose production, taken together, constitutes a major proportion of the domestic industry. In some instances, no doubt, such a requirement would be both impractical and unrealistic. Rather, the data before the competent authorities must be sufficiently representative to give a true picture of the "domestic industry". What is sufficient in any given case will depend on the particularities of the "domestic industry" at issue. In this case, the Panel's conclusion that the data before the USITC was not sufficiently representative is, in our view, a finding that turns on the particularities of the United States' lamb meat industry, as defined by the USITC, and we see no reason to disturb this finding of the Panel. We note, moreover, that the USITC itself acknowledged that the data before it for growers did not represent a "statistically valid sample".[82]

133. We, therefore, uphold the Panel's finding that the USITC, and, hence, the United States, acted inconsistently with the *Agreement on Safeguards* by making a determination regarding the "domestic industry" on the basis of data that was not sufficiently representative of that industry. However, we find that, in so doing, the United States acted inconsistently with Article 4.2(a) of the *Agreement on Safeguards*, read together with the definition of "domestic industry" in Article 4.1(c). Article 4.1(c) contains nothing more than a definition of the term "domestic industry" and does not, by itself, impose any obligation on WTO Members. We, therefore, disagree with the Panel's ultimate conclusion on this point that the United States acted inconsistently with Article 4.1(c) alone.

134. Accordingly, we modify the Panel's conclusion, in paragraph 8.1(e) of the Panel Report, by holding that the United States acted inconsistently with Article 4.2(a) of the *Agreement on Safeguards* in making a determination regarding the "domestic industry" on the basis of data that was not sufficiently representative of that industry.

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

(b) Temporal focus of the data evaluation

135. Before the Panel, the parties disagreed as to which part of the period of investigation was the most relevant in "evaluating" the state of the domestic industry when making a "threat" determination. The Panel opined that, "due to the future-oriented nature of a threat analysis, it would seem logical that occurrences at the beginning of an investigation period are less relevant than those at the end of that period."[83] The Panel went on to conclude that:

> … the USITC was correct to focus on the *most recent data* available from the end of the investigation period. We also consider that data from 1997 and interim-1998 cover an adequate and reasonable time-period if complemented by projections extrapolating existing trends into the imminent future so as to ensure the prospective analysis which a threat determination requires.[84] (emphasis added)

> Therefore, we consider that, by basing its determination on events at the end of the investigation period (i.e., one year and nine months) rather than over the course of the entire investigation period, the USITC analysed sufficiently recent data for making a valid evaluation of whether significant overall impairment was "imminent" in the near future.[85] (emphasis added)

136. We recall that, in making a "threat" determination, the competent authorities must find that serious injury is "clearly imminent". As we have already concluded, this requires a high degree of likelihood that the anticipated serious injury will materialize in the very near future. Accordingly, we agree with the Panel that a threat determination is "future-oriented". However, Article 4.1(b) requires that a "threat" determination be based on "facts" and not on "conjecture". As facts, by their very nature, pertain to the present and the past, the occurrence of future events can never be definitively proven by facts. There is, therefore, a tension between a future-oriented "threat" analysis, which, ultimately, calls for a degree of "conjecture" about the likelihood of a future event, and the need for a fact-based determination. Unavoidably, this tension must be resolved through the use of facts from the present and the past to justify the conclusion about the future, namely that serious injury is "clearly imminent". Thus, a fact-based evaluation, under Article 4.2(a) of the *Agreement on Safeguards*, must provide the basis for a projection that there is a high degree of likelihood of serious injury to the domestic industry in the very near future.[86]

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[83]Panel Report, para. 7.192.

[84]*Ibid*., para. 7.193.

[85]*Ibid*., para. 7.194.

[86]We observe that the projections made must relate to the overall state of the domestic industry, and not simply to certain relevant factors.

137. Like the Panel, we note that the *Agreement on Safeguards* provides no particular methodology to be followed in making determinations of serious injury or threat thereof.[87] However, whatever methodology is chosen, we believe that data relating to the most recent past will provide competent authorities with an essential, and, usually, the most reliable, basis for a determination of a threat of serious injury. The likely state of the domestic industry in the very near future can best be gauged from data from the most recent past. Thus, we agree with the Panel that, in principle, within the period of investigation as a whole, evidence from the most recent past will provide the strongest indication of the likely future state of the domestic industry.

138. However, we believe that, although data from the most recent past has special importance, competent authorities should not consider such data in isolation from the data pertaining to the entire period of investigation. The real significance of the short-term trends in the most recent data, evident at the end of the period of investigation, may only emerge when those short-term trends are assessed in the light of the longer-term trends in the data for the whole period of investigation. If the most recent data is evaluated in isolation, the resulting picture of the domestic industry may be quite misleading. For instance, although the most recent data may indicate a decline in the domestic industry, that decline may well be a part of the normal cycle of the domestic industry rather than a precursor to clearly imminent serious injury. Likewise, a recent decline in economic performance could simply indicate that the domestic industry is returning to its normal situation after an unusually favourable period, rather than that the industry is on the verge of a precipitous decline into serious injury. Thus, we believe that, in conducting their evaluation under Article 4.2(a), competent authorities cannot rely exclusively on data from the most recent past, but must assess that data in the context of the data for the entire investigative period.[88]

139. In this case, the Panel interpreted Article 4.2(a) of the *Agreement on Safeguards* to mean that the USITC was entitled to "base its determination" of a "threat of serious injury" on data pertaining to the last 21 months of the five year period of investigation. In our view, as we will see below, the Panel's interpretation of the temporal aspects of the competent authorities' evaluation, under Article 4.2(a), placed *too much* emphasis on certain data from the most recent past, while neglecting

[87]Panel Report, para. 7.184.

[88]We note that, at footnote 130 of our Report in *Argentina – Footwear Safeguard*, *supra*, footnote 15, we said that "the relevant investigation period should not only *end* in the very recent past, the investigation period should *be* the recent past." In this Report, we comment on the relative importance, within the period of investigation, of the data from the end of the period, as compared with the data from the beginning of the period. The period of investigation must, of course, be sufficiently long to allow appropriate conclusions to be drawn regarding the state of the domestic industry.

other, even more recent data. Also, the Panel did not ensure that the data was assessed in the context of the data for the entire period of investigation. The Panel's approach improperly excluded the possibility that short-term trends in the data, evident in the last 21 months of the period of investigation, could possibly be a misleading indicator of the likely future state of the domestic industry, when viewed in the context of the data for the entire period of investigation.

4. Panel's Review of the USITC's Determination of a "Threat of Serious Injury"

140. We have examined, so far, the interpretation of the appropriate standard of review, and the interpretation of the term "threat of serious injury" defined in Article 4.1(b) of the *Agreement on Safeguards*. We have also examined certain interpretive questions relating to the competent authorities' evaluation, under Article 4.2(a) of that Agreement, in making a determination that there is such a "threat". With all these considerations in mind, we will now examine the heart of the appeal by Australia and New Zealand on this point: whether the Panel *applied* the appropriate standard of review to the USITC's evaluation of the state of the domestic industry, under Article 4.2(a), and to the USITC's determination that there existed a "threat of serious injury".

141. We have already said that, in examining a claim under Article 4.2 of the *Agreement on Safeguards*, a panel's application of the appropriate standard of review of the competent authorities' determination has two aspects. First, a panel must review whether the competent authorities have, as a *formal* matter, evaluated *all relevant factors* and, second, a panel must review whether those authorities have, as a *substantive* matter, provided a *reasoned and adequate explanation* of how the facts support their determinations.

142. As regards the formal aspects of the Panel's review, we observe that the Panel found that "the *USITC has investigated all the relevant injury factors*".[89] (emphasis added) The Panel reached this conclusion after describing, in summary form, the data before the USITC concerning the relevant factors.[90] Although Australia argues that the Panel erred in finding that the USITC had evaluated all of the relevant factors[91], we consider that the Panel was correct to conclude that, as a formal matter,

[89]Panel Report, para. 7.177.

[90]*Ibid*., paras. 7.142 – 7.171. We note that this section of the Panel Report is entitled "Whether the USITC evaluated in this investigation all injury factors listed in SG Article 4.2(a)". After an introduction (paras. 7.139 – 7.141), the Panel presented a "Summary of the injury data collected by the USITC" (paras. 7.142 – 7.171), before turning to examine whether the USITC had evaluated all relevant factors (paras. 7.172 – 7.178).

[91]Australia's other appellant's submission, paras. 63 – 80.

the USITC did evaluate each of the relevant factors, with respect to some part of the domestic industry, as the USITC defined that industry. However, we see the essence of Australia's appeal, on this point, as directed more toward the Panel's review of the *substantive* aspects of the USITC's evaluation of the relevant factors, and to the USITC's determination that the domestic industry was threatened with serious injury.[92] New Zealand also appeals the substantive aspects of the Panel's review.[93] Both of these appellants assert that the Panel erred in finding that the USITC's explanation of its evaluation of the relevant factors was adequate to support its determination that there existed a threat of serious injury to the domestic industry.

143. On our reading of the Panel Report, we see that the Panel examined, first, whether the USITC formally evaluated all the relevant factors. Next, the Panel examined "the USITC's analytical approach" and concluded that there was "no conceptual fault" with that approach because it was "sufficiently fact-based and future-oriented".[94] The Panel reached this conclusion after reviewing the "[p]rojections relevant to a threat of injury finding" and the "[r]elevant time-period for the threat analysis".[95] The Panel also made an "[e]valuation of data pertaining to the period from January 1997 to September 1998".[96] This period was the last 21 months of the period of investigation, on which the Panel said the USITC could "bas[e] its determination".[97] In the course of evaluating the data from this period, the Panel noted:

> … the complainants do not, as such, challenge the USITC's findings that there were declines in 1997 and interim-1998 for most of the indicators referred to by the USITC in its determination.[98]

144. After summarizing the remainder of the parties' views on the data, the Panel then observed, correctly, that the competent authorities are not required "to show that each listed injury factor is

[92]Australia's other appellant's submission, paras. 63 – 80.

[93]New Zealand's other appellant's submission, paras. 3.12 – 3.22.

[94]Panel Report, paras. 7.222 and 7.224.

[95]*Ibid*., headings 3(a) and 3(b), pp. 64 and 65.

[96]*Ibid*., heading 3(c), p. 66.

[97]*Ibid*., para. 7.194.

[98]*Ibid*., para. 7.199.

declining" but, rather, they must reach a determination in light of the evidence as a whole.[99] Without any further analysis, the Panel concluded:

> Therefore, in the light of the specific evidence, explanations and prospective analysis reflected in the USITC report, we consider the USITC's reliance, among other difficulties, on factors including the domestic industry's market share, production, shipments, profitability and prices as a sufficient basis for determining whether threat of serious injury exists. We also consider that the USITC's analysis of the overall picture of trends reflected in and projected from the most recent data (especially from 1997 and interim-1998) along with the projections concerning further increases in imports (assuming *arguendo* that the data on which these trends and projections were based were representative of a major proportion of the producers forming the relevant industry), seem to confirm the USITC determination that a "significant overall impairment" in the overall position of the domestic industry was clearly imminent.[100] (underlining added)

145. Finally, the Panel examined, and upheld, the claim by Australia and New Zealand that the USITC did not have sufficiently representative data to make a determination about the lamb meat industry, as defined by the USITC.[101]

146. The only part of the Panel Report where the Panel purports to conduct a substantive review of whether the USITC provided a reasoned and adequate explanation of how the facts supported its determination is in the section dealing with the "[e]valuation of data pertaining to the period from January 1997 to September 1998".[102] However, even there, the Panel did not demonstrate any *substantive* review of the factors which it considered provided "a sufficient basis" for the USITC's

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[99]Panel Report, para. 7.203. We note that, earlier in its Report, the Panel stated that competent authorities "may arrive at a threat determination *even if the majority of firms within the relevant industry is not facing declining profitability*, provided that an evaluation of the injury factors *as a whole* indicates threat of serious injury." (Panel Report, para. 7.188, emphasis added) In *Argentina – Footwear Safeguard*, we said that the competent authorities' determination of "serious injury" must be based on "the overall picture" of the domestic industry and that the determination must be made "in light of all the relevant factors". Accordingly, in evaluating "the overall position of the domestic industry", no single relevant factor can be accorded decisive importance and, instead, all of the factors must be examined and weighed together. (Appellate Body Report, *Argentina – Footwear Safeguard*, *supra*, footnote 15, para. 139)

It follows that the Panel was correct to state that the competent authorities' determination must be based on "an evaluation of the injury factors *as a whole*". Moreover, it is theoretically possible, as the Panel said, that an industry *might* be threatened with serious injury, even though "a majority of firms … is not facing declining profitability". Profits are simply one of the relevant factors mentioned in Article 4.2(a) and to accord that factor decisive importance would be to disregard the other relevant factors. However, in our view, it will be a rare case, indeed, where the relevant factors as a whole indicate that there is a threat of serious injury, even though the "majority of firms in the industry" is not facing declining profitability.

[100]Panel Report, para. 7.204.

[101]*Ibid*., paras. 7.208 – 7.221.

[102]*Ibid*., heading 3(c), p. 66, and, paras. 7.196 – 7.204.

determination – "market share, production, shipments, profitability and prices". The Panel seemed to regard it as sufficient for its own conclusion, first, that most economic indicators were in decline in 1997 and 1998 and, second, that not every economic indicator need be in decline.

147. Australia and New Zealand made a number of substantive arguments before the Panel about the USITC's evaluation, and about its determination that the domestic industry was "threatened with serious injury" at the end of the period of investigation in 1998. These arguments were that: lamb meat prices actually rose in late 1998 and in 1999; the USITC's price comparisons were inappropriate; the USITC did not properly evaluate capacity, capacity utilization, inventories and productivity; lamb growers' production, sales and productivity increased over the entire period of investigation; shipments of live lambs increased in 1998; and, growers' productivity and employment levels increased in 1998. The Panel summarized the substantive arguments made by Australia and New Zealand regarding the USITC's evaluation and determination.[103] Yet, nowhere do we see that the Panel actually addressed them.

148. These arguments by Australia and New Zealand were evidently intended to cast doubt on the adequacy of the explanation provided by the USITC as to how the facts, in the form of the data, supported the USITC's "threat of serious injury" determination. In our view, by failing to review the USITC's determination in light of these detailed substantive arguments, the Panel failed to examine critically whether the USITC had, indeed, provided a reasoned and adequate explanation of how the facts supported its determination that there existed a "threat of serious injury".

149. In consequence, we find that the Panel has not *applied* the appropriate standard of review, under Article 11 of the DSU, in examining whether, as a substantive matter, the USITC provided a reasoned and adequate explanation of how the facts support a determination of "threat of serious injury" under Article 4.2(a) of the *Agreement on Safeguards*.

150. Having found that the Panel did not properly review the USITC's determination that there existed a "threat of serious injury", we now turn to examine ourselves the claims of Australia and New Zealand on this issue. We will focus on the arguments by Australia and New Zealand relating to prices, and we will base our determination *exclusively* on the facts presented in the USITC Report, which form part of the Panel record and are uncontested.

[103]The Panel summarizes these arguments at paragraphs 7.200 – 7.202 of the Panel Report.

151. The USITC made the following statement about prices:

> We find that financial performance across all industry segments has worsened due largely to *falling prices*. Commission questionnaires show a marked *decline in prices* for various lamb meat products *beginning in mid-1997*. Although prices recovered to some degree in 1998, *prices remained depressed through September 1998*, the end of the period surveyed. Weighted average U.S. delivered *prices* for virtually all of the products surveyed were *substantially lower beginning with the third quarter of 1997*. In several instances *prices* for several of the products *were 20 percent or more below comparable quarters in 1996 and early 1997*.[104] (emphasis added)

In summarizing the data on prices, the USITC Report states:

> Respondents have questioned whether the domestic industry is injured when slaughter prices, the price felt most directly by the segment of the industry that petitioners have stated are most injured, ended the period of investigation higher than they began. Respondents argued that prices are returning to normal after a temporary increase brought about by decreased domestic supply. Petitioners state that the Commission should focus on the price decline in 1996 and 1997 and that 1993 is not a good year for comparison because it was one of the worst years on record. To examine this question, staff converted monthly slaughter lamb prices (Jan. 1985-Aug. 1998) to constant 1985 dollars using the BLS producer price index to remove the effects of inflation. The average real price per CWT was $62.96 for the full-period (Jan. 1985-Aug. 1998) and $56.19, $55.61, $64.86, $71.50, $73.32, and $64.73, respectively, for years 1993-interim 1998. Thus, prices were below the full-period average in 1993 and 1994, increased above the average level in 1995-97, and decreased to slightly above the average in interim 1998.[105]

152. Australia and New Zealand argued, before the Panel, that it was not appropriate for the USITC to use prices from 1996 and 1997 as the benchmark for comparison with prices in 1998, at the end of the period of investigation, because prices in 1996 and 1997 were unusually high. The fall in prices between 1996 and 1998 was, they argued, a misleading indicator of price trends because prices were simply returning to their normal levels and were not in general decline. In addition, Australia and New Zealand argued that, in any event, the most recent price data indicates that prices were rising

[104]USITC Report, p. I-20.

[105]*Ibid*., p. II-55. The USITC Report has two parts. Part I contains the "Determination and views of the Commission" (pp. I-1 – I-61); Part II contains "Information obtained in the investigation" (pp. II-1 – II-83). The United States stated, at the oral hearing before us, that panels and the Appellate Body can rely on all aspects of the USITC Report.

in 1998, at the end of the period of investigation.[106] This rise in prices indicated, they argued, that the situation of the lamb meat industry was improving and that it was not faced imminently with "serious injury".

153. We note that the price data set out in the USITC Report, which we have just summarized, indicates that prices in 1996 and 1997 were considerably higher than at any other point during the period of investigation.[107] The data also shows that prices were significantly lower in August 1998 than in 1996 and 1997.[108] Prices in 1998 were, nonetheless, markedly higher than the prices in 1993 and 1994, the early part of the period of investigation.[109] In addition, the price data in the Part II of the USITC Report, and in United States' Exhibit US-41, submitted to the Panel, indicates that there was a sharp rise in prices in the last few months of the period of investigation, in mid-1998.[110]

154. Accordingly, the uncontested data demonstrates that, during the period of investigation, lamb meat prices generally rose until 1996/1997, then dropped until mid-1998, and rose again until the end of the period of investigation. At that time, prices were higher than they had been at the beginning of the period of investigation.

155. We emphasize that we are not in a position to reach any definitive conclusions on the significance of these price trends for the situation of the domestic lamb meat industry. However, these trends raise doubts for us about the adequacy of the USITC's explanation of the "bearing" of prices on the situation of the domestic industry.

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[106]Although we attach no importance to this fact, we note that Meat and Livestock Australia Ltd. ("MLA") argued, in its post-hearing brief before the USITC, that the *sharp rise in prices at the end of the period of investigation* showed that the USITC did not have an adequate basis to find that the domestic industry was seriously injured (MLA, Post-hearing brief, p. 19, submitted as Australia's Exhibit Aus-29 in the Panel proceedings).

[107]Average real prices in dollars per hundred weight ("CWT") of live lambs purchased for slaughter were at their highest in 1997 ($73.32) and at their lowest in 1994 ($55.61). Prices in interim 1998 ($64.73) were slightly above the average. (USITC Report, p. II-55)

[108]Average real prices per CWT were: $71.50 in 1996; $73.32 in 1997; and, $64.73 in interim 1998. (USITC Report, p. II-55)

[109]Average real prices per CWT were: $56.19 in 1993; $55.61 in 1994; and, $64.73 in interim 1998. (USITC Report, p. II-55)

[110]USITC Report, Figures 3, 5, 7, 8, and 9. See, also, United States' Exhibit US-41, Tables 38, 39, 40, and 43. Table 38 (carcasses) shows a price rise of 10.4 percent between 1 July and 30 September 1998; Table 39 (fresh chilled frenched rack) shows a price rise of 3.9 percent during that period; Table 40 (fresh, chilled loins) shows a price rise of 29.2 percent during that period; Table 43 (fresh, chilled square cut shoulder) shows a price rise of 32.6 percent during that period. These tables indicate that the price rises occurred in July – September 1998, the last three months of the period of investigation. We, also, note, for completeness, that Tables 41 and 42 (cuts of frozen boneless leg) show prices falling during that period by 0.8 percent and 1.6 percent respectively.

156. In the passage we quoted previously, from page I-20 of the USITC Report, the USITC expressed the view that the "worsen[ing]" financial performance of the domestic industry was "due largely to *falling* prices" for lamb meat.[111] It is clear from this passage that the USITC determined that prices were "falling" through a comparison between prices in 1998 and prices in 1996/1997. However, it seems to us that there is a legitimate doubt as to which prices during the period of investigation should have been used as the appropriate benchmark. That doubt stems from the fact that prices in 1996 and 1997 were around 30 percent higher than they had been in 1993 and, during those two years, were also at their peak for the period of investigation. In these circumstances, we consider that the USITC Report should have explained why prices in 1996 and 1997 were the appropriate benchmark rather than prices in 1993, 1994 or 1995. The USITC provides no such explanation and, instead, *assumes* that prices in 1996 and 1997 were the appropriate benchmark. We do not wish to suggest that prices in 1996 and 1997 could *not* be used as the benchmark, or that prices from another year should have been the benchmark. Our point is that the USITC has not justified its decision – which was key to its overall evaluation of prices and, thus, also, of the financial performance of the domestic industry – that prices in 1996 and 1997 were the appropriate benchmark for comparison with prices in 1998.

157. For similar reasons, we are not satisfied that the USITC explained adequately its conclusion that "prices remained *depressed* through September 1998" because, compared with price levels in 1993 and 1994, prices in September 1998 were markedly higher, and were not "depressed".[112] (emphasis added) Again, the USITC's conclusion overlooks entirely the evolution of prices across the entire period of investigation, and fails to explain why the overall rise in prices between 1993 and 1998 is not relevant to the determination.

158. In addition, we have already observed that there was a sharp rise in lamb meat prices in the last few months of the period of investigation.[113] However, the USITC's consideration of this rise in prices was confined to the observation that, "[*a*]*lthough prices recovered to some degree in 1998*, prices remained depressed through September 1998".[114] (emphasis added) The USITC did not elaborate further on the importance to the domestic industry of the rise in prices in 1998. Nor did the USITC explain the likely future evolution of prices in light of these price rises which were, in some cases, rather significant. The USITC did not, therefore, explain, at all, whether it considered that

[111]USITC Report, p. I-20.

[112]*Ibid*.

[113]*Supra*, para. 153. See, in particular, footnote 110.

[114]USITC Report, p. I-20.

prices would continue to rise; whether the price rises would be reversed; or whether prices would remain at the level reached at the end of the period of investigation.

159. We see a contradiction between the most recent price rises, in 1998, and the USITC's conclusion that the price data supports its determination that the domestic industry is threatened with serious injury. A rise in prices, particularly if significant, should, in the ordinary course of events, be beneficial for an industry. Conceivably, such a rise could lead to an increase in revenues, and could increase margins and profits, and, possibly, also, production levels, if the price rises are sustained. Thus, if an industry is *not* yet in a state of serious injury, and that industry has enjoyed rising prices in the most recent past, it is, at least, questionable whether the industry is highly likely to suffer serious injury in the very near future. In such a situation, the competent authorities should devote particular attention to explaining the apparent contradiction between the most recent price rises and their view that the industry is still threatened with serious injury. In this case, the USITC offered no such explanation.

160. We wish to emphasize again that our remarks about the price data are not intended to suggest that the domestic industry was *not* threatened with serious injury. Rather, our conclusion is simply that the USITC has *not* adequately explained how the facts relating to prices support its determination, under Article 4.2(a), that the domestic industry *was* threatened with such injury.

161. Accordingly, we find that the United States acted inconsistently with Article 4.2(a) of the *Agreement on Safeguards* and, hence, also with Article 2.1 of that Agreement.

VII. Causation

162. In assessing the claims made by Australia and New Zealand relating to causation, the Panel began with a "[g]eneral interpretative analysis" of the relevant provisions of the *Agreement on Safeguards*, before turning to the application of that interpretation to the facts of this dispute.[115] The Panel took note of the terms of Articles 4.2(a) and 4.2(b) of that Agreement[116] and, after examining the ordinary meaning of the word "cause"[117], stated:

[115]Panel Report, heading 2, p. 74.

[116]*Ibid*., para. 7.236.

[117]*Ibid*., para. 7.237.

> It is not enough that increased imports cause just some injury which may then be intensified to a "serious" level by factors other than increased imports. In our view, therefore, the ordinary meaning of these phrases describing the Safeguards Agreement's causation standard indicates that increased imports must not only be *necessary*, but also *sufficient* to cause or threaten a degree of injury that is "*serious*" enough to constitute a significant overall impairment in the situation of the domestic industry.[118] (underlining added)

163. The Panel added that:

> … the second sentence of SG Article 4.2(b) also makes clear … that increased imports need *not* be the *sole* or exclusive causal factor present in a situation of serious injury or threat thereof, as the requirement not to attribute injury caused by other factors by implication recognises that *multiple* factors may be present in a situation of serious injury or threat thereof.[119]
>
> …
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> … where a number of factors, one of which is increased imports, are sufficient *collectively* to cause a significant overall impairment of the position of the domestic industry, but increased imports *alone* are not causing injury that achieves the threshold of "seriousness" set up by SG Article 4.2(a) and 4.2(b), the conditions for imposing a safeguard measure are not satisfied. While we believe that a Member remains free to determine any appropriate method of assessing causation, any method that it selects would need to ensure that the injury caused by increased imports, considered alone, is "serious injury", i.e., causing a significant overall impairment in the situation of the domestic industry. Moreover, we cannot see how a causation standard that does not examine whether increased imports are both a *necessary* and *sufficient* cause for serious injury or threat thereof would ensure that injury caused by factors other than increased imports is not attributed to those imports.[120] (underlining added)

164. The United States appeals the Panel's finding that the USITC's causation analysis was inconsistent with the *Agreement on Safeguards*. According to the United States, there is no basis in Article 4.2(b) of that Agreement to support the Panel's interpretation that increased imports must be a "necessary and sufficient cause" of, or must, "considered alone", cause, serious injury or a threat thereof. The United States asserts that the Panel's approach is indistinguishable from the approach of the panel in *United States – Wheat Gluten Safeguard*, which we reversed on appeal. The United

[118]Panel Report, para. 7.238.

[119]*Ibid*., para. 7.239.

[120]*Ibid*., para. 7.241.

States concludes that, for the reasons we gave in that appeal, we must also reverse the Panel's findings on causation in this dispute.

165. We agree with the United States that the Panel's interpretation of the causation requirements in Articles 4.2(a) and 4.2(b) of the *Agreement on Safeguards* is very similar to the interpretation of the same provisions by the panel in *United States – Wheat Gluten Safeguard*. Both panels reasoned that increased imports, considered on their own, must be capable of causing, or threatening to cause, injury which is "serious".[121] Both panels stated that increased imports must be "sufficient" to cause serious injury.[122] Moreover, both panels accepted that the situation of the domestic industry may be aggravated by other factors which are also contributing to the injury and, therefore, that increased imports need not be the sole cause of injury, but may be one of several causes.[123] Furthermore, we note that, in this case, the Panel relied on the interpretation of the causation requirements given by the panel in *United States – Wheat Gluten Safeguard* and stated that its interpretation of causation "is *consistent* as well with the findings of the Panel in *US – Wheat Gluten* (currently on appeal)".[124] (emphasis added) As the United States points out, we did indeed reverse those findings on appeal in our own Report in *United States – Wheat Gluten Safeguard*.

166. In that appeal, in examining the causation requirements in the *Agreement on Safeguards*, we observed that the first sentence of Article 4.2(b) of the *Agreement on Safeguards* 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) In interpreting this phrase, we said:

[121]Panel Report, para. 7.241; Panel Report, *United States – Wheat Gluten Safeguard*, *supra*, footnote 18, paras. 8.138, 8.139 and 8.143.

[122]Panel Report, paras. 7.238 and 7.241; Panel Report, *United States – Wheat Gluten Safeguard*, *supra*, footnote 18, para. 8.138.

[123]Panel Report, para. 7.238; Panel Report, *United States – Wheat Gluten Safeguard*, *supra*, footnote 18, para. 8.138.

[124]Panel Report, para. 7.242. See, also, Panel Report, paras. 7.244, 7.245 and 7.247.

> … 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. 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*.[125]

167. We also noted in that appeal the crucial significance of the second sentence of Article 4.2(b), which states that competent authorities "shall not … attribute" to increased imports injury caused by other factors, and we found that:

> 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".[126]

168. We emphasized there that the non-attribution language in the second sentence of Article 4.2(b) means that the effects of increased imports, as separated and distinguished from the effects of other factors, must be examined to determine whether the effects of those imports establish a "genuine and substantial relationship of cause and effect" between the increased imports and serious injury.[127]

169. We also addressed, in that appeal, the language in Articles 2.1 and 4.2(a) of the *Agreement on Safeguards*, which we found to support our reading of the non-attribution language in the second sentence of Article 4.2(b). By way of conclusion, we:

> … reverse[d] 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".[128]

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[125]Appellate Body Report, *United States – Wheat Gluten Safeguard*, *supra*, footnote 19, para. 67.

[126]*Ibid*., para. 68.

[127]Appellate Body Report, *United States – Wheat Gluten Safeguard*, *supra*, footnote 19, para. 69.

[128]*Ibid*., para. 79.

170. In view of the close similarity between the respective interpretations of the causation requirements in the *Agreement on Safeguards* given by this Panel and by the panel in *United States – Wheat Gluten Safeguard*, we are of the view that, for the reasons we gave in *United States – Wheat Gluten Safeguard*, the Panel in this dispute erred in its interpretation of the causation requirements in the *Agreement on Safeguards*. As we held in *United States – Wheat Gluten Safeguard*, the *Agreement on Safeguards* does not require that increased imports be "sufficient" to cause, or threaten to cause, serious injury. Nor does that Agreement require that increased imports "alone" be capable of causing, or threatening to cause, serious injury.

171. Accordingly, we reverse the Panel's interpretation of the causation requirements in the *Agreement on Safeguards*, as set forth in paragraphs 7.238, 7.241 and 7.247 of the Panel Report.

172. Having reversed the Panel's "[g]eneral interpretative analysis"[129] of "causation", we go on to consider whether the Panel was correct nonetheless in concluding that the United States acted inconsistently with the causation requirements in Article 4.2 of the *Agreement on Safeguards*. Our own examination of this issue is based *exclusively* on the facts presented in the USITC Report, which form part of the Panel record and are uncontested. Furthermore, notwithstanding the findings we have made previously in this appeal[130], we must *assume* in our examination: first, that the definition of the domestic industry given by the USITC is correct, *and*, second, that the USITC correctly found that the domestic industry is threatened with serious injury. On this basis, we must examine whether the USITC properly established, in accordance with the *Agreement on Safeguards*, the existence of the required "causal link" between increased imports and threatened serious injury.

173. At the outset, we note that this appeal does *not* involve any claim relating to the causation standard set forth in the United States statute.[131] The Panel issued a preliminary ruling that the United States statute *as such* does not fall within the Panel's terms of reference[132], and this ruling has not been appealed.[133] Therefore, like the Panel, our task on this issue is confined to examining the

[129]Panel Report, heading 2, p. 74.

[130]*Supra*, paras. 75, 96, 133, 134 and 161.

[131]Under the United States Trade Act of 1974 (19 U.S.C. §§ 2251 to 2254), the United States' competent authorities are directed, by Section 202(b)(1)(A) to "make an investigation to determine whether an article is being imported into the United States in such increased quantities as to be a *substantial cause* of serious injury, or the threat thereof". (emphasis added) Section 202(b)(1)(B) explains that the term "substantial cause" means "a cause which is important and not less than any other cause."

[132]Panel Report, paras. 5.57 and 5.58.

[133]Furthermore, at the oral hearing, all the participants agreed that the United States' statutory standard as such is not at issue in this appeal.

application of the United States' statutory causation standard by the USITC in its determination in the lamb meat investigation for its consistency with the *Agreement on Safeguards*.

174. The claims by Australia and New Zealand relating to causation focus principally on the requirement, in Article 4.2(b) of the *Agreement on Safeguards*, that injury caused by factors other than increased imports should not be "attributed" to those imports. In the view of Australia and New Zealand, it is uncontested that the USITC acknowledged that other factors were having injurious effects on the domestic industry. However, Australia and New Zealand argue that the USITC failed to explain what the injurious effects of the other factors were, and, therefore, that the United States failed to demonstrate compliance with the "non-attribution" requirement in the second sentence of Article 4.2(b) of the *Agreement on Safeguards*.[134]

175. Accordingly, we must consider whether the USITC properly ensured that injury caused, or threatened, by factors other than increased imports was not attributed to increased imports, as required by Article 4.2(b). In so considering, we recall that, as we have already elaborated at some length in this Report, when examining a claim under Article 4.2 of the *Agreement on Safeguards*, panels must review whether the competent authorities have acted consistently with the obligations in Article 4.2 by examining whether those authorities have given a reasoned and adequate explanation as to how the facts support their determination.[135]

176. Article 4.2(b) of the *Agreement on Safeguards* provides:

> (b) The determination referred to in [Article 4.2(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)

177. In our Report in *United States – Wheat Gluten Safeguard*, we said:

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[134]See, generally, Australia's appellee's submission, paras. 226 – 250; New Zealand's appellee's submission, paras. 6.32 – 6-39.

[135]*Supra*, paras. 100 – 107.

> 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*.[136]

178. We emphasize that these three steps simply describe a logical process for complying with the obligations relating to causation set forth in Article 4.2(b). These steps are not legal "tests" mandated by the text of the *Agreement on Safeguards*, nor is it imperative that each step be the subject of a separate finding or a reasoned conclusion by the competent authorities. Indeed, these steps leave unanswered many methodological questions relating to the non-attribution requirement found in the second sentence of Article 4.2(b).

179. The primary objective of the process we described in *United States – Wheat Gluten Safeguard* is, of course, to determine whether there is "a genuine and substantial relationship of cause and effect" between increased imports and serious injury or threat thereof. As part of that determination, Article 4.2(b) states expressly that injury caused to the domestic industry by factors other than increased imports "shall not be attributed to increased imports." In a situation where *several factors* are causing injury "at the same time", a final determination about the injurious effects caused by *increased imports* can only be made if the injurious effects caused by all the different causal factors are distinguished and separated. Otherwise, any conclusion based exclusively on an assessment of only one of the causal factors – increased imports – rests on an uncertain foundation, because it *assumes* that the other causal factors are *not* causing the injury which has been ascribed to increased imports. The non-attribution language in Article 4.2(b) precludes such an assumption and, instead, requires that the competent authorities assess appropriately the injurious effects of the other factors, so that those effects may be disentangled from the injurious effects of the increased

[136]Appellate Body Report, *supra*, footnote 19, para. 69.

imports. In this way, the final determination rests, properly, on the genuine and substantial relationship of cause and effect between increased imports and serious injury.

180. As we said in our Report in *United States – Wheat Gluten Safeguard*, the non-attribution language in Article 4.2(b) indicates that, logically, the final identification of the injurious effects caused by increased imports must follow a prior separation of the injurious effects of the different causal factors. If the effects of the different factors are not separated and distinguished from the effects of increased imports, there can be no proper assessment of the injury caused by that single and decisive factor. As we also indicated, the final determination about the existence of "the causal link" between increased imports and serious injury can only be made *after* the effects of increased imports have been properly assessed, and this assessment, in turn, follows the separation of the effects caused by all the different causal factors.

181. We emphasize that the method and approach WTO Members choose to carry out the process of separating the effects of increased imports and the effects of the other causal factors is not specified by the *Agreement on Safeguards*. What the Agreement requires is simply that the obligations in Article 4.2 must be respected when a safeguard measure is applied.

182. In this case, the USITC Report states that the "worsen[ing]" financial situation of the domestic industry, as defined by the USITC, had occurred as "a result of the increase in imports."[137] The USITC identified six factors other than increased imports which were alleged to be contributing to the situation of the domestic industry at the same time.[138] Applying the statutory standard established in United States law, the USITC considered whether, individually, each of these six factors was a "more important cause" of the threat of serious injury than the increased imports. The USITC concluded that each of these factors was not a more important cause than the increased imports.[139] The USITC then concluded, echoing the United States statutory standard, that "the increased imports are an important cause, and a cause no less important than any other cause, of the threat of serious injury".[140]

[137]USITC Report, p. I-24.

[138]These six other factors were: the cessation of subsidy payments under the National Wool Act of 1954; competition from other meat products, such as beef, pork and poultry; increased input costs; overfeeding of lambs; concentration in the packing segment of the industry; and a failure to develop and maintain an effective marketing program for lamb meat. (USITC Report, pp. I-24 – I-26).

[139]USITC Report, pp. I-24 – I-26.

[140]*Ibid*., p. I-26.

183. According to Australia and New Zealand, the USITC's determination on this issue is inconsistent with Article 4.2(b) of the *Agreement on Safeguards* because the methodology used by the USITC did not ensure that injury caused by the six other factors was not attributed to increased imports.[141] Our examination, therefore, focuses on the issue of non-attribution. As we have just stated, in a situation such as this, where there are several causal factors, the process of ensuring that injury caused by other causal factors is not attributed to increased imports must include a separation of the effects of the different causal factors.

184. By examining the *relative* causal importance of the different causal factors, the USITC clearly engaged in some kind of process to separate out, and identify, the effects of the different factors, including increased imports. Although an examination of the *relative* causal importance of the different causal factors may satisfy the requirements of United States law, such an examination does not, for that reason, satisfy the requirements of the *Agreement on Safeguards*. On the record before us in this case, a review of whether the United States complied with the non-attribution language in the second sentence of Article 4.2(b) can only be made in the light of the explanation given by the USITC for its conclusions on the relative causal importance of the increased imports, as distinguished from the injurious effects of the other causal factors.

185. In that respect, we see nothing in the USITC Report to indicate how the USITC complied with the obligation found in the second sentence of Article 4.2(b) and, therefore, we see no basis for either the Panel or us to assess the adequacy of the USITC process with respect to the "non-attribution" requirement of Article 4.2(b) of the *Agreement on Safeguards*. The USITC Report, on its face, does not explain the process by which the USITC separated the injurious effects of the different causal factors, nor does the USITC Report explain how the USITC ensured that the injurious effects of the other causal factors were not included in the assessment of the injury ascribed to increased imports. The USITC concluded only that each of four of the six "other factors" was, relatively, a less important cause of injury than increased imports.[142] As Australia and New Zealand argue, and as the

[141]Australia argues that, "after finding that other factors were merely a 'less important cause' of the threat of serious injury than imports, [the USITC] failed to undertake the next step in the analysis" and, therefore, "failed to demonstrate that any threat of serious injury caused by other factors had not been attributed to imports". (Australia's appellee's submission, paras. 225 and 231; see, generally, paras. 225 – 250) New Zealand argues that the USITC failed "to properly distinguish the injurious effects of imports from the injurious effects of other factors", and also failed "to ensure that threat of serious injury caused by 'other factors' was not attributed to increased imports". (New Zealand's appellee's submission, heading (i), p. 52 and para. 6.39; see, generally, paras. 6.16 – 6.39)

[142]These four other factors were: cessation of the payments under the National Wool Act of 1954; competition from other meat products; concentration in the packer segment of the industry; the failure to develop and implement an effective marketing program.

Panel expressly found[143], in doing so, the USITC acknowledged implicitly that these factors were actually causing injury to the domestic industry at the same time. But, to be certain that the injury caused by these other factors, whatever its magnitude, was not attributed to increased imports, the USITC should also have assessed, to some extent, the injurious effects of these other factors. It did not do so. The USITC did not explain, in any way, what injurious effects these other factors had on the domestic industry. For instance, of the six "other factors" examined, the USITC focused most on the cessation of the payments under the National Wool Act of 1954 (the "Wool Act") subsidy. The USITC recognized that the Wool Act subsidies represented an important contribution to the profits of the growers and feeders of live lambs.[144] Yet the USITC's analysis of the injurious effects of this "factor" is confined largely to the statement that "the loss of Wool Act payments *hurt* lamb growers and feeders and caused some to withdraw from the industry."[145] (emphasis added) This explanation provides no insight into the nature and extent of the "hurt" caused to the domestic industry by this factor. The USITC stated also that "the effects of termination of the Wool Act payments can be expected to recede further with each passing month."[146] The USITC, thereby, acknowledged that the Wool Act will have on-going effects, but it did not elaborate on what these effects are likely to be nor how quickly they will disappear. In varying degree, the same is true as well for the remaining "other factors" examined. Thus, although the USITC acknowledged that these other factors were having *some* injurious effects, it did not explain what these effects were, nor how those injurious effects were separated from the threat of serious injury caused by increased imports.

186. In the absence of any meaningful explanation of the nature and extent of the injurious effects of these six "other" factors, it is impossible to determine whether the USITC properly separated the injurious effects of these other factors from the injurious effects of the increased imports. It is, therefore, also impossible to determine whether injury caused by these other factors has been attributed to increased imports. In short, without knowing anything about the nature and extent of the injury caused by the six other factors, we cannot satisfy ourselves that the injury deemed by the USITC to have been caused by increased imports does not include injury which, in reality, was caused by these factors.

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[143]Panel Report, para. 7.277.

[144]The USITC said that "Wool Act subsidies represent an important contribution to profit (15 to 20 percent)." (USITC Report, p. I-30)

[145]*Ibid*., p. I-24.

[146]*Ibid*., p. I-25.

187. In this respect, we also recall that, on this issue, the Panel concluded:

> … that the USITC's application of the "substantial cause" test in the lamb meat investigation as reflected in the USITC report did not ensure that threat of serious injury caused by other factors has not been attributed to increased imports.[147]

188. For the foregoing reasons, we find that the USITC, in its Report, did not adequately explain how it ensured that injury caused to the domestic industry by factors other than increased imports was not attributed to increased imports. In the absence of such an explanation, we uphold, albeit for different reasons, the Panel's conclusions that the United States acted inconsistently with Article 4.2(b) of the *Agreement on Safeguards*, and, hence, with Article 2.1 of that Agreement.[148]

VIII. Judicial Economy

189. The Panel made a single finding on the claims of Australia and New Zealand under Articles I and II of the GATT 1994 and under Articles 2.2, 3.1, 5.1, 8, 11 and 12 of the *Agreement on Safeguards*:

> Bearing in mind the statements of the Appellate Body on "judicial economy" in the disputes on *United States – Shirts and Blouses* and *Australia – Salmon*, we believe that in the foregoing sections we have addressed all those claims and issues which we considered necessary for the resolution of the matter in order to enable the DSB to make sufficiently precise recommendations and rulings for the effective resolution of the dispute before us. Therefore, we see no need to rule on the complainants' claims under SG Articles 2.2, 3.1, 5.1 and GATT 1994 Articles I and II, or on Australia's claims under SG Articles 8, 11 and 12.[149]

190. New Zealand appeals the Panel's decision to exercise judicial economy by not examining its claim under Article 5.1 of the *Agreement on Safeguards* on the nature of the safeguard measure applied by the United States. New Zealand submits that the Panel's rulings relate solely to the *investigation* required to underpin safeguard measures, but do not address the appropriateness of the *safeguard measure* itself. Therefore, New Zealand concludes that, in declining to rule on the claim under Article 5.1 of the *Agreement on Safeguards*, the Panel has failed to enable the DSB to make sufficiently precise recommendations and rulings for the effective resolution of this dispute.

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[147]Panel Report, para. 7.277.

[148]*Ibid*., paras. 7.279, 8.1(f) and 8.1(g).

[149]*Ibid*., para. 7.280.

191. We recall that, on the issue of panels' exercise of judicial economy, we have previously explained that panels "need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."[150] At the same time, the "discretion" a panel enjoys to determine which claims it should address is not without limits[151], as a panel is obliged "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".[152]

192. We have considered appeals from panels' application of judicial economy in the context of challenges to safeguard measures on two previous occasions. In *Argentina – Footwear Safeguard*, the European Communities requested that we address its claim on "unforeseen developments". In *United States – Wheat Gluten Safeguard*, the European Communities made a similar appeal concerning its "unforeseen developments" claim. In that case, the European Communities also asked us to overturn that panel's exercise of judicial economy and to address the European Communities' claims under Article I of the GATT 1994 and Article 5 of the *Agreement on Safeguards*. However, in both *Argentina – Footwear Safeguard* and in *United States – Wheat Gluten Safeguard*, we upheld the respective panel's findings that the safeguard measure imposed was inconsistent with the requirements of Articles 2 and 4 of the *Agreement on Safeguards*. In both cases, we determined, therefore that the respective panel had correctly found that the safeguard measure lacked a legal basis, and, in both cases, we found that, *for this reason*, the panel had acted within its discretion in declining to address the issue of "unforeseen developments" under Article XIX:1(a) of the GATT 1994. In *United States – Wheat Gluten Safeguard*, in considering the further claims of the European Communities, we observed:

> 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.[153]

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[150]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.

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

[152]Appellate Body Report, *Australia – Salmon*, *supra*, footnote 25, para. 223.

[153]*Supra*, footnote 19, paras. 183 and 184.

193. In this case, the Panel found that the United States had acted inconsistently with Article XIX:1(a) of the GATT 1994, with various provisions of Article 4 of the *Agreement on Safeguards*, and with Article 2.1 of the *Agreement on Safeguards*. The Panel found that the United States had failed to "demonstrate", as a matter of fact "the existence of unforeseen developments", had defined the United States' domestic lamb industry inconsistently with the provisions of Article 4.1(c) of the *Agreement on Safeguards*, had relied on data insufficient to support its determination of a threat of serious injury pursuant to Article 4.2(a), and had erred in its assessment of causation under Article 4.2(b). These findings concern the substantive determinations made by the USITC, and, as in *Argentina – Footwear Safeguard* and *United States – Wheat Gluten Safeguard*, the findings made by the Panel – as upheld by us on appeal – deprive the safeguard measure at issue of a legal basis.

194. In consequence, we are of the view that there is no meaningful distinction to be drawn between the Panel's exercise of judicial economy in this case with respect to New Zealand's claim under Article 5.1 of the *Agreement on Safeguards*, and the exercise of judicial economy with respect to the claim under that Article by the panel in *United States – Wheat Gluten Safeguard*. Having found that the safeguard measure applied by the United States lacked a legal basis, the Panel was entitled to decline to address further claims that the same measure is inconsistent with other provisions of the *Agreement on Safeguards*. We also observe that a finding on New Zealand's claim under Article 5.1 of the *Agreement on Safeguards* would not have enhanced the ability of the DSB to make sufficiently precise recommendations and rulings in this dispute.

195. We, therefore, conclude that the Panel did not err in its exercise of judicial economy with respect to New Zealand's claim under Article 5.1 of the *Agreement on Safeguards*.

IX. Conditional Appeals

196. Australia makes a conditional appeal against the Panel's exercise of judicial economy in declining to examine its claims under Articles 2.2, 3.1, 4.2, 5.1, 8.1, 11.1(a) and 12.3 of the *Agreement on Safeguards*. New Zealand makes a conditional appeal against the Panel's exercise of judicial economy in declining to examine its claims under Articles 2.2, 3.1 and 5.1 of the *Agreement on Safeguards*, and under Articles I and II of the GATT 1994. These appeals, however, are made *only if* we reverse the Panel's conclusions that the safeguard measure at issue was inconsistent with the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994. As the conditions on which these requests are predicated have not been fulfilled, there is no need for us to examine the conditional appeals of Australia and New Zealand. We recall, as well, that we found above that there was no

need for us to examine Australia's conditional appeal relating to the Panel's findings on "unforeseen developments".[154]

X. Findings and Conclusions

197. For the reasons set forth in this Report, the Appellate Body:

(a) upholds the Panel's finding, in paragraphs 7.45 and 8.1(a) of the Panel Report, that the United States acted inconsistently with Article XIX:1(a) of the GATT 1994 by failing to demonstrate, as a matter of fact, the existence of "unforeseen developments";

(b) upholds the Panel's finding, in paragraphs 7.118, 8.1(b) and 8.1(g) of the Panel Report, that the United States acted inconsistently with Articles 2.1 and 4.1(c) of the *Agreement on Safeguards* because the USITC defined the relevant "domestic industry" to include growers and feeders of live lambs;

(c) upholds the Panel's finding, in paragraph 7.221 of the Panel Report, that the USITC made a determination regarding the "domestic industry" on the basis of data that was not sufficiently representative of that industry; but modifies the Panel's ultimate finding, in paragraph 8.1(e) and 8.1(g) of the Panel Report, that the United States thereby acted inconsistently with Articles 2.1 and 4.1(c) of the *Agreement on Safeguards* by finding, instead, that the United States thereby acted inconsistently with Articles 2.1 and 4.2(a) of that Agreement;

(d) finds that the Panel correctly interpreted the standard of review, set forth in Article 11 of the DSU, which is appropriate to its examination of claims made under Article 4.2 of the *Agreement on Safeguards*; but concludes that the Panel erred in applying that standard in examining the claims made concerning the USITC's determination that there existed a threat of serious injury; and finds, moreover, that the United States acted inconsistently with Articles 2.1 and 4.2(a) of the *Agreement on Safeguards* because the USITC Report did not explain adequately the determination that there existed a threat of serious injury to the domestic industry;

[154]*Supra*, para. 75.

(e) reverses the Panel's interpretation of the causation requirements in the *Agreement on Safeguards* but, for different reasons, upholds the Panel's ultimate finding, in paragraphs 7.279, 8.1(f) and 8.1(g) of the Panel Report, that the United States acted inconsistently with Articles 2.1 and 4.2(b) of the Agreement because the USITC's determination that there existed a causal link between increased imports and a threat of serious injury did not ensure that injury caused to the domestic industry, by factors other than increased imports, was not attributed to those imports;

(f) upholds the Panel's exercise of judicial economy, in paragraph 7.280 of the Panel Report, in declining to rule on the claim of New Zealand under Article 5.1 of the *Agreement on Safeguards*; and,

(g) declines to rule on the respective conditional appeals of Australia and New Zealand relating to Articles I, II and XIX:1(a) of the GATT 1994, and to Articles 2.2, 3.1, 5.1, 8.1, 11.1(a) and 12.3 of the *Agreement on Safeguards*.

198. 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 GATT 1994 and the *Agreement on Safeguards*, into conformity with its obligations under those Agreements.

Signed in the original at Geneva this 12th day of April 2001 by:

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Claus-Dieter Ehlermann
Presiding Member

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James Bacchus
Member

A. V. Ganesan
Member