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

Report of the Panel

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

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

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I. INTRODUCTION

A. COMPLAINT OF NEW ZEALAND

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

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

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

B. COMPLAINT OF AUSTRALIA

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

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

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

C. ESTABLISHMENT AND COMPOSITION OF THE PANEL

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

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

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

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

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

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

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

D. PANEL PROCEEDINGS

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

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

II. FACTUAL ASPECTS

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

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

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

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

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

[5] G/SG/N/6/USA/5 (Exh. US-3).
[6] G/SG/N/8/USA/3 + Corr.1 and Corr.2 (Exh. US-4)
[7] USITC Publication 3176, "Lamb Meat", Investigation TA-201-68, April 1999. ("USITC Report", Exh. US-1.)
[8] G/SG/N/8/USA/3/Rev.1 (Exh. US-5).
[9] G/L/313, G/SG/19 (Exh. US-8).

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

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

Country Allocations

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

Tariff Duties

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

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

III. FINDINGS REQUESTED BY THE PARTIES

A. AUSTRALIA

3.1 In its first submission, Australia claims:

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

[10] Proclamation 7208 of 7 July 1999, "To facilitate positive adjustment to competition from imports of lamb meat".(Exh. US-2.)

[11] G/SG/N/10/USA/3 (Exh. US-6).

[12] G/SG/N/10/USA/3/Suppl.1 (Exh. US-7).

[13] G/SG/N/11/USA and G/SG/N/11/USA/3/Suppl. 1 (Exh. US-6 and –7).

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

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

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

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

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

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

- the USITC did not meet the requirements of SG Article 4.1(b) that for a finding of threat of serious injury the serious injury must be imminent and "[a] determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility;

- the determination of threat of serious injury, by attributing to increased imports injury caused by other factors, was contrary to SG Article 4.2(b); and

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

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

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

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

[14] GATT 1994 Article XIX:1

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

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

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

3.2 Australia requests that the Panel therefore:

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

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

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

B. NEW ZEALAND

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

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

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

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

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

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

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

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

C. UNITED STATES

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

IV. ARGUMENTS OF THE PARTIES

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

V. PRELIMINARY ISSUES

A. PARTIES' REQUESTS FOR PRELIMINARY RULINGS BY THE PANEL

1. Australia

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

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

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

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

2. New Zealand

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

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

[16] Article 11 of the DSU: "… Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. …"

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

3. The United States

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

B. ALLEGED INSUFFICIENCY OF PANEL REQUEST

1. Initial arguments of the parties

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

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

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

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

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

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

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

2. Written response and request for comments by the Panel

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

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

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

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

3. Comments of the parties

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

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

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

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

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

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

4. Ruling by the Panel

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

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

5. Reasoning

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

(a) Sufficient specificity of the panel requests

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

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

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

(i) be in writing;

(ii) indicate whether consultations were held;

(iii) identify the specific measures at issue; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Attendant circumstances

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

Discussion in the Committee on Safeguards

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

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

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

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

Consultations

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

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

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

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

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

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

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

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

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

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

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

Establishment of the Panel by the DSB

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[45] Id. at paragraph 165.

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

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

(c) Prejudice to due process rights

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

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

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

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

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

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

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

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

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

1. Arguments of the parties

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

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

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

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

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

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

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

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

3. Reasoning

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

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

D. SUBMISSION AND PROTECTION OF CONFIDENTIAL INFORMATION

1. Arguments of the parties

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

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

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

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

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

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

3. Reasoning

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

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

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

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

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

VI. INTERIM REVIEW

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

A. AUSTRALIA'S REQUESTS FOR INTERIM REVIEW

6.2 In response to Australia's interim review request, we have modified our descriptions of complainants' arguments in paragraph 7.14 and footnote159.

B. NEW ZEALAND'S REQUESTS FOR INTERIM REVIEW

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

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

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

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

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

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

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

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

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

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

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

C. THE UNITED STATES' REQUESTS FOR INTERIM REVIEW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. SUBSTANTIVE ISSUES

A. STANDARD OF REVIEW

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

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

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

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

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

B. THE EXISTENCE OF "UNFORESEEN DEVELOPMENTS"

1. General interpretative analysis of Article XIX of GATT 1994

(a) Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) What are "unforeseen developments"?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "that the term 'unforeseen developments' should be interpreted to mean developments occurring *after* the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated."[64]

The members also agreed "that the *fact that hat styles had changed did not constitute an 'unforeseen development'* within the meaning of Article XIX",[65] but that the effects of the special circumstances of this case, and "particularly the *degree to which the change in fashion affected the competitive situation*, could not reasonably be expected to have been foreseen by the United States authorities in 1947, and that the condition of Article XIX that the increase in imports must be due to unforeseen developments and to the effect of the tariff concessions can therefore be considered to have been fulfilled."[66] (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Examination of "unforeseen developments" in this case

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Finding on "unforeseen developments"

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

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

C. DEFINITION OF THE DOMESTIC INDUSTRY

1. Introduction

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

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[73] Id.

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

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

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

2. Background

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

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

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

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

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

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

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

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

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

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

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

3. Arguments of the Parties

(a) Australia and New Zealand

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

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

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

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

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

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

(b) United States

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Discussion by the Panel

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

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

[92] Id. at paragraph 73.

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

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

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

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

[97] Id. at paragraph 75.

[98] Id. at paragraph 74.

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

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

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

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

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

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

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

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

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

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

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

[100] Oxford English Dictionary, at. 2367.

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

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

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

(ii) "Producers as a whole"

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

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

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

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

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

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

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

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

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

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

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

(b) Past panel reports

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) The *Canada – Beef* case

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) The New Zealand – Transformers case

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(vi) Concluding remarks on past panel reports

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

(c) Negotiating history

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

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

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

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

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

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

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

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

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

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

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

(d) "Directly competitive products"

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

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

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

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

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

5. Findings on the definition of the domestic industry

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

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

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

D. THREAT OF SERIOUS INJURY

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

(a) Introduction

7.120 According to SG Article 4.1(b):

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

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

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

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

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

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

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

> "In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilisation, profits and losses, and employment."

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

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

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

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

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

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

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

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

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

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

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

(b) Interpretation by the Panel

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

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

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

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

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

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

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

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

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

7.134 The *Korea – Resins* panel found that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[176] *See*, also *Argentina – Footwear*, op. cit., at paragraph 8.284, in which the Panel found that an analysis of threat of serious injury in the safeguards context is separate from an analysis of actual serious injury: "[t]he question of threat, whether instead of or in addition to a finding of present serious injury, must be explicitly examined in an investigation and supported by the evidence in accordance with Article 4.2(a-c).

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

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

(a) Introduction

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

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

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

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

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

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

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

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

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

(i) Production and shipments

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

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

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

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

(ii) Capacity and capacity utilisation

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

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

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

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

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

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

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

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

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

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

(iii) Employment

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

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

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

(iv) Market share

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

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

(v) Productivity

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

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

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

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

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

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

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

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

(vi) Inventories

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

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

(vii) Financial performance (profit and loss)

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

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

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

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

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

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

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

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

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

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

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

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

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

(viii) Difficulty of generating capital

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

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

(ix) Prices and price trends

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

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

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

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

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

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

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

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

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

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

(c) Evaluation by the Panel

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

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

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

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

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

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

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

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

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

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

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

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

(a) Projections relevant to a threat of injury finding

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

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

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

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

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

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

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

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

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

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

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

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

(b) Relevant time-period for the threat analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Representativeness of data collected

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Introduction

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

> "[the] investigation demonstrates on the basis of objective evidence the existence of a *causal link* between increased imports of the product concerned and serious injury or the threat thereof. When *factors other* than increased imports are causing injury to the domestic industry at the same time, *such injury shall not be attributed to increased imports*."

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

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

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

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

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

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

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

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

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

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

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

[248] Id., at paragraph 555.

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

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

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

7.236 We begin our interpretative analysis with the relevant parts in SG Article 4.2's subparagraph (a), i.e., "in the investigation to determine *whether increased imports have caused or are threatening to cause serious injury to a domestic industry*" and in subparagraph (b), i.e., "[that] determination … shall not be made unless this investigation demonstrates, on the basis of objective evidence, *the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof*".

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) Increased input costs

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

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

(iv) Alleged overfeeding of lambs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VIII. CONCLUSIONS AND RECOMMENDATIONS

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

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

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

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

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

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

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

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

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

ANNEX 1-1

FIRST SUBMISSION OF AUSTRALIA

(19 April 2000)

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1. OVERVIEW

1. On 7 July 1999 the United States of America imposed a safeguard measure in the form of a tariff quota on imports of fresh, chilled, and frozen lamb meat to apply from 22 July 1999. This involved not only a high out of quota tariff starting at 40 per cent in the first year but also an in-quota tariff starting at 9 per cent in the first year compared to the bound rate of about 0.2 per cent. The US excluded Canada, Mexico, Israel and beneficiary countries under CBERA and ATPA[1] from the measure.[2]

2. The imposition of the safeguard measure followed an investigation by the USITC [3] initiated on 7 October 1998, which reported to the US President on 5 April 1999 that there was a threat of serious injury, i.e. that serious injury was imminent, for which increased imports were a substantial cause. The decision on the measure was not taken by the US President until 7 July 1999. The measure imposed was more trade restrictive than that recommended by the USITC. No explanation has been given for the delay in the decision and no justification has been given about the basis for imposing a more restrictive measure.

3. The non-confidential versions of the USITC Report[4] and the main submissions by Meat and Livestock Australia (MLA) to the USITC have been provided as Exhibits AUS-1 and 28-31. These will provide the Panel with detailed background on the market.

4. Australia asks the Panel for an immediate preliminary ruling that the US should be asked to supply information to the Panel and Australia to ensure that the Panel can carry out its responsibilities under DSU Article 11.[5]

5. Australia will show that the US has acted inconsistently with its obligations under the Safeguards Agreement and GATT 1994 Article XIX[6] in imposing the measure. In addition, Australia will show that the measure is inconsistent with the US's obligations under GATT 1994 Article II.

6. The USITC Report failed to discuss whether increased imports of lamb meat were threatening to cause serious injury to the "domestic industry" ". . . as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions . . . "[7] as required by GATT 1994 Article XIX:1. Therefore, the US has acted inconsistently with its obligations under GATT 1994 Article XIX and the Safeguards Agreement.

7. The US acted inconsistently with the requirements of SG Article 5.1[8] for a determination that the measure is applied only to the extent "necessary to prevent or remedy serious injury and to facilitate adjustment." Neither the USITC recommendation nor the action ultimately taken by the US President was justified under SG Article 5.1.

8. The US failed to publish a report justifying the measure imposed and so acted inconsistently with SG Article 3.1. Moreover, to the extent that the US carried out any investigation subsequent to

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[1] Caribbean Basin Economic Recovery Act and Andean Trade Preference Act, respectively

[2] These exclusions were distinct from those made under SG Article 9.1 for certain developing country Members.

[3] United States International Trade Commission.

[4] USITC Pub 3176, Lamb Meat: Investigation No. TA-201-68, April 1999, Parts I and II - hereafter referred to as the "USITC Report".

[5] Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

[6] Article XIX of the General Agreement on Tariffs and Trade 1994.

[7] GATT 1994 Article XIX:1

[8] Article 5.1 of the Safeguards Agreement.

the report of the USITC, it was in breach of the requirements of SG Article 3.1 and SG Articles 12.2 and 12.6.

9. The USITC's determination of threat of serious injury being caused to the "domestic industry" was inconsistent with the requirements of SG Article 4 in a number of respects, principally:

(a) the USITC's determination of the relevant "domestic industry" was inconsistent with the provisions of SG Article 4.1(c) through the inclusion of enterprises that do not produce the like or directly competitive products

(b) the US did not demonstrate that increased imports were threatening to cause serious injury to the "domestic industry", in particular

(i) the data were inadequate and did not support the determination as required under SG Article 4.2

(ii) the USITC did not meet the requirements of SG Article 4.1(b) that for a finding of threat of serious injury the serious injury must be imminent and "[a] determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility"

(iii) the determination of threat of serious injury, by attributing to increased imports injury caused by other factors, was contrary to SG Article 4.2(b)

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

10. The US acted inconsistently with its obligations under SG Article 8.1 and SG Article 12.3, which require a Member to endeavour to maintain a substantially equivalent level of concessions and other obligations and to enter into consultations in good faith to achieve that objective.

11. The US acted inconsistently with SG Article 2.2 to apply the measure to all imports irrespective of source. In particular no WTO justification was given for the inclusion of Canada, Mexico, Israel and beneficiary countries under CBERA and ATPA in the injury investigation but their exclusion from the measure. This was also inconsistent with SG Article 4.

12. Since the US acted inconsistently with the other provisions of the Safeguards Agreement, in particular SG Article 4, it is also in breach of SG Article 2.1.

13. The US is in breach of GATT 1994 Article II, since the measure is inconsistent with the US's tariff bindings on lamb meat.

14. These errors cannot be cured and the US can only bring the measure into conformity with the Safeguards Agreement and GATT 1994 by revoking the measure without delay.

Therefore, Australia asks the Panel:

- to find that the measure is inconsistent with the Safeguards Agreement and GATT 1994 and that the US has acted inconsistently with its obligations under the Safeguards Agreement and under GATT 1994; and accordingly;

- to find that therefore the US is in violation of its obligations under the Safeguards Agreement and GATT 1994; and

- to recommend that the US bring the measure into conformity with the WTO Agreement.

2. REQUEST FOR IMMEDIATE PRELIMINARY RULING ON INFORMATION USED IN THE INVESTIGATION

15. Australia requests, pursuant to Article 13 of the DSU, that the Panel request the US to produce the following information for review by the Panel and Australia:

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

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

16. Australia is prepared to enter into a reasonable undertaking on the treatment of confidential information

17. All the above information is relevant to the Panel's responsibility to make an objective assessment of the matter before it under DSU Article 11. Australia asked for such information during consultations under DSU Article 4 but it was refused.[9]

18. If the US is not prepared to provide all such information, then Australia asks the Panel to draw adverse inferences from the unwillingness of the US to cooperate in the provision of information.

3. FACTS OF THE CASE

3.1 Investigation and imposition of the safeguard measure

3.1.1 US law and practice in a safeguards investigation

19. The USITC is the agency of the US Government that, amongst other things, conducts injury inquiries for contingent remedy cases on safeguards, anti-dumping, and countervailing. The US safeguards legislation was notified to the WTO Committee on Safeguards (Committee) in G/SG/N/1/US/1.[10] The principal legislative provisions covering safeguards under the Safeguards Agreement are Sections 201-204 of the Trade Act of 1974, as amended. The USITC initiates an inquiry on the basis of a private petition. It holds a public hearing on the question of injury. If it finds that increased imports are a substantial cause of serious injury or threat thereof to an industry in the US, it then holds a public hearing on the question of remedy.

20. When the USITC has completed its inquiry, it makes a report to the US President, and the non-confidential version of its report is made public. Decisions by the USITC are by vote and it makes a single recommendation to the US President.

21. Where the USITC makes a recommendation to the US President that a safeguard measure should be imposed, the US President then has 60 days in which to make a decision.[11] The only

[9] Question 3, Exhibit AUS-27.
[10] At Exhibit AUS-24.
[11] Under Section 203(a)(4)(A) of the Trade Act of 1974.

apparent qualification to this is where the US President asks the USITC for a supplemental report,[12] in which case the US President has 30 days in which to make a decision after receiving the subsequent USITC report.[13]

22. The US notified the Committee that "the authority in the United States competent to initiate and conduct investigations relating to safeguards is the United States International Trade Commission."[14] The US legislation leaves scope to the US President to determine the measure. However, for the US to act consistently with its WTO obligations, the process and the measure must conform with the relevant WTO provisions, in particular the Safeguards Agreement and GATT 1994 Article XIX, and not just its own legislation.

3.1.2 The procedures followed by the US in this case

23. This dispute concerns the imposition of a definitive safeguard measure by the US on imports of fresh, chilled and frozen lamb meat under the tariff headings HS 0204.10.00, 0204.22.20, 0204.23.20, 0204.30.00, 0204.42.20 and 0204.43.20. This was in the form of a tariff quota with country quotas for Australia and New Zealand together with an "other country" quota. Certain countries were selectively excluded from the measure.

24. A petition was filed with the USITC on 7 October 1998 requesting safeguard action against imports of lamb meat. This petition was filed on behalf of "American Sheep Industry Association, Inc., National Lamb Feeders Association, Harper Livestock Co., Winters Ranch Partnership, Godby Sheep Co., Talbott Sheep Co., Iowa Lamb Corp., Ranchers' Lamb of Texas, Inc., and Chicago Lamb & Veal Co."[15]

25. The USITC initiated an investigation (TA201-68) on 7 October 1998 through a notice on 19 October 1998[16] "to determine whether lamb meat, provided for in subheadings 0204.10.00, 0204.22.20, 0204.23.20, 0204.30.00, 0204.42.20 and 0204.43.20 of the Harmonized Tariff Schedule of the United States, is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article." The period of the investigation was 1 January 1993 through to 30 September 1998.[17]

26. The Committee was notified in G/SG/N/6/US/5 dated 5 November 1998. A public hearing on the injury phase was held on 12 January 1999. The USITC voted on injury on 9 February 1999 that lamb meat was being imported into the US in such increased quantities to be a substantial cause of the threat of serious injury to the "domestic industry": it found unanimously that serious injury was not being experienced by the "domestic industry". A public hearing on remedy was held on 25 February 1999. The USITC voted on remedy on 26 March 1999 and reported to the US President on 5 April 1999. The USITC recommended the imposition of a tariff-rate quota system on imports of lamb meat.

27. The 60-day deadline by which the US President was to decide on the USITC's recommendation under Section 203(a)(5) of the Trade Act of 1974 expired on 4 June 1999.

[12] Under Section 203 (a)(5) of the Trade Act of 1974.
[13] Under Section 203 (a)(4)(B), of the Trade Act of 1974.
[14] At page 1 of G/SG/N/1/US/1.
[15] See G/SG/N/6/US/5 at Exhibit AUS-8.
[16] See G/SG/N/6/US/5 at Exhibit AUS-8.
[17] At page I-7 of the USITC Report ("USITC I-7").

28. The decision was made by the US President on 7 July 1999. This decision imposed a tariff quota on imports of lamb meat that applied from 22 July 1999 for a period of three years and a day. The Proclamation is at Exhibit AUS-5, and the modification at AUS-7.

29. The US notified the Committee in G/SG/N/8/US/3[18] dated 18 February 1999 of the injury determination and in G/SG/N/8/US/3/Rev.1 dated 15 April 1999 of the USITC recommendation on the measure. The US notified the Committee of the measure actually imposed in G/SG/N/10/US/3- G/SG/N/11/US/3 dated 12 July 1999.[19]

30. Australia and the US had consultations under SG Article 12.3 on 4 May 1999 and 14 July 1999.[20]

31. Subsequently, in an exchange of letters dated 19 October 1999, and notified to the Council for Trade in Goods,[21] Australia and the US: "agreed that their reciprocal rights and obligations under the Agreement on Safeguards and the General Agreement on Tariffs and Trade 1994 will be maintained, and for this purpose they have agreed that the 90-day period set forth in Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the General Agreement on Tariffs and Trade 1994 shall be considered to expire on 21 July 2002."

32. On 23 July 1999 Australia requested consultations under DSU Article 4 and pursuant to GATT 1994 Article XXII:1 and SG Article 14.[22] These were held on 26 August 1999. On 14 October 1999 Australia asked for the establishment of a Panel in WT/DS178/5 and Corr.1. The first request to the DSB was on 27 October 1999. The Panel was established at the second request on 19 November 1999. The Panel was composed with standard terms of reference on 21 March 2000.

3.1.3 Description of the recommended and imposed safeguard measures

33. The USITC recommended that the US President:[23]

> "- impose a tariff-rate quota system, for a four-year period, on imports of lamb meat that are the subject of this investigation, as follows (all weights are in terms of carcass-weight equivalents):

[18] Subsequently amended in G/SG/N/8/US/3/Corr.1, and G/SG/N/8/US/3/Corr.2. See Exhibit AUS-9.
[19] Subsequently modified and notified in G/SG/N/10/US/3- G/SG/N/11/US/3/Suppl.1. See Exhibit AUS-12.
[20] G/L/313-G/SG/19 at Exhibit AUS-13.
[21] G/L/339-G/SG/N/12/AUS/1-G/SG/N/12/US/1 at Exhibit AUS-14.
[22] WT/DS178/1-G/L/314-G/SG/D9/1, and Corr.1 at Exhibit AUS-21.
[23] G/SG/N/8/US/3/Rev.1 at Exhibit AUS-10.

Year	***Tariff Rate Quota***
First	20% *ad valorem* on imports over 78 million pounds;
Second	17.5% *ad valorem* on imports over 81.5 million pounds;
Third	15% *ad valorem* on imports over 81.5 million pounds; and
Fourth	10% *ad valorem* on imports over 81.5 million pounds

- implement appropriate adjustment assistance to facilitate efforts by the domestic industry to make a positive adjustment to import competitive *[sic]* and provide greater economic and social benefits than costs.

- exclude from the relief imports from Canada and Mexico under section 311(a) of the NAFTA Implementation Act in view of the USITC's finding that imports from those countries either do not account for a substantial share of total imports or do not contribute importantly to serious injury, or both.

- exclude from the relief imports from Israel, and any imports that enter duty free from beneficiary countries under the Caribbean Basin Economic Recovery Act or the Andean Trade Preference Act, in view of the USITC's finding that there were few or no imports of lamb meat from these countries."

34. The US President, without any justification, imposed a far more aggressive remedy, as follows:[24]

> "The measure is a tariff-rate quota on imports of lamb meat[25] for a period of just over three years. The tariff-rate quota in the first year is 31,851,151 kilograms, an amount that is equal to imports of lamb meat during calendar year 1998. The tariff-rate quota amount will increase by an additional 857,342 kilograms in each of the second and third years of the measure. Individual country allocations for product imported from Australia, New Zealand, and an "other country" category within the tariff-rate quota have also been established, which reflect the actual shares of each country in calendar year 1998.
>
> Increased rates of duty for imports within the tariff-rate quota amount will be set as follows: 9 per cent *ad valorem* for imports in the first year of the measure; 6 per cent *ad valorem* for imports in the second year; and 3 per cent *ad valorem* for imports in the third year. Rates of duty for imports above the tariff-rate quota levels will be set at 40 per cent *ad valorem* in the first year of relief, 32 per cent *ad valorem* in the second year, and 24 per cent *ad valorem* in the third year.

[24] G/SG/N/10/US/3-G/SG/N/11/US/3 and G/SG/N/10/US/3/Suppl.1-G/SG/N/11/US/3/Suppl.1 at Exhibit AUS-11 and 12.

[25] Fresh, chilled and frozen lamb meat under the tariff headings HS 0204.10.00, 0204.22.20, 0204.23.20, 0204.30.00, 0204.42.20 and 0204.43.20. *[Footnote not in original text but specified separately.]*

Chart 1: Country Allocation[26]

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

Chart 2: Tariff Duties

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

The measure does not apply to imports from Canada, Mexico, Israel, beneficiary countries under the Caribbean Basin Economic Recovery Act or the Andean Trade Preference Act, or developing countries described in the notification under Article 9, footnote 2, provided below."[27]

35. "The measure was introduced on 7 July 1999, and is effective with respect to goods exported on or after 22 July 1999."[28]

3.2 Competitive conditions in the US market

3.2.1 Growers – US

36. In the US, lambs are initially raised by "growers", who also produce wool and who would usually breed the lambs.

37. At around 6 months of age the lambs are weaned and about 70-80% of lambs for lamb meat go to feedlots or "feeders" for fattening on grain or other concentrates.[29]

38. Lambs are then subject to intensive feeding and finishing for 2-4 months. The fed lambs or "slaughter lambs" are then sold at about 9-12 months to an abattoir or "packer". The packer in turn may sell the carcass to be butchered to a "breaker", which divide carcasses into primal, subprimal, or retail cuts for resale to non-breaker wholesalers or retail outlets.

39. Each of these industries produces a different product. Moreover, many growers will have other activities rather than being a specialist grower of lambs for sale as feeders. Packers and breakers may not be limited to lamb meat, but may also produce other sheep meat. Some lamb meat

[26] Weights are in terms of product weight. The carcass weight equivalent depends on the conversion factor used, but the USITC recommendation and the measure are approximately equivalent for the first year. *[Footnote not in original text.]*

[27] G/SG/N/10/US/3-G/SG/N/11/US/3 at Exhibit AUS-11.

[28] G/SG/N/10/US/3/Suppl.1-G/SG/N/11/US/3/Suppl.1 at Exhibit AUS-12.

[29] See table on USITC II-52.

is produced by packers and breakers that also slaughter other livestock species and butcher their carcasses.[30]

3.2.2 Growers - Australia and New Zealand

40. There is no Australian or New Zealand counterpart for the lamb feeder industry. Lambs are grass fed and then go to slaughter.

41. The genetic differences between Australian and US lambs combine with the earlier slaughter age in Australia to give much smaller lambs.[31]

3.2.3 Lamb meat - Australia and US

42. The average Australian lamb carcass is significantly smaller than in the US with lower fat content. This results in significantly different sizes of cuts with imported cuts sold in the marketplace as ungraded cuts. This, combined with Australian lamb being grass fed, means that the imported product has different product characteristics from the domestic product and competes for different market segments. In addition, much of the imported product comes in as frozen and so again competes for a different segment of the market.[32]

3.2.4 Support for US growers

43. The major support for US growers, including grower/feeders, was through National Wool Act subsidies.[33] This was based on a support price for wool of varying grades and a direct payment to growers when prices fell below the relevant support price. In 1993 total payments under the National Wool Act amounted to US$125.2m.[34] For those growers that responded to the USITC questionnaire these subsidies amounted to 18% of net sales value in fiscal year 1993 and 19% in fiscal year 1994. This meant the difference between net income before taxes of US$0.995m and US$2.007m and losses of US$3.672m and US$3.306m in fiscal years 1993 and 1994, respectively.[35]

44. The Omnibus Budget and Reconciliation Act of 1993 (P.L. 103-130) enacted in November 1993 provided for the phase-out and repeal of the National Wool Act. In 1995, growers received payments for the 1994 marketing year of 75% of the usual payment; in 1996 this reduced to 50% for the 1995 marketing year; and effective 31 December 1995 the National Wool Act was repealed with no further payments to be made after 1996.[36]

[30] USITC II-12, 14 and 15, and Footnote 57.
[31] At page 4 and Exhibit 2 of Vol. 1 of the MLA pre-injury hearing brief at Exhibit AUS-28.
[32] At pages 29-34 of Vol. 1 of the MLA pre-injury hearing brief at Exhibit AUS-28.
[33] National Wool Act of 1954, as amended. See USITC II-11.
[34] See table below derived from data in Table 45 at USITC II-78.
[35] See Table 12 at USITC II-25 and table in Section 7.2.3.5.1 of this Submission.
[36] For a description of the National Wool Act of 1954, see USITC II-77-79.

PAYMENTS UNDER THE NATIONAL WOOL ACT (US$ millions)

	1993	1994	1995
Shorn wool net payments	100.6	55.5	24.9
Unshorn wool net payments	24.6	13.6	6.7
Total	125.2	69.1	31.6

Source: Table 45, USITC II-78.

3.2.5 Market developments in the US

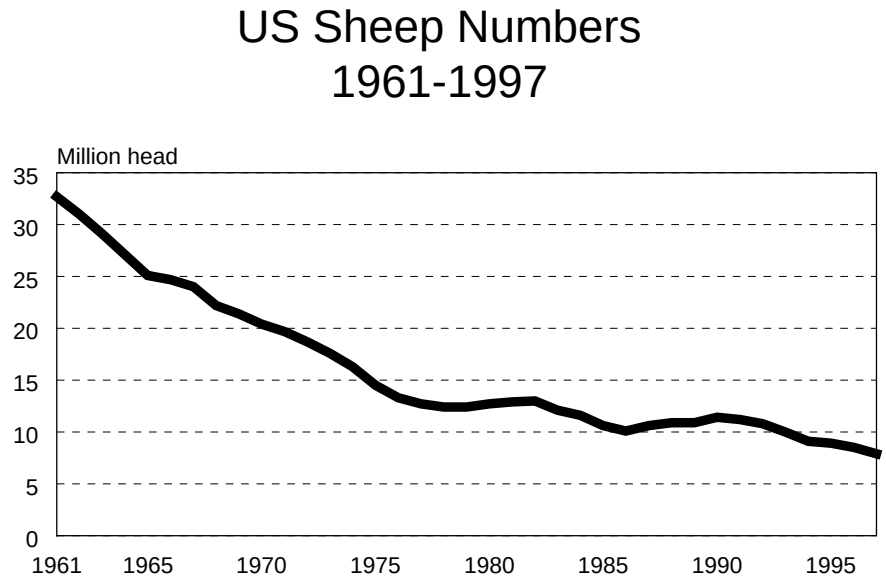
45. The repeal of the National Wool Act caused a reduction in the number of grower operations and a decline in flock numbers. As a result of the repeal of the National Wool Act, the US sheep industry entered into a flock liquidation phase. The flock reduction was accomplished partly by the slaughter of breeding stock and partly by exporting animals. Over 1993 and 1994, a period of stable imports, the flock declined 9 per cent in 1993, from 10.013m on 1 January 1993 to 9.076m by 1 January 1994, and a further 7 per cent to 8.461m by 1 January 1996. This declined continued to 7.937m by 1 January 1997, a fall of a further 6 per cent.[37]

46. The decline in flock numbers over the period of investigation simply continued historical trends, intensified by the repeal of the National Wool Act. The flock had fallen from 56.2m in 1942 to 10.75m by 1992. The reduction in flock numbers did result in higher feeder lamb prices in 1996 and 1997.

47. The accelerated decline during the period of investigation was directly linked to the decisions to liquidate the domestic flock, which in turn was caused by the removal of the National Wool Act subsidies.[38]

[37] At Exhibit 15 of Vol. 1 of the MLA pre-injury hearing brief at Exhibit AUS-28.
[38] See pages 48-50 of Vol. 1 of the MLA pre-injury hearing brief at Exhibit AUS-28.

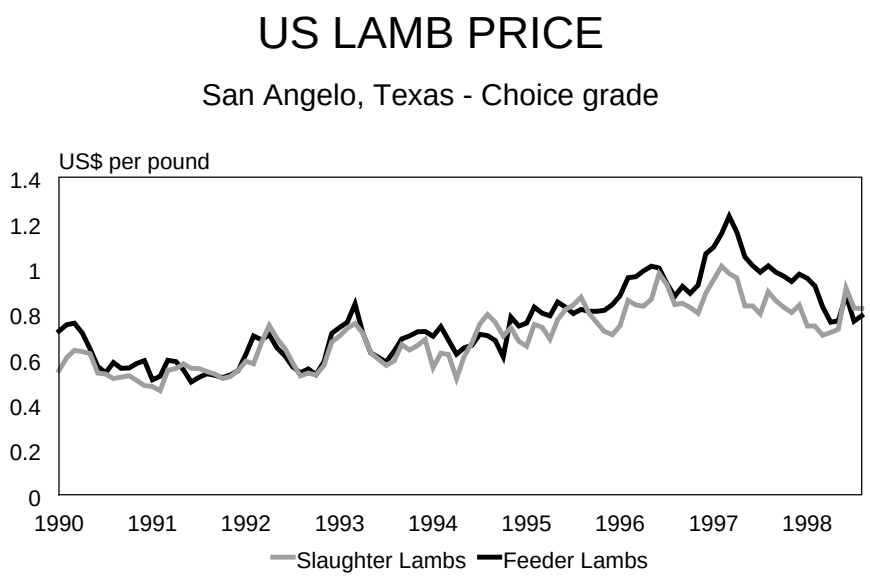
GRAPH 1



3.2.6 Price developments in the US market

48. The flock liquidation resulted in sharply increased lamb prices through 1996 and 1997. Subsequently prices tended to return to more normal levels. However, prices remained in both nominal and real terms above those prevailing in 1993 and 1994. See Figure 3 on USITC II-55. Prices of lamb carcasses followed a similar trend with prices first spiking but then returning to levels that were still above those prevailing in 1993 and 1994. See Figure 5 on USITC II-58. Wholesale price trends for various prices of cuts of lamb meat are shown in Figures 6-10 on USITC II-59 to II-60. These show that prices were relatively flat over the period of investigation, and ended the period above the level in 1993 and 1994.

GRAPH 2



Source: USDA

3.3 US's tariff bindings on lamb meat

49. In the Uruguay Round, the US bound the tariffs on lamb meat in Schedule XX at 0.7¢/kg reducing from 1.1¢/kg in six equal instalments over six years. This tariff concession entered into force on 1 January 1995. The bound level was 0.8¢/kg in 1999 and is 0.7¢/kg in 2000.

4. THE USITC FAILED TO FULFIL THE REQUIREMENT UNDER ARTICLE XIX OF GATT 1994 TO DEMONSTRATE "UNFORESEEN DEVELOPMENTS"

4.1 "Unforeseen developments"

50. Before imposing the measure the US was obliged to demonstrate that:

> "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". [*Emphasis added*.][39]

51. The Appellate Body in Korea - Dairy Safeguard[40] and in Argentina - Footwear Safeguard[41] found that:

[39] GATT 1994 Article XIX:1.

[40] *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products (Korea - Dairy Safeguard)*, Panel Report, WT/DS98/R; Appellate Body Report, WT/DS98/AB/R.

[41] *Argentina - Safeguard Measures on Imports of Footwear (Argentina - Footwear Safeguard)*, Panel Report, WT/DS121/R; Appellate Body Report, WT/DS121/AB/R.

> "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."[42] *[Footnote omitted.]*

52. The Appellate Body in *Korea - Dairy Safeguard* and in *Argentina - Footwear Safeguard* also found that the first clause in GATT 1994 Article XIX:1(a):[43]

> "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."[44]

53. Accordingly, for a Member to apply a safeguard measure consistently with its WTO obligations it is necessary that it has demonstrated, as a matter of fact, that increased imports are causing or threatening to cause serious injury to the domestic industry as a result of "unforeseen developments".

54. The Appellate Body in *Korea - Dairy Safeguard* at paragraph 87 said that

> "The object and purpose of Article XIX is to allow a Member to re-adjust temporarily the balance in the level of concessions between that Member and other exporting Members when it is faced with "unexpected" and, thus, "unforeseen" circumstances which lead to a product "being imported" in "such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers … of like or directly competitive products". "

55. Thus the issue of ' "unforeseen" circumstances ' is a "pertinent issue of fact and law" that has to be demonstrated by the competent authority and included in its report in compliance with SG Article 3.1, which requires that:

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

56. The USITC did not examine the issue and therefore as a matter of fact did not demonstrate this circumstance of "unforeseen developments". Therefore, the US has not acted consistently with its obligations under GATT 1994 Article XIX.

57. While there is no onus on Australia to demonstrate that the circumstance of "unforeseen developments" did not exist, a brief description of the facts in this case make it clear that the situation affecting the "domestic industry" in the US was not the result of unforeseen developments.

58. The long-term decline of the US sheep and lamb meat industries was not new: it was not unexpected. The major cause for the instability in the market and the subsequent reduction in returns to growers was the removal of the National Wool Act subsidies.

59. As set out above in the section on "Support for US growers",[45] the legislation for the removal of the National Wool Act subsidies was enacted on 1 November 1993. Knowledge about what the impact would be was well known to both the American Sheep Industry Association (ASI) and

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[42] At Paragraph 77 of WT/DS98/AB/R. See also Paragraph 84 of WT/DS121/AB/R.
[43] "If, as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions".
[44] At Paragraph 85 of WT/DS98/AB/R. See also Paragraph 92 of WT/DS121/AB/R.
[45] Section 3.2.4.

members of the US Congress. Members of the US Congress as well as the ASI were fully aware that this was going to have a major impact on growers and significantly reduce the flock size. There was no surprise when that actually happened. This was clearly foreseen at the time.[46]

60. On 1 January 1995, the WTO Agreement entered into force for the US. This involved a binding commitment by the US to reduce its tariff from 1.1¢/kg to 0.7¢/kg by 2000. The enactment of legislation removing the National Wool Act subsidies was before that date and the effects of the removal of the National Wool Act subsidies were clearly foreseen at the time.

61. The Appellate Body in *Korea - Dairy Safeguard* and *Argentina - Footwear Safeguard* has found that "unforeseen" developments must be "unexpected" developments.[47] "Unexpected" means: "not expected; surprising".[48] Some volatility in the price of an agricultural product is hardly surprising. Nor is the growth of imports into a market where production is declining. Nor is the decline in production of lambs where the government took the conscious decision to remove a large subsidy programme from an inefficient industry. The USITC Report at II-78 and 79 said:

> " . . . in the early 1990's increases in producer surplus resulting from the Wool Act sometimes exceeded 10 percent of producer revenue. *[Footnote omitted.]* Effects under the Wool Act were not substantial enough to reverse the long-term decline, but it did abate the decline."

62. The removal of the National Wool Act subsidies led to the reduction in lamb production which led to the reduction in domestic production of lamb meat which led to an increase in lamb meat prices. The subsequent cyclical drop in prices to the levels prevailing before the removal of the subsidies was a normal cycle. It was not unexpected: it was not surprising. To allow the combination of any such cycle with an increase in imports over a low bound tariff to trigger safeguard action would undermine the gains of the Uruguay Round in liberalizing markets for agricultural products. Where an industry is in long-term secular decline and is subject to a low, bound rate of duty, increases in imports can only be expected from countries that are more efficient producers of that product and cannot be regarded as being "unforeseen developments".

4.2 Conclusion on "unforeseen developments"

63. The USITC did not look at the issue of "unforeseen developments" and so did not prove that increased imports were threatening to cause serious injury as a result of "unforeseen developments". Accordingly, the US acted inconsistently with its obligations under GATT 1994 Article XIX. Therefore, the measure is not in conformity with GATT 1994 Article XIX and hence also the Safeguards Agreement, in particular SG Article 11.1(a).

5. THE US FAILED TO ACTED CONSISTENTLY WITH ITS OBLIGATION UNDER SG ARTICLE 5 TO ONLY APPLY A MEASURE TO THE EXTENT NECESSARY TO PREVENT SERIOUS INJURY

64. SG Article 5.1 says, *inter alia*:[49]

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[46] See pages 45-48 of Vol. 1 of the MLA pre-hearing injury submission at AUS 28. See also a statement by Senator Baucus on 18 October 1993 at AUS-32.

[47] At Paragraph 84 of WT/DS98/AB/R, and Paragraph 91 of WT/DS121/AB/R.

[48] NSOED - New Shorter Oxford English Dictionary CD version, January 1997.

[49] This demonstration that the US acted inconsistently with its obligations under SG Article 5.1 is without prejudice to Australia's claims that the measure is not in conformity with other provisions of GATT 1994 Article XIX and the Safeguards Agreement, including SG Article 4, and so had no right under the Safeguards Agreement to impose any measure.

> "A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment."

65. Since the basis for the USITC injury determination was "threat of serious injury" (i.e. in the future), the issue is what (if any) measure was necessary to prevent serious injury being caused by increased imports in the future. The US had to have demonstrated that the measure chosen would be applied: "only to the extent necessary to prevent . . . serious injury and to facilitate adjustment".

66. The Appellate Body found in *Korea - Dairy Safeguard* that:

> "the first sentence of Article 5.1 imposes an *obligation* on a Member applying a safeguard measure to ensure that the measure applied is not more restrictive than necessary to prevent or remedy serious injury and to facilitate adjustment."[50]

67. Thus the US was obliged "to ensure that the measure applied was not more restrictive than necessary . . . ". The only way in which the US could have met that obligation was if it had reached a finding, before imposing the measure, that the measure met the requirements of the first sentence of SG Article 5.1. Therefore, the US was obliged to have justified the measure applied before the decision to impose the measure. This is a critical issue of fact and law under the Safeguards Agreement and so is a "pertinent issue of fact and law" under SG Article 3.1.

68. The US has not been prepared to produce any such justification and it can only be presumed that it does not exist. Accordingly, Australia submits that the Panel should conclude that such a justification did not exist and that the US breached its obligations under SG Article 5.1. It would not be sufficient for the US to seek to justify its actions after the event. A lack of a formal determination at the time cannot be cured.

69. Australia considers that the onus of proof that such a justification existed lay with the US. If the US had provided such a proof, then it would have been up to Australia to argue that it was invalid.

70. The following argument in the alternative is provided in case the Panel considers that Australia must establish a prima facie case that the measure was not justified under SG Article 5.1 even in the face of the refusal by the US to provide its justification of July 1999.

71. The USITC recommendation to the US President was that a less restrictive measure was sufficient to prevent serious injury from being caused by increased imports. The USITC recommendation was less restrictive because it did not impose an additional in-quota tariff and because the out of quota tariff was much lower.

72. The US imposed large increases in the tariff rate applying within the tariff quota, compared to the bound rate of 0.8¢/kg in 1999 and 0.7¢/kg in 2000, or approximately 0.2 per cent *ad valorem*[51] compared to the 9 per cent safeguard rate for 1999/2000. The tariff quota aimed at effectively limiting imports at levels where no injury was being experienced by the "domestic industry". Given the unanimous finding of the USITC that no serious injury was being caused by this level of imports, there is no conceivable basis for imposing an additional tariff on product coming within quota. Such an additional impost goes well beyond the extent necessary to prevent the occurrence of serious injury.

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[50] At Paragraph 96 of WT/DS98/AB/R.
[51] At USITC II-8.

73. The USITC recommendation was for an out of quota tariff of 20 per cent in the first year whereas the measure provides for an outside tariff of 40 per cent. SG Article 5.1 is a necessity test and so the US cannot simply impose a higher tariff than is necessary to prevent injury. The USITC found that a 20 per cent out of quota tariff would be sufficient. The arbitrary imposition of a level twice that, as imposed by the US President, was clearly in excess of what was necessary. The final out of quota tariff rate of 24 per cent in the third year compares to the 15 per cent recommended by the USITC, and is still higher than that recommended by the USITC for the first year.

74. Therefore, the measure imposed by the US went far beyond the recommendation of the USITC and so, on the basis of its own competent authority's finding, was not necessary to prevent serious injury being caused by increased imports.

75. Turning to the USITC recommendation itself, the recommended measure aimed at effectively limiting the level of trade in 1999/2000 to that achieved in calendar year 1998 with a small increase for the subsequent years. However, the USITC found that the level of imports in 1998 was not causing injury. If this level of imports was not causing injury then it **could not have been necessary** to restrict imports to that level. No objective analysis is given of what level of quota would have been **necessary**, but it would have had to be greater than the 1998 level of imports. SG Article 5.1 is clear that the US had to ensure that the measure was **necessary**, not merely that it was **sufficient**.

76. The USITC does not objectively analyse why the recommended measure was necessary to prevent serious injury being caused by increased imports for each of the industry segments[52] that make up the "domestic industry". Each segment will be affected differently by an import restriction. Moreover, the USITC did not seek to weigh the impact of the recommended measure on the various segments to obtain an overall view of the impact on the "domestic industry" as a whole.

77. A safeguard measure can only be applied to the extent that it is remedying or preventing injury from being caused by the increased imports. It is not a means of increasing protection generally. Where there is injury, including injury in the future due to threat, the Member can only apply a measure that offsets the injury caused, or to be caused, by the increased imports. An analysis is required of the injury so that the measure is at most proportionate to the share of the injury, which is attributable to increased imports. Such an analysis requires the Member to cumulate other causes of injury to determine the extent of serious injury attributable to increased imports. The necessity test of SG Article 5.1 then requires that any safeguard measure only be applied to the extent necessary to prevent that injury. The exceptional nature of safeguard measures calls for particular care in the determination of what is necessary and must be the least trade restrictive option available. The USITC Report failed to perform such an analysis and so could not have been used to justify even its own recommendation. This is, of course, now hypothetical given that the US did not adopt the USITC recommendation.

78. In addition the US had to demonstrate that the extent of the recommended measure itself was necessary to facilitate adjustment by the "domestic industry". Again, in the absence of a report explaining the basis for the measure imposed, there has been no demonstration that the measure was necessary to facilitate adjustment.

79. The USITC Report would not be sufficient to justify the actual measure, since the measure is more restrictive than its recommendation. Moreover, the USITC Report does not meet the requirements of SG Article 5.1 even for its own recommended measure. There is no objective

[52] The USITC expression "industry segment" is used in this Submission to maintain consistent language. This is without prejudice to Australia's view of what constitutes the "domestic industry" under SG Article 4.1(c) in this dispute.

analysis of why the measure was necessary, what the impact would be for the various industries, and whether the USITC sought to weigh the impact on the various industries.

80. A tariff quota cannot help all the industry segments and runs the risk of destabilizing the market. The industry segments are faced with the reality of long-term declining consumption and production. A temporary increase in domestic prices due to a tariff quota combined with restricted availability of Australian and New Zealand product, which is serving to grow the market,[53] will only serve to accelerate the decline in the demand for lamb meat. The US has manifestly failed to show how even the USITC recommended measure this would facilitate adjustment for the "domestic industry".

81. Therefore, the US acted inconsistently with SG Article 5.1 and so the measure is not in conformity with the Safeguards Agreement. Such an inconsistency cannot be cured by a subsequent evaluation of what measure was necessary.

6. THE US ACTED INCONSISTENTLY WITH THE REQUIREMENTS UNDER SG ARTICLE 3.1 ON INVESTIGATIONS AND PUBLIC REPORTS

6.1 The investigation did not stop with the USITC Report

82. The US legislation requires the US President to reach a decision on a recommendation by the USITC within 60 days. The only apparent exception to this is where the US President asks for a supplemental report from the USITC, in which case under Section 203 (a)(4)(B), the US President has 30 days from the receipt of the supplemental report.

83. The USITC reported to the US President on 5 April 1999. Accordingly, the US President had until 4 June 1999 to make his decision. The actual decision was not made until 7 July 1999.

84. Clearly the issue of the nature of the measure to be imposed was subject to further intensive investigation by US agencies. This is confirmed by US media.[54] However, no such further work by the USITC or any other US agency have been made public by the US.

6.2 The US failed to act consistently with its obligations under SG Article 3.1 regarding investigations subsequent to the USITC Report

85. SG Article 3.1 says that:

> "A Member may **apply** a safeguard **measure only following** an **investigation by the competent authorities** of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. . . . " *[Emphasis added.]*

It then goes on to set out further requirements for that "investigation".

86. The object and purpose of SG Article 3 are to ensure that governments can not undertake safeguard investigations in a black box, i.e. that they cannot impose measures following a secret, internal investigation.

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[53] See for example, the last line on I-34, where the USITC notes that the continuing efforts by the Australian and New Zealand producers to increase lamb consumption in the US have substantially benefitted all lamb producers, including the domestic industry.

[54] For example, report at pages 7 and 8 of Inside US Trade of 18 June 1999 at Exhibit AUS-33.

87. The word "investigation" means:

"1. The action or process of investigating; systematic examination; careful research

2. An instance of this; a systematic inquiry; a careful study of a particular subject"[55]

This is not limited to inquiries involving data gathering.

88. The NSOED defines "following" (as a preposition) to mean:

"As a sequel to or consequence of; coming after in time."

89. To take the second meaning ("coming after in time"), would be to say that once the report of the SG Article 3.1 investigation has been made, the government of the Member is not bound to abide by it but can have a further investigation outside the requirements of SG Article 3.1. This would render the provision meaningless for the purpose of transparency and affording Members the ability to defend their rights under the WTO.

90. Accordingly, its interpretation is that the **application** of a measure ("apply a safeguard measure") has to be as a **consequence** of the findings of the investigation. Thus, it applies to all issues of fact and law through to the application of the measure, not just the injury determination but also the justification of the measure applied that is required under SG Article 5.1.

91. On the question of when does the "investigation" under the Safeguards Agreement finish, the Committee and Secretariat practice here is instructive. Under the G/SG/N/9/- series, the Committee publishes: "Information to be Notified to the Committee where a Safeguard Investigation is Terminated with No Safeguard Measure Imposed". In three cases where an affirmative determination was followed by a decision not to impose a measure, the notifications were regarded as terminations of an investigation without the imposition of a measure,[56] i.e. the investigation process under the terms of the Safeguards Agreement can go on beyond the initial report by the investigating authority.

92. There is no basis for limiting the scope of SG Article 3.1 to some preliminary stage of the complete investigation. If a Member could arbitrarily limit what is to be an "investigation" under SG Article 3.1, then it could leave any aspect of it to an internal inquiry at some later date.

93. Australia submits that the determination of the measure is a key issue that must be covered by the investigation procedures of SG Article 3. The US was not allowed to conduct further investigations, collect information or other facts without giving parties the opportunity to defend themselves in accordance with the published procedures provided for under SG Article 3.1.

94. A country's domestic arrangements cannot be used to avoid obligations under the WTO. The US could have published a report on the actual decision. Of course, where the recommendation of the USITC, or a less restrictive measure, is adopted, there would be no need.[57] But where that is not the case, then there is a requirement under the Safeguards Agreement to publish a report on the decision as "a pertinent issue of fact and law".

95. Moreover, if the US carried out a further investigation to justify the measure, then it would also be in breach of its obligations under SG Article 3.1 on the establishment and publication of

[55] NSOED.
[56] G/SG/N/9/AUS/1, G/SG/N/9/IND/2, and G/SG/N/9/KOR/1 at Exhibits AUS-21-23.
[57] This is without prejudice to Australia's views on the USITC determination and Report under other provisions of the Safeguards Agreement and the GATT 1994 Article XIX.

procedures for investigations, the nature of those investigations and the publication of a report of the investigation on all matters of fact and law.

6.3 The US failed to act consistently with its obligations under SG Article 3.1 to publish the justification for the measure

96. Australia recognizes that the Appellate Body in paragraph 151(d) of *Korea - Dairy Safeguard* said that it:

> "reverses the Panel's broad finding in paragraph 7.109 of its Report that Article 5.1 requires a Member to explain, at the time it makes its recommendations and determinations concerning the application of a safeguard measure, that its measure is necessary to remedy serious injury and to facilitate adjustment, even where the particular safeguard measure applied is *not* a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years"

However, in this context the Appellate Body restricted itself to finding what obligations SG Article 5.1 imposes on a Member about justifying its action. The Appellate Body did not in this context address the obligations under other provisions of the Safeguards Agreement, in particular SG Article 3.1. Moreover, the second sentence of SG Article 5.1 does not apply to this measure, which is not a quantitative restriction.

97. The panel report in *Mexico - HFCS*[58] says at paragraph 7.104:

> ' . . . at the point of preliminary or final determination, when a stage of the process of investigation is completed, the investigating authority reaches its conclusions based on the information and arguments developed to that point in the investigation, and preliminary or definitive anti-dumping measures are either imposed or not. The parties', and the public's, interest in a full understanding of the reasons for the imposition of measures, or of a negative determination, is much greater, and the requirement in Article 12.2 that the investigating authority set forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material" is directed at that interest. Footnote 592: *See Korea-Anti-Dumping Duties on imports of Polyacetal Resins from the United States* (*Korea-Resins*), ADP/92, adopted 27 April 1993, BISD 40S (*Korea-Resins Panel Report*), paras. 209-210, where the Panel noted that the purpose of the requirement for explanations of final determinations in public notices under Article 8:5 of the Tokyo Round Anti-Dumping Code was transparency, that this purpose would be frustrated if, in dispute settlement, the country imposing the measure could rely on reasons not set forth in the public notice, which latter would be inconsistent with orderly dispute settlement, because a full statement of reasons "enabled Parties to the Agreement to assess whether recourse to the dispute settlement mechanism…was appropriate…".'

98. This emphasises that the importing Member's government must comply with the "investigation" requirements on all aspects of the measure and provide a public notice of its reasons, including the justification for the actual measure imposed.

99. Accordingly, the US has acted inconsistently with its obligations under SG Article 3.1 to publish its reasons for the measure imposed.

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[58] *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* (*Mexico - HFCS)*, WT/DS132/R.

6.4 Conclusions on the obligations on investigations and public reports

100. The US failed to act consistently with its obligations under SG Article 3.1 in respect to the conduct of any investigation after the USITC Report and also failed to provide a public report on the "findings and reasoned conclusions" for the actual measure imposed. Therefore, the measure is not in conformity with the Safeguards Agreement, and the US has acted inconsistently with its obligations under SG Article 3.1.

7. THE US FAILED TO ACT CONSISTENTLY WITH THE REQUIREMENTS UNDER SG ARTICLE 4 TO DEMONSTRATE THAT INCREASED IMPORTS ARE THREATENING TO CAUSE SERIOUS INJURY TO THE "DOMESTIC INDUSTRY"

7.1 The USITC determination of threat of serious injury was based on a determination of domestic industry inconsistent with SG Article 4.1(c)

101. The concept of "domestic industry" in the Safeguards Agreement derives from the definition in the other two WTO agreements on contingent trade remedies, i.e. the Anti-Dumping Agreement and the Subsidies Agreement[59], i.e.

> "the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products . . . "[60]

102. For the Safeguards Agreement "domestic industry" is defined in SG Article 4.1(c) as:

> '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.'

103. While the Safeguards Agreement does not itself define "like product", the Anti-Dumping and Subsidies Agreements provide authoritative guidance, i.e.

> "Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.[61]

104. Clearly packers and breakers of lamb meat produce like product to imported lamb meat.

105. At I-13, the USITC determined that the "domestic industry" consisted of growers, feeders, packers and breakers. This was on the basis of "like product". The only explanation of this is that:

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[59] The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 and the Agreement on Subsidies and Countervailing Measures, respectively.

[60] Article 4.1 of the Anti-Dumping Agreement. See also Article 16.1 of the Subsidies Agreement.

[61] Article 2.6 of the Anti-Dumping Agreement and Footnote 46 of the Subsidies Agreement.

> "The evidence clearly establishes a continuous line of production from a raw product, live lambs, to the processed product, lamb meat."

and

> "There is also evidence of a coincidence of economic interests between lamb growers and processors."

This analysis was not done to satisfy the requirements of the Safeguards Agreement, but rather being simply consistent with the USITC's past practice, since at I-12 the USITC says:

> "Unlike the antidumping and countervailing duty provisions in title VII of the Tariff Act of 1930, section 201 does not address the issue statutorily. Over the years the Commission *[i.e. the USITC]* generally has taken an approach similar to that developed, and later codified, under title VII. *[Footnote omitted.]* Under that approach, the Commission includes producers of the raw product in the industry producing the processed product if it finds (1) there is a continuous line of production from the raw to the processed product, and (2) there is substantial coincidence of economic interest between the growers and processors. *[Footnote omitted.]*"

106. At I-10 (first full paragraph) the USITC says that:

> "If there are identifiable domestic producers of a product that is "like" the imported product, the Commission is not required to look further for an industry producing products that are "directly competitive" but not "like" the imported products." *[Footnote omitted.]*

107. Accordingly, the USITC defined "domestic industry" on the basis of "like product" rather than "like or directly competitive products". This is confirmed by the discussion by Commissioners Askey and Crawford in Footnotes 7 and 8 at USITC I-8&9.

108. The USITC does not provide any explanation how it would justify its determination of "domestic industry" under the Safeguards Agreement in light of the requirements of SG Article 4.1(c). The US has provided no argument, beyond USITC practice and US anti-dumping/countervailing statute, why a lamb produced by a grower or a feeder should be regarded as being "like product" to the lamb meat being imported from Australia and New Zealand that is subject to the safeguard measure.

109. Indeed, the USITC found that:

> " . . . **the** domestic product "like" the imported lamb meat is domestically produced lamb meat."[62] *[Emphasis added.]*

Accordingly, the USITC found that feeder lambs, lambs for breeding purposes, and slaughter lambs were not "like" imported lamb meat.

110. The USITC Report says: "[e]xcept for lambs withheld for breeding purposes, virtually all meat-type lambs are shipped to feeders in the fall".[63] Thus growers of lambs in the US produce lambs for sale to feeders who fatten them before selling lambs to packers for slaughter.

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[62] At the first full paragraph on USITC I-12.
[63] At the second full paragraph on USITC I-13.

111. Growers are producing lambs for breeding purposes and for sale on weaning to feeders for fattening. A lamb that has just been weaned is not yet even ready for slaughter. It clearly is not "alike in all respects" to lamb meat. Indeed, it has quite different characteristics to the product under investigation, which is meat, chilled and frozen, whole carcass, half-carcass, bone-in and bone-out, in a wide variety of cuts. The lamb is alive and even if destined for slaughter will be subject first to being fattened and finished by a feeder and then being slaughtered by a packer before it becomes a carcass. A lamb produced by a grower is in no way interchangeable with a carcass or some cut of lamb meat. Indeed, feeder lambs have different characteristics to slaughter lambs and are not interchangeable with them. Thus lambs produced by growers are not "like product" to lamb meat. Therefore growers do not produce "like product" to lamb meat.

112. Similarly, lambs produced by feeders (i.e. slaughter lambs) again are not "alike in all respects" to lamb meat, and again have quite different characteristics. A slaughter lamb is alive and is in no way interchangeable with a carcass or some cut of lamb meat. It only obtains "characteristics closely resembling" lamb meat after it has been slaughtered. Therefore, slaughter lambs are not "like product" to lamb meat and so feeders do not produce "like product" to lamb meat.

113. While the USITC based its decision on the definition of the "domestic industry" on "like product", the same error would apply if it had in fact used "directly competitive" as the criterion. Clearly, two products are "directly competitive" only if they compete in the market place. This is confirmed, for example, by the Appellate Body in *Japan - Taxes on Alcoholic Beverages*, in the context of looking at "directly competitive or substitutable".[64]

114. In respect of growers, feeder lambs do not compete in the market with carcasses or primal and subprimal cuts. Neither do lambs for breeding. The markets for lambs for breeding and for feeder lambs are each quite different from that for lamb meat. Therefore, growers do not produce product that is directly competitive with lamb meat.

115. Similarly, slaughter lambs do not compete with the output of packers and breakers, since they are the major input for packers. Thus slaughter lambs are not directly competitive with lamb meat. Therefore, feeders do not produce product that is directly competitive with lamb meat.

116. Accordingly, growers and feeders are not part of the "domestic industry" as defined in SG Article 4.1(c), which should be composed only of packers and breakers. Therefore the determination by the USITC is wrong and the incorrect "domestic industry" is used in its injury determination and in any assessment under SG Article 5.1 as to what measure was necessary to prevent or remedy serious injury and to facilitate adjustment.

117. If the Panel agrees that the USITC was in error in including growers, or in including growers and feeders, as part of the "domestic industry", then the Panel should find that the USITC's injury investigation is irremediably flawed. In that case, the Panel should find that the imposition of the safeguard measure was inconsistent with the US's obligations under SG Article 4.

118. In the alternative, Australia will proceed to demonstrate that even if the "domestic industry" is considered to include all four industries, the action by the US does not meet the requirements of SG Article 4.

[64] At page 25 of *Japan - Taxes on Alcoholic Beverages*, Appellate Body, WT/DS8/AB/R.

7.2 The USITC determination of threat of serious injury was not supported by evidence obtained in the investigations as required by SG Article 4.2

119. The Panel has the responsibility under DSU Article 11 to "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". The conclusion[65] of the panel in *Korea - Dairy Safeguard* at paragraph 7.30 was that:

> "We consider that for the Panel to adopt a policy of total deference to the findings of the national authorities could not ensure an "objective assessment" as foreseen by Article 11 of the DSU. This conclusion is supported, in our view, by previous panel reports that have dealt with this issue. *[Footnote omitted]* However, we do not see our review as a substitute for the proceedings conducted by national investigating authorities. Rather, we consider that the Panel's function is to assess objectively the review conducted by the national investigating authority, in this case the KTC. For us, an objective assessment entails an examination of whether the KTC had examined all facts in its possession or which it should have obtained in accordance with Article 4.2 of the Agreement on Safeguards (including facts which might detract from an affirmative determination in accordance with the last sentence of Article 4.2 of the Agreement on Safeguards), whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of Korea. Finally, we consider that the Panel should examine the analysis performed by the national authorities at the time of the investigation on the basis of the various national authorities' determinations and the evidence it had collected. . . . "

120. This emphasises in particular that the Panel needs to assess objectively whether the US met its obligations in examining the data that it had collected. However, the Panel also has the responsibility to decide whether the US met its obligations in collecting the right data to allow it to make a determination in conformity with the requirements of the Safeguards Agreement, and in particular SG Article 4.

7.2.1 The USITC made some use of USDA data, which was inconsistent with its own questionnaire data

121. At I-18-19, USITC Report said that:

> "We note that questionnaire data from all industry segments generally showed more positive trends on such indicators as production, shipments, and employment than USDA data. *[Footnote omitted.]* As discussed above, since USDA data are more comprehensive, where possible we have relied more heavily on USDA data and given less weight to questionnaire data."

122. The USITC uses both its own survey data, in particular the responses to questionnaires sent to enterprises in the "domestic industry", and USDA data. It uses the USDA data selectively, which can amount to picking and choosing data to support the case. On the other hand, the questionnaire data is not comprehensive and is not based on statistically valid samples. Neither does the questionnaire data objectively support the USITC's determinations.

[65] This was also confirmed by the Appellate Body in *Argentina - Footwear Safeguard* at paragraphs 116 and 117.

123. The USITC at the first and third paragraphs on I-17 seeks to argue that USDA data are better. This rationalization is not compelling, especially for a finding of "threat of serious injury". For example, in the first paragraph on I-17 the USITC said:

> "A main reason for this is that our questionnaire data have a survivorship bias in that we did not obtain responses from those establishments that exited the market. Indeed, it stands to reason that those establishments that survive are relatively more competitive for a variety of reasons."[66]

124. This dispute, however, is not about whether the USITC found that there was serious injury - the USITC found that there was no serious injury. Threat of serious injury has to be based on a demonstration that serious injury will occur imminently. But "serious injury" can only be "serious injury" to growers that are still in the "domestic industry", and the USITC says that it "stands to reason" that the survivors are "more competitive" than those that have exited. The threat of serious injury must be demonstrated in respect of those survivors, not those that have left the industry.

7.2.2 Inadequacy of the evidence, especially from growers, on "domestic industry" performance

125. There are four basic types of production involved in the "domestic industry", i.e. growers, feeders, packers and breakers. However, for data on financial conditions, capital expenditure, research and development, and investment, the USITC Report looks at two additional segments of grower/feeders (i.e. feedlots that also grow some feeder lambs) and packer/breakers (i.e. firms that are both packers and breakers). Grower/feeders that do not purchase feeder lambs, are included as part of the grower industry for the presentation of financial data and analysis in the USITC Report.

126. For each segment, the USITC failed to support its conclusions with adequate evidence. Without adequate evidence on the "position" of the "domestic industry" it was impossible for the USITC to "demonstrate[ ] 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" as required by SG Article 4.2(b).

7.2.2.1 Growers

127. In the case of growers, the USITC did not attempt to obtain a valid picture of the position of this industry segment. At paragraph 2 on USITC I-17 it said:

> "We note that the sheer size and nature of the grower segment (there were over 70,000 growers in 1997) made it impossible to canvass a large percentage of the industry or even to develop the kind of statistically valid sample used for smaller, less dispersed industries. To obtain financial and other data on grower operations, we sent questionnaires to 110 firms and individuals believed to be among the larger growers of lambs. We received usable data from 57 firms or individuals accounting for an estimated 6 percent of domestic lamb production. *[Footnote 65 omitted]"*[67]

128. When it comes to the USITC's assessment of the financial condition of growers, the number is reduced to just 49 growers accounting for an estimated 5% of the lamb crop in 1997.[68] Moreover,

[66] Nowhere does the USITC justify this implication that it received so few replies because of growers exiting. It does not stand to reason that half of the growers to whom the USITC sent questionnaires had exited the "industry". If that were the case, why did the USITC not find some other growers, out of a population of 70,000 who had not exited?

[67] Note that at paragraph 3 on USITC II-11, this figure of 110 appears to include grower/feeders.

[68] At paragraph 1 on USITC II-24.

even these 49 include 7 grower/feeders who indicated that they fed only their own live lambs.[69] Of these 49, the data from a further 4 growers was excluded from the Jan-Sept 1997 and Jan-Sept 1998 interim data, [70, 71] and the quantitative data for another was estimated from the value data.[72] The USITC recognized at Footnote 87 on USITC II-24 that:

> "The grower data **may not be a representative sample** due to the number of questionnaires received and **the variance of data elements** among the sample growers." *[Emphasis added.]*

129. The data on the number of ewes in the first line of Table 12 on USITC II-25 suggests that the growers on which interim data are provided may account for only around half the production of the 49 chosen, i.e. for only 2 to 3% of the total domestic market. Thus the assessment of the financial condition of the "domestic industry" in 1998 so far as growers are concerned is based on a trivial proportion, 45 growers out of 70,000 accounting for less than 3% of production of lambs.

130. It would seem from the relative number of feeder lamb sales and slaughter lamb sales,[73] that the growers who also feed their own lambs account for around 40 per cent of the lambs grown for meat by this selection of growers. Since the profitability of the various segments are not synchronized such a mix of data is of little value.

131. The fact that out of the trivial proportion of growers sent questionnaires less than half responded with financial data for Jan-Sept 1998 means that the data is even more unreliable. Apart from the fact that the data has no statistical validity, a reasonable scenario would see the least profitable growers responding to questionnaires, since they would be the strongest proponents for protectionist measures on imports.

132. Financial information is given on the basis of the financial years used by the individual companies.[74] These years are not consistent[75], and so aggregated numbers are also potentially misleading.

133. The questionnaire data relates only to the period of the investigation, i.e. up to September 1998. No quantifiable, forward looking data is collected from growers that would have allowed a prospective analysis to make a finding on the issue of "threat of serious injury".

7.2.2.2 Grower/feeders

134. For grower/feeders, the USITC only obtained data from three firms.[76] The data cannot be analyzed because Table 14[77] is blank, being confidential. However, the first full paragraph on USITC II-29 says that:

> "Interim data were not provided by the firms."

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[69] Footnote 89 on USITC II-29.
[70] See Footnote 1 to table 12 on USITC II-28.
[71] "Interim data" in the USITC Report means data for Jan-Sept 1998 compared with data for Jan-Sept 1997.
[72] See Footnote 3 to Table 12 on USITC II-28.
[73] See Table 12 at USITC II-25.
[74] References to fiscal years and FY1993-97 are in respect of the usage of the responding companies' fiscal periods in the USITC Report.
[75] See Footnotes 79, 80, and 81 on USITC II-24.
[76] At paragraph 1 on USITC II-24.
[77] At USITC II-29.

135. Therefore no data was provided for Jan-Sept 1998,[78] i.e. the latest data is for 1997. Thus it was impossible for the USITC to come to the conclusion that these three firms, let alone any other grower/feeders, were subject to threat of serious injury in 1999.

136. Again there would appear to be no statistical basis for the selection of these firms, and it is unclear what proportion of this segment was covered by the responses to the questionnaire. However, what is clear is that the USITC did not have the valid data to make a finding of threat of serious injury for this section of what it calls the "domestic industry".

7.2.2.3 Feeders

137. No basis for the selection of the 9 feeders is given.[79] The USITC Report claims that they only account for about a third of the slaughter lambs in feedlots.[80] In addition it is unclear what data has been excluded because of the deletion of information in Footnote 82 on USITC II-24.

138. On II-29, the USITC notes that one of the nine feeders went out of business in the interim period for 1998 (Jan-Sept 1998). This makes the data on the financial condition non-comparable to previous periods. Moreover, this is a case of threat of serious injury. There can be no threat of serious injury being caused to a feeder that is no longer in business. To use data from such a feeder is a significant flaw in the USITC Report. The data in Table 15 on USITC II-30-32 are for 9 firms over FY1993-97, but for 7 firms for Jan-Sept 1997 and for 6 firms in Jan-Sept 1998, which severely reduces the validity of any comparison of data over the investigation period.

7.2.2.4 Packers, Packer/Breakers, Breakers

139. As with the data for growers, grower/feeders, and feeders, there is no prospective analysis for these industries, and so the USITC had no basis to find threat of serious injury. Given that these are the actual producers of the like product, lamb meat, it was incumbent upon the USITC to provide a detailed justification of the "threat of serious injury" at least for the packers and breakers that had responded to the questionnaire.

140. The responding packers and packer/breakers account for some 76% of commercial lamb slaughter,[81] but of the 17 questionnaires returned only five responses included detail on packing operations.[82] The financial data is based on two packers and two packer/breakers.[83] While some firms may have gone out of business, the USITC does not explain why it did not pursue the other firms for responses. Neither did it explain why these firms could be regarded as representative of the packers as a whole.

141. For breakers, useable data was provided by only 4 firms. For financial data the USITC relied on what appear to be the same two packer/breakers and just one additional breaker. The USITC Report at II-15 notes that there are "less than ten major firms" that are breakers but not packers. At Footnote 63 on II-15, the USITC quotes an estimate that 75% of lamb carcasses are processed by breakers other than packers. By implication there must be close to 10 **major** breakers and presumably significantly more than 10 who are not classified as major. However, the USITC came up with only one respondent with no explanation of why more could not be obtained. Set against this is the fact that imports of lamb meat other than carcasses and half-carcasses accounted for 95% of US imports in

[78] The aggregation of company fiscal years.
[79] At paragraph 1 on USITC II-24.
[80] At paragraph 2 on USITC II-24.
[81] At the second full paragraph on USITC II-24.
[82] At the second full paragraph on USITC II-14.
[83] At the second full paragraph on USITC II-24.

1997.[84] Moreover, at least some of the carcasses and half-carcasses goes to breakers such as Transhumance. Thus virtually all of the imported product that enters the US market is in the form of primal, subprimal and retail cuts.[85] Yet the producers are represented by data from only one firm.

7.2.3 The "evidence" used by the USITC in its examination of factors listed in SG Article 4.2(a) did not demonstrate threat of serious injury caused by imports

7.2.3.1 The USITC data showed an increase in production

142. The USITC Report says on II-11 that US shipments of lambs by growers responding to questionnaires increased in Jan-Sept 1998.

143. The USITC Report says on II-17 that US shipments by producers of lamb meat increased slightly in Jan-Sept 1998.[86]

7.2.3.2 Imports share of domestic market increased due to decline in domestic production

144. While imports of lamb meat have had an increase in market share of lamb meat due to the decline in domestic production, imports have been filling the gap left by declining production rather than displacing domestic product. Over the period from 1993-97 increased imports accounted for less than a third of the fall in domestic production.[87]

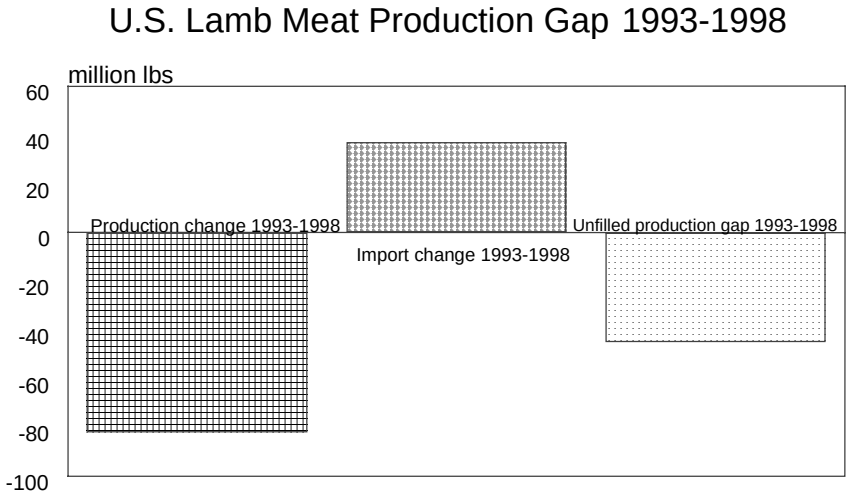
[84] See the first table in Exhibit 8 of Vol. 1 of the MLA pre-hearing injury submission at Exhibit US-28. Imports of carcasses and half-carcasses were only 2,558,550 lbs out of total imports of 54,200,749 lbs in 1997, or 4.7%.

[85] In reality the imported grass fed product is different from that produced by breakers being grass fed and with different cuts. The bulk of it does not compete with US fed product, being sold to distinct markets.

[86] Table 5 at USITC II-17.

[87] At page 27 of Vol. 1 of the MLA pre-injury hearing brief at Exhibit AUS-28.

GRAPH 3



Source: US DOC, Bureau of Customs, IM 145, HTS Codes: 0204100, 0204222, 0204232, 0204300, 0204422, 0204432; ITC Staff Report at II-17.

145. For the purpose of SG Article 4.2(a) imports from Australia and New Zealand have zero market share of feeder lambs and slaughter lambs. Imports from Australia and New Zealand have a share of the market for the product produced by packers and a share of the market for the product produced by breakers. These are different markets with different shares. In addition a share of the imports of product like that produced by packers goes to a breaker such as Transhumance and so are further processed by what the USITC is regarding as the "domestic industry". Accordingly, these imports are contributing to the profitability of such a firm.

146. As with all other sections in the threat of serious injury determination, there was no prospective analysis in this section.

7.2.3.3 Productivity was constant

147. The USITC found that the productivity of growers, feeders, packers, and breakers remained relatively constant over the period of the investigation.[88]

7.2.3.4 Capacity utilization down only because capacity increased

148. The USITC at Footnote 96 on I-20 said that:

> "Collection of capacity and capacity utilization data from growers and feeders was not practical."

149. SG Article 4.2(a) lists "capacity utilization" as one of relevant factors that must be evaluated. It is not for an investigating authority to decide whether it wants to examine a factor. As discussed above the US had an obligation to examine all factors. A reasonable explanation of why the USITC has not done this is shown by the paucity of data collected from growers and from feeders. The

[88] At USITC I-20.

USITC did not collect data on a consistent basis from a statistically valid sample of growers and feeders. This is why it was "not practical".

150. The capacity of packers rose during the latter part of the period of investigation including in the interim period for 1998 (Jan-Sept).[89] Presumably reflecting a profitable business and the ability to raise capital. The fall in capacity utilization in the interim period for 1998 (Jan-Sept) must be seen against the increasing capacity of the packers responding to the survey. The lack of data in the USITC Report makes it difficult to comment on the state of those responding to the survey. However, variations in capacity utilization are a normal part of any business especially a volatile one like the meat packing industry. It is difficult to see what can be read into this.

151. On USITC I-20, it was noted that the capacity of packers was higher in Jan-Sept 1998 than in Jan-Sept 1997 and that the capacity of breakers rose during the investigation period. The USITC recognizes that the reduction in capacity utilization for breakers is the result of increasing capacity:

> "Capacity reported by breakers rose significantly during the period of investigation and at a faster rate than production. **<u>As a result</u>** capacity utilization declined significantly." *[Footnotes 95 and 96 omitted.] [Emphasis added.]*

152. This is hardly the sign of an ailing industry or one that is facing imminent serious injury. Moreover, this reduction in capacity utilization cannot be attributed to increased imports.

7.2.3.5 Profits and losses - some fall in profits as prices return to normal levels

7.2.3.5.1 Growers

153. Even from the financial data presented, what is clear is that while the growers had a better year in Jan-Sept 1997 than Jan-Sept 1998 due to the price spike from the flock liquidation in the mid-1990s, the situation in 1998 was still better than that in 1993 and 1994. In the absence of comparative data for the Jan-Sept period earlier years, it is difficult to see what the comparative profit and loss situation was. Table 12 on USITC II-25 shows that this selection of growers was still profitable over Jan-Sept 1998, and indeed had been profitable over the whole period of the investigation. However, for the period FY1993-96 in every year there was a loss if the payments under the National Wool Act are deducted from net income. It was only with the flock liquidation that the industry temporarily became more profitable. The change in 1998 can hardly be put down to being caused by imports rather than government action.

<u>NET INCOME AND WOOL ACT SUBSIDIES FOR GROWERS IN SELECTED SAMPLE (FISCAL YEARS AND US$ '000)</u>

	1993	**1994**	**1995**	**1996**	**1997**	**Jan-Sept 1997**	**Jan-Sept 1998**
Wool incentive payment	4,105	4,709	2,771	1,437	0	0	0
Unshorn lamb payment	562	604	423	156	0	0	0
Total National Wool Act subsidies	4,667	5,313	3,194	1,593	0	0	0
Net income or (loss) before income taxes	995	2,007	2,078	189	792	3,072	1,522

[89] At USITC I-20.

Net income without National Wool Act subsidy	(3,672)	(3,306)	(1,116)	(1,404)	792	3,072	1,522

Source: Table 12 on USITC II-25.

154. The data on growers showed that those responding to the survey (27) were profitable as a whole in the interim period for 1998 (Jan-Sept). The USITC said that 9 out of the 27 made losses in the interim period for 1998 compared to 7 out of 27 for the interim period of 1997.[90] Thus the USITC conclusion on profit and loss for growers in respect of imminent serious injury in 1999 was based on two further growers making losses in the interim period for 1998. These were only two growers out of more than 70,000 growers. Moreover, the respondents to the survey were self-selecting (to the extent that they were in the original sample surveyed) in that only those who wanted import restrictions would have bothered responding. To the extent that 9 out of 27 made losses in the interim period for 1998, the other 18 (i.e. two-thirds of the respondents) were profitable.

155. No proof is given for why these figures should be taken to show threat of serious injury, i.e. that there would be in the very near future serious overall impairment of the position of the industry segment. Moreover, the anecdotal type of so-called evidence that the growers that were asked and responded to the USITC said that low priced imports would erode profit margins[91] cannot be taken as anything but self-serving allegations with no merit for a safeguard investigation. SG Article 4.1(b) is explicit that:

> "A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility."

7.2.3.5.2 Grower/feeders

156. It is not possible to evaluate the information provided on the grower/feeders, since all that was provided is:

> "The combined firms incurred losses in 1993 and 1997.[92]

This suggests that at least some of the firms made profits in FY1997. In any case, information about FY1997 cannot be used to prove that there would be serious injury in 1999.

157. No interim data was provided by the reporting grower/feeders, i.e. the latest data was for FY1997. The USITC could not have used this data to make any assessment about imminent serious injury in 1999. It also begs the question why those firms responding did not provide such data. It would be reasonable to conclude that this was because it did not support the petitioners' case for safeguard action. No meaningful conclusions should have been drawn by the USITC on this.

158. The USITC at II-29 did say that net losses were incurred in FY1997. Presumably this was due to the simple variation of the margin on feeder and slaughter lambs. Something that will always occur in this industry segment. Such a variation between spring and fall of 1997 says nothing about imports going to cause serious injury some time in 1999.

[90] At Footnote 88 on USITC I-20.
[91] At Footnote 88 on USITC I-20.
[92] At first full paragraph on USITC II-29.

7.2.3.5.3 Feeders

159. The data for feeders is inconclusive so far as threat of serious injury is concerned. The figures indicate a high degree of volatility for these firms. The data does show a loss for Jan-Sept 1998 down on a profit in the same period for 1997. However, that loss is due to a fall of more than US$21.26 per slaughter lamb compared to only US$6.70 per feeder lamb, the major expense. This type of short term change in price differentials where there are lags between purchasing inputs and selling the product are common in all industries and well known in livestock industries. They are an integral part of market cycles. It says nothing about threat of serious injury in 1999 and beyond.

160. This was clearly a short run phenomenon, which would be expected to be corrected in future periods. The profit situation for feeders is highly dependent on the differential between the cost of feeder lambs and the subsequent sale price of slaughter lambs some 2-4 months later. The normal price transmission where there are upstream and downstream industries with livestock cycles entail that there are leads and lags in price movements. This was recognized, for example, in the third full paragraph on USITC II-14.

7.2.3.5.4 Packers, Packer/Breakers, Breakers

161. Even though these are the firms that produce the like product, the USITC does not indicate whether there was any attempt to follow up with the firms to whom questionnaires had been sent to seek responses or to obtain improved data from those who replied. The limited response to questionnaires supports the view that much of this part of the "domestic industry" was not suffering from serious injury or threat thereof. Clearly there was only limited support for the Section 201 investigation even in this more concentrated area of the "domestic industry".

162. On USITC II-29, it is noted that for packers the cost of lambs followed a similar trend to that of the sales value of the lamb meat. That makes economic sense and underlines the lack of a basis for finding threat of serious injury from increased imports.

163. The same comment was made for breakers on USITC II-33, i.e. that the cost of goods followed the same trend as the sales value. Again this indicates the lack of a basis for finding threat of serious injury from increased imports.

164. If prices received for lamb meat, carcass or cuts, fall, then this will be reflected in the price that will paid by the packer or breaker for their input. Nowhere has the USITC sought to demonstrate that the normal, rational economic behaviour of private firms has been suspended for packers and breakers. This is not the basis for a finding of serious injury going to occur imminently in 1999.

165. The USITC claims on I-20 that two witnesses at a hearing reported difficulties in the packer and breaker segments in "recouping new investments in plant and equipment and in repaying loans." This is not the type of situation requiring emergency safeguard action. If every time a firm that had expanded capacity and did not immediately meet its profit targets could get safeguard protection, there would be little trade going on.

7.2.3.6 Employment increased for growers, was steady for feeders, but was not examined for packers and breakers

166. Employment is one of the relevant factors that the competent authority must consider under SG Article 4.2(a).

167. The comments for growers based on USDA data on USITC I-18 refer only to the period 1993 - 1997. These are of no relevance to a finding of threat of serious injury in 1999 and beyond.

168. Table 11 on USITC II-23 showed that production and related workers (PRWs) for growers **increased** between Jan-Sept 1997 and Jan-Sept 1998 with only a small decline in hours worked. The PRWs were steady for feeders over the same period again with only a small decline in hours worked. In both cases there had been significant growth in PRWs and hours worked over FY1993 to FY1997.

169. Footnote 78 on USITC I-18-19 notes that:

> "production reported by packers fluctuated during the period of investigation, production reported by breakers trended upwards during the period of investigation, and production reported by growers also rose during the period of investigation. Similarly, the number of employees reported by growers increased by 9% between 1993 and 1997 and rose a further 4% in Jan-Sept 1998."

170. The USITC chose not to analyse employment for packers and breakers[93] despite the requirements of SG Article 4.2(a).

7.2.3.7 Capital expenditure and fixed assets increased over the period of the investigation

171. Tables 20 and 21 on USITC II-34 and 35 show that during the period FY1993-1997, the reporting growers were increasing their capital expenditure and their fixed assets. The data for the periods Jan-Sept 1997 and Jan-Sept 1998 are meaningless for comparison purposes because they are not comparable with data in the periods FY1993-1997, since some growers did not report for Jan-Sept 1998.

7.2.3.8 The failure to show that there was a "significant overall impairment of the position of the domestic industry"

172. The USITC was required to prove on the basis of facts that in the absence of a safeguard measure there would be serious injury to the "domestic industry", i.e. that there would be "significant overall impairment of the position of the domestic industry." However the USITC Report does not mark out the basis on which it distinguished between serious injury and the threat of serious injury. The concept of "threat of serious injury" is not a matter of a lower threshold for "serious injury" or a lower standard of proof about existence. The two concepts are distinct and require separate and different consideration. The standard of injury for "threat of serious injury" is the same as for "serious injury" and requires proof that it is clear that it will occur imminently.

173. As a consequence of the definition of "domestic industry" used, the USITC was obliged to prove that there would be a "significant overall impairment in the position" of the producers in all the industry segments (growers, feeders, packers, and breakers) as a whole. To comply with the requirements of the SG Article 4, the USITC had to examine each industry segment.

174. The USITC did not make a case that would be "significant overall impairment in the position" in each of the various segments. The paucity of the data meant it could not have carried out such an analysis even if it had tried to.

175. The USITC simply said that:

> "These USDA data show an industry that has experienced a contraction over the period of investigation. Data on other industry indicators, in particular questionnaire data on the declining financial condition of the industry, exacerbated by declining

[93] See the section on employment on USITC II-23.

> lamb prices at the end of the period of the investigation, show that the domestic industry is threatened with serious injury -- that is, that serious injury is imminent." [94]

and

> "In view of the declines during the period of investigation in the domestic industry's market share, production, shipments, profitability, and prices, among other difficulties that the domestic industry is facing we conclude that it is threatened with imminent serious injury." [95]

176. Because the injury determination was not based on facts with prospective analysis but rather on conjecture, there is no attempt at a quantitative assessment. Thus there is no demonstration that any impairment would be "significant", i.e. "important".[96] The USITC makes no attempt to weigh the "imminent serious injury" in terms of the various segments that it determined constituted the "domestic industry".

177. Therefore, the USITC did not demonstrate that "significant overall impairment of the domestic industry" would occur. Therefore the finding of threat of serious injury was not in conformity with SG Article 4 and so the measure is not in conformity with the Safeguards Agreement.

7.2.4 Illogical conclusions from the evidence obtained regarding injury

178. The USITC recognized that the data was not representative. The USITC Report records no attempt to pursue firms to obtain more comprehensive data on the various industry segments. Information on the various industry segments is only to September 1998 and in some cases only to 1997. On the basis of its evidence the USITC found **unanimously** that serious injury was not being experienced by the "domestic industry".

179. There were no reasoned conclusions put forward why there would be serious injury. A conclusion on the basis of unrepresentative data, which found no serious injury and was at least nine months old by the time of the imposition of the measure, did not provide a logical basis for the US to impose a measure on the basis that there would be future serious injury.

7.2.5 No evidence of threat

180. The data used in the injury analysis was limited to the past state of the various segments of the "domestic industry". Therefore, there could not be any, and there was not any, prospective, objective consideration of the state of the "domestic industry" in reaching a determination of "threat of serious injury".

7.2.6 Conclusions on the adequacy of the evidence to support the USITC's determination under SG Article 4.2

181. The USITC questionnaire data from the "domestic industry" was not collected in a statistically valid manner. The amount of information from growers is trivial and meaningless in the absence of a proper sample. The amount of information from other industry segments is somewhat greater but is still very incomplete. The lack of greater coverage of down stream industry segments is unexplained, as is why a more valid sampling process could not have been used and non-responding firms pursued. It is difficult to see the justification of a safeguard measure where swathes of the

[94] At the first paragraph on USITC I-19.
[95] At the second paragraph on USITC I-21.
[96] NSOED.

"domestic industry" do not support the investigation to the extent of responding to questionnaires. The data that is used is in itself incomplete, e.g. with no interim data for Jan-Sept 1998 for grower/feeders. Data was not collected for some of the factors in SG Article 4.2(a), e.g. capacity utilization for growers and feeders and employment for packers and breakers.

182. No prospective data is collected on the state of the industry beyond anecdotal information such as in USITC Appendix F.

183. The use of USDA data when it supports the case for a measure amounts to picking and choosing data sources. Moreover, the USITC considers that the USDA data might differ because it includes some enterprises that have exited. Those firms should be excluded in any case for the determination of a threat of serious injury being caused by increased imports, since what is at issue is whether serious injury will be caused in the future to those enterprises still in the "domestic industry" at that time.

184. SG Article 4.1(b) emphasises that the determination must be "based on facts". SG Article 4.2(a) requires the evaluation of "all relevant factors of an objective and quantifiable nature". SG Article 4.2(b) requires the determination to be on the basis of "objective evidence". Thus the USITC was required to obtain comprehensive, or at least statistically valid, data on all relevant factors. This included obtaining prospective data about the "position" of each of the "industry segments" and at least explaining how it weighed that evidence. It was not permitted to make a determination on incomplete, unrepresentative data about the past.

185. Therefore, the data used by the USITC was inadequate to reach a determination of threat of serious injury under the requirements of SG Article 4.2.

7.3 The USITC determination of threat of serious injury was inconsistent with the requirements of Article 4.1(b) which requires that the serious injury be "imminent" and the determination of threat of serious injury be "based on facts, not merely allegation, conjecture or remote possibility"

7.3.1 The failure to look to the future to prove threat of serious injury

186. SG Article 4 required the USITC to perform an analysis that increased imports were threatening to cause serious injury within the meaning of SG Article 4.1(b):

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

187. The USITC's analysis was set up to prove serious injury. However, it actually found that the "domestic industry" was not experiencing serious injury. It then simply moved to a finding of threat of serious injury without any analysis of why such serious injury was going to happen, or even what the time frame would be. There is no proof presented that there will be serious injury in the future, let alone that serious injury is imminent, i.e. in the very near future.

188. The USITC concluded that the domestic industry was "threatened with imminent serious injury"[97] before it looked at causation issues. It came to that conclusion by looking essentially at the domestic factors bearing on the state of the "domestic industry". However, without looking at what factors might cause injury in the future, it is impossible to demonstrate threat of serious injury.

[97] At USITC I-21.

Existing (or past) serious injury might be subject to a static analysis. However, threat of serious injury demands a dynamic analysis of what will occur in the near future. This was not carried out by the USITC.

7.3.2 The lack of an analysis that serious injury was "imminent".

189. The USITC was required to have demonstrated, and published its "findings and reasoned conclusions reached on all pertinent issues of fact and law". This included the critical issue of "threat of serious injury" under SG Article 4.1(b). It did not make any demonstration beyond the simple assertions at I-19 (second full sentence) and I-21 (second paragraph).

190. The USITC was required to prove and include the proof in its Report that:

(a) serious injury to the "domestic industry" will occur;

(b) this occurrence is clearly imminent; and

(c) the determination is based on facts.

191. The lack of any such demonstration in the USITC Report means that it must be presumed for this Panel that the USITC did not make such a demonstration, in breach of SG Article 4.1(b).

192. Nevertheless, Australia will show that the US could not have made such a determination.

193. The notion of "threat" is sharply defined here. It does not mean that it might happen, or that there is a possibility of serious injury. Instead it demands proof of **serious injury that is clearly imminent**. This provision exists for circumstances where a large amount of product is about to come over the wharf. SG Article 4.2(b) does not allow a finding of threat of serious injury being caused by increased imports on the basis that the injury might or might not occur in some indefinite period into the future, with a measure to be imposed as a precautionary or protective device.

194. In the NSOED:

> "imminent" is defined as "of an event, esp. danger or disaster: impending, soon to happen".

195. Moreover, the Safeguards Agreement and GATT 1994 Article XIX are about "emergency action". This is the title of GATT 1994 Article XIX. Safeguard measures under the Safeguards Agreement are actions in the sense of GATT 1994 Article XIX.[98] It is also clear from SG Article 11.1(a)[99] that the measure must be "emergency action" to conform with the Safeguards Agreement.

196. The obligation on the US was to have demonstrated that serious injury was obviously going to occur within a very short time, unless a measure was imposed to prevent it.

197. There was no sense of urgency or immediacy in the investigation or the decision making. The petition on which this investigation was based was filed on 7 October 1998 and initiated on

[98] For example, see SG Article 1.

[99] "A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement."

19 October 1998.[100] The injury finding by the USITC was on 9 February 1999. The remedy finding was forwarded by the USITC to the US President on 5 April 1999. While the 60 day time frame for decision ran to 4 June 1999, the actual decision was not made until 7 July 1999 and was effective from 22 July 1999. These delays and missed deadlines underlined that this was not emergency action. Apparently, therefore, there was no **imminent** serious injury.

198. Because an event can only be "imminent" if it is going to happen soon, a finding that an event is "imminent" can only be made in the context of some time frame. In order to have such a finding, the USITC had to have some sense of how soon the serious injury would be caused by increased imports.

199. The USITC Report gives no indication of the time frame in which the USITC believed that the serious injury would occur. In consultations under both SG Article 12.3[101] and DSU Article 4,[102] the US did not provide any further elaboration on what it considered that "imminent" means or what was meant by the USITC in this case.

200. The USITC Report was essentially based on "domestic industry" information relating to the period up to 30 September 1998, and for some companies information was only provided to their 1997 fiscal years. The hearing on injury was on 12 January 1999. The USITC vote on injury was on 9 February 1999. The decision on the measure was not made until 7 July 1999 and the measure was not applied until 22 July 1999. This was almost a year after the latest "domestic industry" data on which the US has based its justification. The US President could not have used any information additional to the USITC Report without being in breach of SG Article 3.1.

201. Australia submits that to impose a trade restriction on the basis of a finding of "threat of serious injury" formulated on industry information prior to 30 September 1998 does not conform with the requirements of SG Article 4.1(b) that the serious injury must be "clearly imminent".

202. No reasonable interpretation of "clearly imminent" would allow for such a time period. For example, one authority writes:

> '**Imminent** means "certain and very near, impending," as in the legal phrases **imminent bodily harm** and **imminent death**.'[103]

203. In no jurisdiction would any case of **imminent bodily harm** or **imminent death** be found on the basis of such old information.

204. Paragraph 7.125 of the panel report in *Mexico - HFCS* also says:

> "Moreover, it is clear that in making a determination regarding the threat of material injury, the investigating authority must conclude that "**material injury would occur**" (emphasis added) in the absence of an anti-dumping duty or price undertaking. . . . "

205. Footnote 599 of the panel report in *Mexico - HFCS* note that:

> "The United States cites in this connection *Korea-Resins Panel Report*, para. 271 ("a proper examination of whether threat of material injury was caused by dumped

[100] The date of initiation was retroactively applied to be 7 October 1998.
[101] Question 10 at Exhibit AUS-25.
[102] Question 13 at Exhibit AUS-27.
[103] See entry under "imminent" in *A Dictionary of Modern Legal usage*: Bryan A. Garner, Oxford University Press 1987.

> imports necessitated a **prospect ive analysis of a present situation** with a view to determining whether a 'change in circumstances' was 'clearly foreseen and imminent'") (emphasis added by the United States); *id.* para. 273 (noting that "the Panel. . . examined whether the [investigating authority's] determination [of threat of material injury] included an analysis **of relevant future developments regarding the condition of the domestic industry** and the volume and price effects of the imports under investigation") (emphasis added by the United States)."

206. Thus a determination of threat, where there is no current injury, must be prospective and based on the impact of future increased imports in the absence of a safeguard measure. No such prospective analysis was performed by the USITC. The resulting decision was therefore inconsistent with SG Article 4.1(b).

7.3.3 Conclusions on the inconsistency of the threat of serious injury determination with SG Article 4.1(b)

207. For threat cases, SG Article 4.1(b) calls for a particularly rigorous approach. The serious injury must be clearly imminent and not some allegation or possibility at some indefinite time in the future. This does not leave a "domestic industry" exposed to a long inquiry once serious injury is actually about to occur or is actually occurring, since in critical circumstances a Member has the ability to impose a provisional measure quickly under SG Article 6.

208. The USITC report does not comply with the requirements of SG Article 4.1(b). This error cannot be cured.

209. The USITC did not make a determination that satisfied the requirements of SG Article 4.1(b) that serious injury was imminent. Therefore, the US acted inconsistently with the requirements of SG Article 4.1(b) and the measure is not in conformity with SG Article 4.1(b).

7.4 The USITC determination of threat of serious injury attributed to imports injury caused by other factors contrary to the requirements of SG Article 4.2(b)

210. There has been a continuing long-term secular decline in the production of lamb meat in the US. Over the investigation period of 1993-1997, production fell by 67.2 million pounds (carcass weight equivalent) while lamb meat imports increased by only 19.4 million pounds. Thus there was a gap of 47.8 million pounds.[104] Imports over that period amounted to less than a third of the shortfall in domestic production. Imports were not displacing domestic production in the US market but only preventing an even more drastic decline in consumption. This gap was being left by declining industries due to a number of factors but including the flock liquidation coming from the removal of the National Wool Act subsidies.

211. Australia and New Zealand have been developing the market for lamb meat in the US and seeking to maintain consumption by market development in the face of falling domestic production. For example, the bulk of the increase in imports from Australia was to a new outlet, not displacing US lamb meat.[105]

212. Meat and Livestock Australia (MLA) updated econometric modelling done for the USITC in a 1995 inquiry into the lamb market and provided this to the USITC as part of its pre-hearing

[104] At page 27 of Vol. 1 of the MLA pre-injury hearing brief at Exhibit AUS-28. See also Section 7.2.3 and Graph 3.

[105] See pages 34-36 of Vol. 1 of the MLA pre-injury hearing brief at Exhibit AUS-28.

submission for the USITC's injury phase. This econometric modelling confirmed what the USITC had found in 1995, i.e. that imports of lamb meat were not the cause of the alleged serious injury.[106]

213. The USITC recognized that there was a range of other factors impacting adversely on the "domestic industry" but concluded that these were **individually** "a less important cause of the threat of serious injury". In effect it dismissed without substantiation against objective criteria: the loss of National Wool Act subsidies; competition from other meat products; increased input costs; concentration in the packer segment; and the failure to implement an effective marketing programme for lamb meat.[107]

214. The USITC placed weight on the views of growers, in particular, about the impact of imports, with an opinion survey at II-77 and at USITC Appendix F. Since it was the grower organization that has sought to blame imports for the industry's problems it is not surprising that responding growers express concern about imports. Such anecdotal views cannot be part of an assessment of threat of serious injury, which must be "based on facts and not merely on allegation, conjecture or remote possibility." Moreover, given that growers are in a quite different industry and are only involved in selling wool, lambs for breeding and feeder lambs, they do not compete in the market place with the product being imported, lamb meat. Consequently, their views are necessarily anecdotal.

215. The USITC first concluded that the "domestic industry" was not experiencing serious injury. Then essentially on the basis of the conditions in 1998, the USITC concluded that the "domestic industry . . . is threatened with imminent serious injury."[108] This was in the section on "Serious injury or threat of serious injury" at USITC I-16-21. The USITC then went on in the **subsequent** section on "Causation" at USITC 21-26 to conclude no more than that a further increase in imports "would be expected"[109] or "is likely"[110] to impact on the "industry" without any analysis even of which segment was being referred to. It then asserted that other factors **individually** were less important causes of this supposed "threat of serious injury".

216. SG Article 4.2(b) requires the Member to examine the impact of all other factors taken together not some dismissal of factors one by one. The USITC did not seek to cumulate the other causes to see what the aggregate impact would be.

217. The USITC was obliged to prove that some separate, additional serious injury was going to be caused by increased imports imminently. In the absence of an objective assessment of the impact of all other factors impacting on the "domestic industry", the USITC could not have made an objective assessment that increased imports would cause the serious injury that it alleged would occur.

218. Thus USITC failed to analyse adequately the impact of factors other than increased imports that were threatening to cause serious injury to the "domestic industry". In addition, the USITC by failing to cumulate the impact of such other factors the USITC did not fulfil its obligation to ensure that it did not attribute to increased imports the serious injury being threatened by those other factors. Therefore, the US acted inconsistently with its obligation under SG Article 4.2(b) not to attribute to increased imports the injury threatened by other factors.

[106] See pages 37-42 of Vol. 1 of the MLA pre-injury hearing brief at Exhibit AUS-28.
[107] At USITC I-25 and 26.
[108] At the second paragraph on USITC I-21.
[109] At line 8 of USITC I-24.
[110] At the second full paragraph of USITC I-24.

7.5 Various factors in SG Article 4.2(a) were not considered by the USITC

219. A number of panel reports have made it clear that the US had an obligation to examine each of the factors in SG Article 4.2(a) for the domestic industry, i.e. "the producers as a whole . . . ". See, for example, the two safeguard panels *Korea - Dairy Safeguard* and *Argentina - Footwear Safeguard* at paragraphs 8.123 and 7.55, respectively. A similar conclusion was reached in the panel on textiles and clothing safeguards, *United States - Shirts and Blouses.*[111] Paragraph 7.128 of the *Mexico - HFCS* panel report says:

> "The question which next must be answered is what is the nature of the consideration of the Article 3.4 factors required in a threat of serious injury determination. The text of Article 3.4 is mandatory:
>
> > "The examination of the impact of the dumped imports on the domestic industry concerned **shall include** an evaluation of **all relevant economic factors** and indices having a bearing on the state of the industry**, including**…" (emphasis added).
>
> In our view, this language makes it clear that the listed factors in Article 3.4 must be considered in all cases. There may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required. In a threat of serious injury case, for instance, the AD Agreement itself establishes that consideration of the Article 3.7 factors is also required. But consideration of the Article 3.4 factors is required in every case, even though such consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry or a particular case, and therefore is not relevant to the actual determination. Moreover, the consideration of each of the Article 3.4 factors must be apparent in the final determination of the investigating authority." *[Footnote omitted.]*

220. Thus a determination must involve an examination at least of each of the factors set out in SG Article 4.2(a). Moreover, the nature of a determination of threat of serious injury, where there is no current injury, must be prospective and based on the impact of future increased imports in the absence of a safeguard measure.

221. Finally, there is the definition used by the US for "domestic industry". Since the US includes all the producers in the various industry segments in its definition of "domestic industry", it has to have examined all the segments for prospective injury caused by increased imports. This had to be done for all relevant factors and in particular each of those specified in SG Article 4.2(a). Accordingly, putting to one side the issue of what is the proper definition of "domestic industry" under SG Article 4.1(c), there are critical issues involved in how the US is required to conduct its injury analysis. For example, the panel report in *Korea - Dairy Safeguard* says at paragraph 7.58:

> " . . . Second, as we noted above, the definition of the domestic industry in this case as comprising two different segments of the dairy products market has consequences for the evaluation of the situation of the industry. In assessing the serious injury to the whole domestic industry, we find that it is acceptable to analyze distinct market segments but, as stated above, all factors listed in Article 4.2 must be addressed. In considering each of the factors listed in Article 4.2, and any others found to be relevant by the authority, **the investigating authority has two options: for each**

[111] *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India (United States – Shirts and Blouses)* - see paragraph para. 7.25.

> **factor, the investigating authority can consider it either for all segments, or if it decides to examine it for only one or some segment(s), it must provide an explanation of how the segment(s) chosen is (are) objectively representative of the whole industry**. A lack of consideration of all segments, without any explanation, is a flaw that we find present in Korea's analysis of the domestic industries' profits and losses, prices, debt to equity ratio, capital depletion and production cost. How Korea relates developments in one segment to its determination regarding the industry as a whole is for Korea to decide in the first instance. Our point here is that an analysis of only a segment of the domestic industry, without any explanation of its significance for the whole industry, will not satisfy the requirements of the Agreement on Safeguards. . . . " *[Emphasis added.]*

222. Accordingly, the US was obliged to look at every factor for every industry segment, unless it was prepared to explain the significance of the analysis of one segment for the whole industry. The following table sets out what the USITC found regarding the factors set out in SG Article 4.2(a) in its determination threat of serious injury of the factors.

CONSIDERATION BY THE USITC OF FACTORS IN SG ARTICLE 4.2(A)

	GROWERS	GROWER/FEEDERS	FEEDERS	PACKERS AND BREAKERS
FUTURE	No prospective consideration.	No prospective consideration	No prospective consideration	No prospective consideration
QUALITY OF DATA	Minimal sample. Not a statistically valid sample and data is unrepresentative.	No basis for selection of 3 firms.	No basis for selection of 9 firms.	No explanation why more firms not asked to respond.
LATEST DATA	Jan-Sept 1998	Latest data is for 1997.	Only data from 6 firms for Jan-Sept 1998.	Jan-Sept 1998 .
PRODUCTION	Shipments of lambs increased in Jan-Sept 1998.	Not examined.	Shipments of lambs decreased in Jan-Sept 1998	Shipments of lamb meat increased in Jan-Sept 1998.
MARKET SHARE	Nil market share for Australia and New Zealand.	Nil market share for Australia and New Zealand.	Nil market share for Australia and New Zealand.	Market share for packers only minimally affected by imports from Australia and New Zealand. Also product in this category can go to breakers. Market share for breakers decreased.
PRODUCTIVITY	Relatively constant over investigation period. Poor data.	Not examined.	Relatively constant over investigation period. Poor data.	Relatively constant over investigation period. Labour cost data.
CAPACITY UTILIZATION	Not examined.	Not examined.	Not examined.	Capacity utilization fell in Jan-Sept 1998, against increasing capacity
PROFITS AND LOSSES	Fall in profits in Jan-Sept 1998 because prices fell to more normal levels following price spike in 1996 and 1997 due to flock liquidation. 18 out of 27 respondents profitable in Jan-Sept 1998.	Little data. Some firms made losses in FY1997, so apparently some firms made profits.	Loss in Jan-Sept 1998 due to narrowing of margin between price paid for feeder lambs and sales value for slaughter lambs. No suggestion that that would not return to normal quickly.	Apparently situation for "all industry segments" "worsened" in Jan-Sept 1998. Presumably this includes packers, packer/breakers and breakers.
EMPLOYMENT	Increased in Jan-Sept 1998 .	Not examined.	Steady.	Not examined.

Note: Information from firms responding to the USITC questionnaires.

224. The table shows that the USITC determination was based on totally inadequate data and on few indications of injury. It is not surprising that the USITC found that its "domestic industry" was not experiencing serious injury. However, what is more disturbing is the lack of basis for the USITC to have then gone and found threat of serious injury on the same data without an analysis that there was to be a **major change** in the overall position of the "domestic industry". The USITC determination is seriously flawed and does not comply with the requirements of SG Article 4.[1]

225. The USITC decided not to examine capacity utilization for growers and feeders and not to examine employment for packers and breakers. The panel report in *Korea - Dairy Safeguard* said at paragraph 7.58 in respect of the factors listed in SG Article 4.2(a): "**if it decides to examine it for only one or some segment(s), it must provide an explanation of how the segment(s) chosen is (are) objectively representative of the whole industry**." The USITC did not try to explain how capacity utilization for packers and breakers or how employment for growers and feeders were representative of the whole industry. Indeed, that would be impossible given the nature of the different industry segments. Therefore, the US did not conform with the requirement of SG Article 4.1(a) to examine every factor for the "domestic industry"

226. It is not just a matter of the examination of capacity utilization and employment. While nominally the USITC has looked at other factors, the reality is that not only was that done inadequately for a situation of serious injury, there was no attempt to examine the factors in the context of an examination of whether there was a threat of serious injury.

227. In no case in examining the factors set out in SG Article 4.2(a) did the USITC make a prospective analysis. The USITC looked to the past without examining the future. This made it impossible for it to reach a finding on threat of serious injury.

228. In addition, the USITC gave no indication of what sort of time frame was involved in its determination that each of the various industry segments would actually suffer from serious injury. The USITC had to demonstrate "threat of serious injury" for all of the various segments. However, not even the USITC makes the claim that the market changes impact on each of the segments simultaneously. For example, at I-14[2], the USITC says:

> "While the impact of price changes on profitability in the various segments of the lamb industry can be **staggered in time**, price changes impact on all four segments in a similar manner." *[Emphasis added.]*

229. In looking at the factors listed in SG Article 4.2(a) the USITC has not even tried to show that serious injury was imminent (let alone serious injury being caused by increased imports). It has not explained how, given that the various segments are affected differently by changes in the market, there will be an overall impairment of the "domestic industry".

230. Therefore, the US has acted inconsistently with the requirements of SG Article 4.2(a) and has acted inconsistently with its obligations under the Safeguards Agreement.

7.6 Conclusion on the issue of injury

231. The US failed to act consistently with its obligations under SG Article 4 because:

[1] As will be proved also, the exclusion of certain countries from the cover of the measure is also inconsistent with not only SG Article 2.2 but also SG Articles 4 and 5.

[2] Third full paragraph on USITC I-14.

(a) the USITC's determination of the relevant "domestic industry" was inconsistent with the provisions of SG Article 4.1(c) through the inclusion of enterprises that do not produce the like or directly competitive products

(b) the US did not demonstrate that increased imports were threatening to cause serious injury to the "domestic industry", in particular

(i) the data was inadequate and did not support the determination as required under SG Article 4.2

(ii) the USITC did not meet the requirements of SG Article 4.1(b) that for a finding of threat of serious injury the serious injury must be imminent and "[a] determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility"

(iii) the determination of threat of serious injury, by attributing to increased imports injury caused by other factors, was contrary to SG Article 4.2(b)

(iv) the "evidence" used in its examination of factors listed in SG Article 4.2(a) did not demonstrate threat of serious injury USITC

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

232. Therefore, the US is in breach of its obligations under SG Article 4 and the measure is not in conformity with the Safeguards Agreement.

8. THE US FAILED TO ACT CONSISTENTLY WITH ITS OBLIGATION TO ENDEAVOUR TO MAINTAIN A SUBSTANTIALLY EQUIVALENT LEVEL OF RIGHTS AND OBLIGATIONS WITH AUSTRALIA UNDER SG ARTICLE 8.1

233. SG Article 8.1 says that:

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

234. During the SG Article 12.3 consultations on 4 May 1999 the US did not make any offer to maintain a substantially equivalent level of concessions and other obligations. Australia asked what the US was going to do and the US's response was that:

> "Article 8.3 provides that the right of suspension of the application of substantially equivalent concessions or other obligations shall not be exercised for the first three years that a safeguard measure is in effect."[3]

235. The actual decision on 7 July 1999 imposed a much harsher regime, including an in-quota tariff above the bound rate. Again at the subsequent SG Article 12.3 consultations on 14 July 1999

[3] See the answer to Question 34 asked at the consultations on 4 May 1999 at Exhibit AUS-25.

Australia asked what the US was going to do. The US's oral response was that it interpreted SG Article 8.3 as providing a three year grace period before it would be required to maintain a substantially equivalent level of obligations.[4]

236. SG Article 8.1 imposes a clear obligation on the US to endeavour to maintain a substantially equivalent level of concessions and other obligations. The US's had an obligation to do this in good faith.[5] The US's argument in respect of SG Article 8.3 seeks to render SG Article 8.1 meaningless in the case where there is an absolute increase in imports.

237. Moreover, where there is not an absolute increase in imports, the affected exporter has the right under SG Article 8.2 to take unilateral action and so would have negotiating leverage with the importing Member. Thus, the US's argument would have the effect of writing the obligation under SG Article 8.1 out of the Safeguards Agreement.

238. SG Article 8.3 does not say that the obligation under SG Article 8.1 is suspended for the first three years. It only says that the right to unilateral retaliation under SG Article 8.2 is suspended for the first three years.

239. Under GATT 1947, Article XIX allowed an affected exporter to take unilateral action to maintain a substantially equivalent level of concessions and other obligations. This provided the basis for bilateral negotiations to achieve that end. Article XIX only required the importing country to afford the opportunity for consultations:

> "Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action."[6]

However, in return affected exporters had the right to take unilateral action under Article XIX:3.

240. Under the WTO, SG Article 8.3 removes that right to take unilateral action for the first three years where there is an absolute increase in imports. However, in return SG Article 8.1 imposed an obligation on the US. Any other conclusion would render the text in SG Article 8.1 meaningless. The obligations under SG Article 8.1 are key parts of the trade-off for the suspension of the right to take unilateral action for three years under SG Article 8.3.

241. The difference under the WTO from GATT 1947 is that where a Member does not comply with SG Article 8.1 in the situation of increased imports, an affected exporting Member's only recourse during the first three years is to pursue multilateral action through the DSU, rather than the unilateral action that was allowed under GATT 1947. This applies whether or not the measure itself is consistent with other provisions of the Safeguards Agreement and GATT 1994 Article XIX. The approach of the US is to try to write this provision out of the WTO. Members will only comply with this provision if they must in order to ensure that their measures are in conformity with the Safeguards Agreement.

242. The US has failed to maintain a substantially equivalent level of concessions and other obligations, since

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[4] No written response was provided by the US to Question 9 at Exhibit AUS-26.
[5] See for example Article 26 of the Vienna Convention on the Law of Treaties.
[6] Extract from GATT Article XIX:2.

(a) the duty payable on the trade outside the tariff quota is inconsistent with the US's tariff bindings under GATT 1994 Article II; and

(b) the duty payable on imports within the tariff quota is also in breach of the US's tariff bindings under GATT 1994 Article II.

243. Therefore, the US breached its obligation under SG Article 8.1 to endeavour to maintain such a balance of the level of concessions and other obligations. Moreover, in refusing to discuss this issue, the US also thereby acted inconsistently with its obligations under SG Article 12.3 as explained below.

244. Since the US has failed to abide by SG Article 8.1, it has failed to act consistently with the requirements of the Safeguards Agreement in imposing its measure and so the measure does not conform with the requirements of the Safeguards Agreement. This cannot be subsequently cured, since these are key obligations under the Safeguards Agreement. If a Member could simply defer this until after losing a dispute on the matter, then it would amount to no effective requirement. No Member would have any incentive to abide by SG Article 8.1 thereby writing the provision out of the Safeguards Agreement.

245. Therefore, the US has acted inconsistently with its obligations under SG Article 8.1 and so the measure is not in conformity with the Safeguards Agreement.

9. THE US FAILED TO ACT CONSISTENTLY WITH NOTIFICATION AND CONSULTATION REQUIREMENTS UNDER SG ARTICLE 12

9.1 The US failed to act consistently with the notification obligations under SG Article 12.2 to notify the Committee of the justification for the measure

246. SG Article 12.2 requires that the US "provide the Committee on Safeguards with all pertinent information". However, the US has never provided the Committee with information about the basis for the measure that it actually imposed. Indeed it has never published such information, it has never published any submissions on which the measure was based, and has never provided Australia with any information justifying the measure.

247. This is not specifically called for in the non-exhaustive list set out in SG Article 12.2, and so is not specifically called for in the format set out in G/SG/1. However, SG Article 12.2 says: "**all** pertinent information" "which shall include", i.e. the list in SG Article 12.2 is explicitly not exhaustive. *[Emphasis added.]* Information about the justification of a measure is highly pertinent information. Indeed, it is even more pertinent when the decision-maker has ignored the recommendation contained in the report notified to the Committee. In normal circumstances the published report notified to the Committee contains such information and so a specific extra line was not required in the final notification. However, this was a highly abnormal case where the investigation about the extent of the measure to be imposed was continued in secret and the findings and reasoned conclusions have never been made public let alone notified as required under SG Article 12.2.

248. In addition, the requirement to demonstrate "unforeseen developments" is a pertinent issue of fact and law. This was not notified to the Committee either in the context of the USITC Report or separately. Therefore, this pertinent issue of fact and law was not notified to the Committee in breach of SG Article 12.2, which requires the notification of "all pertinent information".

249. Therefore, the US acted inconsistently with SG Article 12.2.

9.2 The US failed to act consistently with the requirements under SG Article 12.3 for consultations to achieve the objective set out in SG Article 8.1

250. SG Article 12.3 requires that:

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

251. This is a clear, absolute obligation with respect to SG Article 8.1. It is not qualified by limiting the application of SG Article 8.1 to cases where immediate, unilateral retaliation is allowed. However, the US's response to Australia was that:

> "Article 8.3 provides that the right of suspension of the application of substantially equivalent concessions or other obligations shall not be exercised for the first three years that a safeguard measure is in effect."[7]

252. An equivalent oral response was received at the consultations on 14 July 1999 to the effect that the US interpreted SG Article 8.3 as providing a three year grace period before it would be required to maintain a substantially equivalent level of obligations.[8]

253. Under SG Article 12.3, the US had at the very least an obligation to enter into consultations in good faith[9] with a view to achieving the objective of maintaining a substantially equivalent level of concessions and other obligations to that existing under GATT 1994. There was no attempt by the US to achieve this objective. Clearly, it did not make an attempt because it considered that it had no obligation to do anything beyond attending consultations under SG Article 12.3. This is contrary to the clear obligations under SG Article 12.3 to have consultations on this matter in good faith.

254. Therefore, the US acted inconsistently with SG Article 12.3.

9.3 The US failed to act consistently with the notification obligations under SG Article 12.6 regarding the conduct of investigations

255. SG Article 12.6 requires that:

> "Members shall notify promptly the Committee on Safeguards of their laws, regulations and administrative procedures relating to safeguard measures as well as any modifications made to them."

Any measure imposed pursuant to laws, regulations or procedures that have not been notified before initiation of an investigation must be inconsistent with the Safeguards Agreement.

256. On page 1 of G/SG/N/1/US/1 the US notified "the Committee that the authority in the United States competent to initiate and conduct investigations relating to safeguards is the United States International Trade Commission."

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[7] See the answer to Question 34 asked at the consultations on 4 May 1999 at Exhibit AUS-25.
[8] See Question 9 asked at the consultations on 14 July 1999 at Exhibit AUS-26.
[9] See for example Article 26 of the Vienna Convention on the Law of treaties.

257. The decision on the measure took more than three months and the measure imposed was more restrictive than the recommendation by the USITC. Clearly the issue of the nature of the measure to be imposed was subject to further intensive investigation by US agencies no information on which has been notified to the Committee.[10] Therefore, the US acted inconsistently with its obligations to notify such a procedure under SG Article 12.6. Therefore, the US is in breach of SG Article 12.6.

9.4 Conclusions on notification and consultation requirements under SG Article 1-

258. The US acted inconsistently with its obligations under SG Article 12.2, 12.3 and 12.6 and the measure is not in conformity with the Safeguards Agreement.

10. THE US BREACHED ITS OBLIGATIONS UNDER THE SAFEGUARDS AGREEMENT BY EXEMPTING CERTAIN COUNTRIES FROM THE MEASURE

259. The object and purpose of the Safeguards Agreement and GATT 1994 Article XIX are to allow a Member to impose a border restriction to prevent or remedy serious injury being caused by imports. It is not a matter of finding injury and then applying a measure to just some of those imports. SG Article 2.2 is explicit that "[s]afeguard measures shall be applied to a product being imported irrespective of its source."

260. The Appellate Body at paragraph 114 of *Argentina - Footwear Safeguard* said that:

> "We conclude that Argentina, on the facts of this case, cannot justify the imposition of its safeguard measures only on non-MERCOSUR third country sources of supply on the basis of an investigation that found serious injury or threat thereof caused by imports from all sources, including imports from other MERCOSUR member States."

261. The analysis required by SG Article 4 has to be carried out for all imports covered by the injury investigation, and then under SG Article 2.2 the measure has to apply to all such imports. Injury must be caused by imports from those countries to be covered by the measure. The imports from sources not covered by the measure must be considered as other factors under the last sentence of SG Article 4.2(b) in the determination on the existence of serious injury or the threat thereof.

262. At the causation stage, the USITC examined the impact of increased imports from all sources, without any discrimination.[11] In G/SG/N/US/8/3 the US notified the Committee simply that the USITC had made such an injury finding.

263. The remedy finding of the USITC recommended the exclusion from the remedy of Canada, Mexico, Israel and beneficiary countries under CBERA and ATPA although they were included in the injury investigation.[12] The USITC did not revisit the injury determination, and the exclusion, in particular, of Canada, Mexico and Israel was recommended as a result of special conditions under their free trade agreements with the US.

264. The US President accepted the recommended exclusions, which were notified to the Committee in G/SG/N/10/US/3- G/SG/N/11/US/3. There was no explanation of the WTO basis for this.[13]

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[10] If the US claimed that no such investigation occurred, then the US could not use any work that had been done, to justify the necessity of the measure, which went beyond the USITC recommendation.

[11] News Release of 9 February 1999 at AUS-3.

[12] G/SG/N/8/US/3/Rev.1.

[13] Question 13 in Exhibit AUS-26 and Questions 30-32 in Exhibit AUS-27.

265. This exclusion is inconsistent with SG Article 2.2. Since these exclusions were required under separate treaty arrangements of the US, the US would have known in advance that these countries would be excluded from the measure and so their inclusion in the injury determination was inconsistent with SG Article 4.[14] While the level of trade is small from the excluded countries, this is a breach of the US's obligations under the Safeguards Agreement and cannot be cured after the event. Therefore the measure is not in conformity with the Safeguards Agreement.

11. THE US BREACHED ITS OBLIGATIONS UNDER SG ARTICLE 11 BECAUSE THE MEASURE WAS NOT EMERGENCY ACTION AND DID NOT CONFORM TO THE PROVISIONS OF GATT 1994 ARTICLE XIX AND THE SAFEGUARDS AGREEMENT

266. SG Article 11.1(a) requires, *inter alia*, that the action to impose the measure:

(a) is an emergency action; and

(b) fulfils the conditions of GATT 1994 Article XIX; and

© conforms to the provisions of the Safeguards Agreement.

267. For an action to be an "emergency action" it must be to meet a situation that has arisen unexpectedly and requires urgent action. What are the facts in this case? A petition was lodged in October 1998. The basis for the injury finding was on the basis of data to September 1998. The finding was on 9 February 1999. The recommendation went to the US President on 5 April 1999. The decision was made on 7 July 1999 and imposed from 22 July 1999. By no stretch of the language can that be called "urgent" or "emergency". This was a very measured decision to increase protection for a small industry and was not "emergency action" as provided for in SG Article 11.1(a). It was not in compliance with the WTO, and in particular not in compliance with GATT 1994 Article XIX.

268. It has also been shown that the US did not even attempt to act consistently with the requirement in GATT 1994 Article XIX to demonstrate that the increased imports of lamb meat into the US were the result of "unforeseen developments". Accordingly, the US failed to fulfil the requirements of GATT 1994 Article XIX, and so also failed to fulfil the requirements of SG Article 11.1(a).

269. It is also shown in this Submission that the US acted inconsistently with other provisions of the Safeguards Agreement, in particular SG Articles 2.1, 2.2, 3.1, 4.1, 4.2, 5.1, 8.1, 12.2, 12.3, and 12.6.

270. Therefore, the US is in breach of SG Article 11.1(a) and so the measure is not in conformity with the Safeguards Agreement.

12. THE US IS IN BREACH OF THE REQUIREMENTS OF SG ARTICLE 2.1

271. SG Article 2.1 says:

> "A Member *[Footnote omitted.]* may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such

[14] There is a clear distinction between imports excluded under SG Article 9.1 and those excluded under other legislation. The exclusion under SG Article 9.1 is only for "**as long as** its share of the product concerned in the importing Member does not exceed 3 per cent . . . ". *[Emphasis added.]* Moreover, Canada at least is not eligible for exclusion under SG Article 9.1 as a developing country Member.

> 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."

272. Australia has shown that the US acted inconsistently with SG Article 4.1 and 4.2. Accordingly, the US did not make the injury determination in SG Article 2.1 "pursuant to the provisions set out below".

273. Therefore, the US acted inconsistently with its obligations under SG Article 2.1. This cannot be cured by any subsequent action and the US can only bring itself into conformity with its obligations by revoking the measure without delay.

13. SINCE THE MEASURE IS INCONSISTENT WITH THE SAFEGUARDS AGREEMENT AND GATT 1994 ARTICLE XIX, THE US IS IN BREACH OF ITS OBLIGATIONS UNDER ARTICLE II OF GATT 1994

274. The situation regarding the tariff bindings by the US on the products covered by the measure has been set out above. The bound tariff rate was US 0.8¢/kg in 1999 and is 0.7¢/kg from 2000 onwards. The USITC Report estimated that the tariff in 1997 was about 0.2%.[15]

275. The in-quota tariff under the measure started at 9% and declines to 4% by the third year. The out of quota tariff started at 40% and declines to 24% by the third year.

276. Accordingly, the measure is inconsistent with those bindings by imposing duties above the bound levels.

277. This Submission has shown that the measure is not in conformity with the Safeguards Agreement, and so the US has no WTO justification for imposing the measure. Therefore, the measure is in breach of the US's obligations under GATT 1994 Article II, and the US has nullified and impaired Australia's rights under GATT 1994 Article II within the meaning of DSU Article 3.8.

14. CONCLUSION

278. Australia has demonstrated that the procedures followed by the US did not conform with the requirements of the Safeguards Agreement and GATT 1994 Article XIX for the imposition of a safeguard measure. In addition, the measure imposed by the US was not in conformity with the requirement that it be no more than necessary to prevent serious injury from being caused by imports. It also was not in conformity with GATT 1994 Article II.

279. Therefore the US is in breach of its obligations under the Safeguards Agreement and GATT 1994, and so there is nullification and impairment of the benefits accruing to Australia under the Safeguards Agreement and GATT 1994 within the meaning of DSU Article 3.8.

280. The only way in which the US can bring the measure into conformity with the Safeguards Agreement and GATT 1994 is to revoke it without delay.

281. Australia requests that the Panel:

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[15] See the fourth full paragraph on USITC II-8.

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

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

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

EXHIBITS

19 APRIL 2000

EXHIBITS

1 USITC Report: Lamb Meat: Investigation No. TA-201-68, Pub. 3176, April 1999.

2 USITC Initiation Notice,

3 USITC news release on the injury finding, 9 February 1999.

4 USITC News Release and accompanying statements on remedy of 26 March 1999, Recommendations, and Additional Statement by Commissioner Crawford, Statements by Commissioners Miller/Hillman, and Koplan.

5 Federal Register proclamation, 7 July 1999.

6 Federal Register Memorandum, 7 July 1999.

7 Federal Register Proclamation, 30 July 1999.

8 G/SG/N/6/US/5.

9 G/SG/N/8/US/3, Corr.1 and Corr.2.

10 G/SG/N/8/US/3/Rev.1.

11 G/SG/N/10/US/3- G/SG/N/11/US/3.

12 G/SG/N/10/US/3/Suppl.1- G/SG/N/11/US/3/Suppl.1.

13 G/L/313-G/SG/19.

14 G/L/339-G/SG/N/12/AUS/1-G/SG/N/12/US/1.

15 WT/DS178/1-G/L/314-G/SG/D9/1 and Corr.1

16 WT/DS178/2 and Corr.1.

17 WT/DS178/3.

18 WT/DS178/4.

19 WT/DS178/5 and Corr.1.

20 WT/DS177/5-WT/DS178/6.

21 G/SG/N/9/AUS/1.

22 G/SG/N/9/IND/2.

23 G/SG/N/9/KOR/1 and Corr.1.

24 G/SG/N/1/US/1.

25 Questions and Answers from Australia to the US for the SG Article 12.3 consultations on 4 May 1999.

26 Questions from Australia to the US for the SG Article 12.3 consultations on 14 July 1999.

27 Questions from Australia to the US for the consultations under DSU Article 4 on 26 August 1999.

28 MLA pre injury hearing Submission - Vol.1 and 2

29 MLA post injury hearing Submission

30 MLA pre remedy hearing Submission

31 MLA post remedy hearing Submission

32 Statement by Senator Baucus, (US) Congressional Record, Senate 18 October 1993.

33 Inside US Trade (pages 7 and 8 of 18 June 1999): "Clinton Weighs Remedy Decision in Section 201 Case on Lamb" Statement by Senator Baucus, (US) Congressional Record, Senate 18 October 1993.

Table on US lamb meat imports provided by the US following the consultations under DSU Article 4 on 26 August 1999.

ANNEX 1-2

LETTER FROM AUSTRALIA

(9 May 2000)

Australia would like to provide the following preliminary comments on the United States' letter to the Panel dated 5 May 2000 requesting preliminary rulings on certain issues. Australia also intends to provide more substantive comments in line with paragraph 13 of the Panel Working Procedures.

With regard to the United States' request in paragraph 15 of its letter for an immediate ruling postponing the deadline for its first written submission until the panel has ruled on its requests for preliminary rulings, Australia considers that the United States' request for preliminary rulings should not alter in any way its obligation to adhere to the 11 May 2000 deadline established by the panel for the receipt of the United States' first written submission.

Australia can see no reason for any connection to be drawn between the United States' request for preliminary rulings and its obligation to meet the deadline for its first written submission. A request for a preliminary ruling is not a sufficient reason for disrupting the carefully balanced timetable for this panel procedure which was formulated in consultation with all of the parties. Panel processes such as the filing of submissions should continue to be observed pending preliminary rulings by the panel.

Australia also notes that the US elected to defer its request for preliminary rulings until more than two weeks after the receipt of Australia's First Submission (and less than one week before the deadline for its own submission), and that the United States has failed to provide any explanation as to why its concerns have not been raised previously (e.g. at the time of the establishment of the panel).

In summary, Australia respectfully requests that the panel:

- decline the United States' request for an immediate ruling postponing the deadline for its first written submission until the panel has ruled on the requests for preliminary rulings

- defer its consideration of the United States' request for preliminary rulings until the first substantive meeting with the parties scheduled for 25-26 May 2000.

ANNEX 1-3

COMMENTS OF AUSTRALIA REGARDING THE REQUEST BY THE UNITED STATES FOR PRELIMINARY RULINGS

(17 May 2000)

1. This submission is in response to the letter from the Panel on 10 May 2000 inviting Australian views on the request by the USA on 5 May 2000 for preliminary rulings on:

(A) Insufficiency of Panel Request

(B) Exclusion of US Statute from Panel Terms of Reference

(C) Business Confidential Information (BCI).

A. INSUFFICIENCY OF PANEL REQUEST

2. For the reasons provided below, the claims by the USA in its letter of 5 May 2000, that the panel requests made in this case by Australia and New Zealand are deficient, are baseless and should be disregarded.

3. In the first place, the USA waited until after it received Australia's First Submission to make its claim about the sufficiency of Australia' s panel request. There were more than four weeks from the date of the constitution of the Panel until Australia submitted its First Submission. The USA, therefore, also had these four weeks in which to act in good faith and notify the Panel and/or the DSB and/or Australia and New Zealand of the alleged deficiencies. In particular it could have, but did not, raise the matter at the first organizational meeting of the Panel on 28 March 2000, more than 5 weeks before the USA raised the matter on 5 May 2000. Moreover, by the time the Panel was constituted in this case, the USA had been in possession of the Australian request for consultations since 23 July 1999 and the request for the establishment of a panel, since 14 October 1999. The USA had plenty of time to raise this issue if it was truly concerned about prejudice.

4. The USA cannot at this stage in good faith request that Australia and New Zealand begin again with the panel request process. The reference to *Guatemala - Cement* is not relevant to this dispute. In that dispute, the Appellate Body found that Mexico failed to specify correctly the measure at issue. The USA is using similar litigation tactics to those for which it was criticized by the Appellate Body in the *United States – Foreign Sales Corporations* case.[1]

5. Article 3.10 of the DSU commits Members in a dispute to engage in dispute settlement procedures "in good faith in an effort to resolve the dispute". The Appellate Body in *United States - Foreign Sales Corporations* stated that this principle requires both complaining and responding Members to comply with the requirements of good faith:

> "By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules. The same principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies

[1] Appellate Body Report on *United States – Tax Treatment for Foreign Sales Corporations*, WT/DS108/AB/R, at paragraphs 155-166.

> to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."[2]

6. In that dispute, the Appellate Body noted that a year passed between submission of the EC's request for consultations and the first mention of the objection by the USA, despite the fact that the USA had numerous opportunities during that time to raise its objections, including three consultations and two DSB meetings at which the request for establishment of a panel was on the agenda. The Appellate Body considered that the USA acted as if it had accepted the establishment of the Panel in the dispute, as well as the consultations preceding such establishment.[3]

7. In the dispute before this Panel, the USA again waited 9½ months from the request for DSU consultations to raise this issue. It waited in order to try to delay adjudication of this dispute while Australia's rights under the WTO continued to be nullified and impaired, and until it gained access to the detailed arguments in the First Submissions. The issue of further delay in a resolution of a dispute is particularly relevant for a safeguard measure, since it is time limited. Parties must make use of the dispute settlement procedures in good faith. The Panel should not dismiss a case based on such a demonstration of time-wasting, litigation techniques.

8. Second, from a factual standpoint, the USA cannot credibly claim that it has suffered any prejudice in this case. As the USA itself points out, whether a panel request meets the requirements of DSU Article 6.2 is a case-by-case determination that rests on "the particular circumstances[4] of each case.

9. The Appellate Body did not conclude that the listing of treaty articles - where the articles listed establish multiple obligations - would not satisfy Article 6.2 of the DSB.[5] The Appellate Body considered that there may be situations where the simple listing of the articles of the agreement or agreements involved may, "in the light of attendant circumstances", suffice to meet the standard of clarity in the statement of the legal basis of the complaint.[6] [6] What is to be taken into account is whether the ability of the respondent to defend itself was prejudiced, "given the actual course of the panel proceedings."[7]

10. The key issue, therefore, is whether the USA has demonstrated that the simple listing in the panel request of the articles asserted to have been violated has prejudiced its ability to defend itself in the course of the Panel proceedings. In its letter to the Panel of 5 May 2000, the USA did no more than assert that the panel requests prevented it from knowing the true nature of the claims made against it and that this limited its ability to begin the task of preparing its defence.

11. The particular circumstances of this case demonstrate the validity and clarity of Australia's and New Zealand's panel requests. The underlying dispute in this case contained a number of discrete issues, many of which were challenged and argued repeatedly before the USITC and raised by Australia and New Zealand in the Safeguards Committee, in SG Article 12.3 consultations, in DSU consultations, and in the DSB. The USA was provided with more than adequate notice of the WTO provisions that Australia considered that it had violated.

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[2] WT/DS108/AB/R, paragraph 166.
[3] WT/DS108/AB/R, paragraph 165.
[4] Appellate Body Report on Korea – Definitive Safeguard Measure on Imports of Certain Dairy Product, WT/DS98/AB/R, at paragraph 131 (Korea – Dairy Safeguard).
[5] WT/DS98/AB/R, paragraph 124.
[6] WT/DS98/AB/R, paragraph 124.
[7] WT/DS98/AB/R, paragraph 127.

12. Moreover, the USA provides no explanation of why it considers that it is being prejudiced in its ability to defend itself, "given the actual course of the panel proceedings". It had 22 days to provide its First Submission after receiving Australia's and this was extended by the Panel to 26 days, compared to the 14-21 days provided for in DSU Appendix 3. It will have 64 days after receiving Australia's First Submission to put in its rebuttal, compared to the 35-56 days provided for in DSU Appendix 3. The period between the receipt of Australia's First Submission and the second substantive meeting with the Panel is 98 days, compared to the 42-70 days provided for in DSU Appendix 3.

13. The USA admits that it did not suffer prejudice in respect of SG Articles 5, 11, and 12 and GATT 1994 Articles I, II, and XIX. The USA makes no reference to SG Article 8 and so it has made no request for a preliminary ruling in respect of any of the articles referenced by Australia and New Zealand other than SG Articles 2, 3, and 4.

14. The USA made no attempt to say what was unknown about SG Articles 2 and 3. Each of the legally pertinent provisions, SG Article 2.1, 2,2, and 3.1 is clearly at issue. The USA made no attempt in its letter of 5 May 2000 to explain why it suffered the alleged prejudice "given the actual course of the panel proceedings". Similarly, in respect of SG Article 4, the core provisions for a threat of injury case, SG Article 4.1(b), 2(a) and 2(b), are necessarily at issue. SG Article 4.1(a) is necessarily at issue either in itself or as incorporated in the other 3 sub-paragraphs as a definition. In addition, as shown below the USA could have been in no doubt that SG Article 4.1(c) is at issue. Again, the USA made no attempt to explain why it suffered the alleged prejudice.

15. This is indeed a case in which the USA violated a wide range of obligations contained in the Agreement on Safeguards, in particular those under SG Articles 2, 3, and 4. These issues had all been raised with the USA. No further specification was necessary to meet the desired level of clarity under DSU Article 6.2.

16. If the USA did not understand what Australia's complaint was about, why did it not ask in the DSU consultations on 26 August 1999? The intent of such consultations provides the opportunity for the respondent to clarify any doubts that it might have about the concerns of the complainant. Of course, after two rounds of SG Article 12.3 consultations, the USA knew all too well what Australia's concerns were. They were made clear also in the DSU consultations. If the USA genuinely did not know which provisions of SG Articles 2, 3 and 4 were being challenged by Australia, why did it not ask at that time or indeed at any time before 5 May 2000, 8½ months later? If the USA did not know that there would be a challenge under some particular provision, it raises the question what provision did the USA think was going to be raised under each of these articles? It is instructive to examine what the USA did in fact know and whether some genuine confusion was possible, and whether that confusion somehow prejudiced the position of the USA. This will include referencing the questions posed to the USA at the various consultations and statements made in the Safeguards Committee and the DSB. Australia's opening statements at the SG Article 12.3 consultations held on 4 May 1999 and at the DSU consultations held on 26 August 1999 (Exhibits AUS-35 and AUS-36) also clearly reiterate where Australia considered that the USA had violated its obligations.

SG Article 4

17. It appears that SG Article 4 is the provision that the USA is most concerned not to have examined by the Panel. Yet, the DSU consultations, supported by both the SG Article 12.3 consultations, made it quite clear that the imposition of the measure on the basis of threat of injury being caused by increased imports would be challenged. The USA has long had notice of Australia’s concerns about all aspects of the underlying threat determination, including through a statement made

by Australia at the Safeguards Committee on 23 April 1998.[8] Thus the USA knew that Australia considered that the "threat" finding was wrong, including in respect of "clearly imminent". Thus SG Article 4.1(b) was at issue. This immediately meant that SG Article 4.2 was at issue, since it is incorporated into SG Article 4.1(b). Australia has also continually raised the fact that the USITC had incorrectly determined what was the "domestic industry". Thus SG Article 4.1(c) was also at issue.

18. Indeed, the underlying USITC investigation and finding of threat of serious injury made it clear that SG Article 4.1(b) and 4.2(a) and (b) are at issue. It is hard to credit that the USA when faced with a challenge to a safeguard measure based on a finding of "threat of serious injury" would not realize which were the main provisions at issue. Further specification was not necessary because each legally pertinent element of SG Article 4 for the determination that serious injury was being threatened to be caused by increased imports is at issue.

19. The USA knew that the consistency of the measure is being challenged under SG Article 4.1(b) and (c) and 4.2(a) and (b). Therefore, no prejudice could be being suffered by the USA in respect of SG Article 4. It is useful to examine what the USA was told about Australia's views.

20. SG Article 4 has two paragraphs each of which has three subparagraphs that will be considered in turn.

Sub-paragraph 1(a)

21. This provides the definition of “serious injury”. While this is a threat case, the requirement of "significant overall impairment" is incorporated in sub-paragraph 1(b). It is difficult to believe that the USA had any confusion over this. Australia's views over "significant overall impairment" were clear from, for example, questions 15 and 16 asked at the DSU consultations on 26 August 1999 (Exhibit AUS-27).

22. Therefore, the USA knew that Australia is challenging, in the context of SG Article 4.1(b) and 4.2, its compliance with the requirement to prove that a "significant overall impairment" of the "domestic industry" was being threatened.

Sub-paragraph 1(b)

23. This sub-paragraph defines “threat of serious injury”, linking the requirements under SG Article 4.2, and the requirement that a determination be based on fact. The measure was imposed after a finding of threat of serious injury. Australia has made it clear that it did not consider that the threat of serious injury had been demonstrated, including the requirement that it be “clearly imminent”.

24. For example, as noted above this was stated at the Safeguards Committee meeting on 23 April 1999.[9] Moreover, it was clear from questions 6-12 asked at the SG Article 12.3 consultations on 4 May 1999 (Exhibit AUS-25), question 7 asked at the SG Article 12.3 consultations on 14 July 1999 (Exhibit AUS-26), and questions 13, 15, and 18 asked at the DSU consultations on 26 August 1999 (Exhibit AUS-27).

25. Therefore, the USA knew that sub-paragraph 1(b) is at issue.

[8] See paragraph 60 of G/SG/M/13 - Exhibit AUS-37.
[9] See paragraph 60 of G/SG/M/13 - Exhibit AUS-37.

Sub-paragraph 1(c)

26. The issue of what constitutes the "domestic industry" in this case was raised by Australia at the Safeguards Committee on 23 April 1999[10], at the SG Article 12.3 consultations on 4 May 1999[11] and at the DSU consultations on 26 August 1999.[12] It was a key issue before the USITC enquiry. The USA knew that it is an issue before the Panel.

Sub-paragraphs 2(a) and (b)

27. These sub-paragraphs contain the key requirements for the demonstration that increased imports are threatening to cause serious injury to a domestic industry. It is inconceivable that the USA did not know that Australia was going to challenge the consistency of the measure under these provisions.

28. Moreover, obligations on compliance with paragraph 2 are in any case picked up through sub-paragraph 1(b).

29. Australia had raised its concerns again and again about the failure of the USA to meet its obligations under these sub-paragraphs. For example, it is clear from paragraph 60 of G/SG/M/13 that Australia was challenging the finding of threat of serious injury as well as causation by increased imports, and explicitly the inadequate treatment of other factors. See also questions 13-16 on threat and adequacy of data and questions 17-28 on causation asked at the SG Article 12.3 consultations on 4 May 1999. See questions 9-24 asked at the DSU consultations on 26 August 1999. Therefore, the USA knew all too well that these sub-paragraphs are before the Panel.

Sub-paragraph 2(c)

30. Australia did not indicate that it would raise the question of a breach of sub-paragraph 2(c). However, there would hardly have been any prejudice to the USA, if it had prepared itself to defend the measure in respect of sub-paragraph 2(c).

31. Overall, therefore, the USA well knew what was at issue under SG Article 4. There was no possibility of confusion.

32. Moreover, as shown below there could have been no confusion over the fact that the measure was being challenged under both paragraphs of SG Article 2. However, SG Article 2.1 requires that the USA had, inter alia, fulfilled the requirements of SG Article 4 on injury before imposing the measure. There is a direct link between SG Article 2.1 and SG Article 4. Even if SG Article 4 had not been mentioned at all in the request for a panel, reference could still have been made to the USA's failure to comply with SG Article 4 in demonstrating the inconsistency of the measure with SG Article 2.1.

<u>SG Article 2</u>

33. In fact, Australia and New Zealand have challenged consistency with both paragraphs of SG Article 2, and, therefore, no further detail of specific provisions was either possible or necessary. It would not have affected the USA's situation for Australia to have specified SG Articles 2.1 and 2.2 rather than SG Article 2.

[10] See paragraph 59 of G/SG/M/13 - Exhibit AUS-37.
[11] See for example questions 2-5 at Exhibit AUS-25.
[12] See for example questions 7-12 at Exhibit AUS-27.

34. This article has two paragraphs and Australia is seeking findings in respect of each of them.

Paragraph 1

35. Paragraph 1 of SG Article 2 says:

> "A Member *[Footnote 1 omitted.]* may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products."

36. This is a critical obligation under the Safeguards Agreement, especially in respect of the injury determination.

37. The USA knew that Australia considered that the USA had not demonstrated that serious injury was being threatened to be caused to the domestic industry by imports of lamb meat. Indeed, why else would SG Article 4 have been cited. It is impossible to credit that the USA did not know that paragraph 1 of SG Article 2 would be raised.

Paragraph 2

38. This paragraph is about non-discrimination in respect of measures under the Safeguards Agreement. The USA was aware that this is an issue of long-standing concern to Australia with regard to US legislation. For example, in the context of the WTO, Australia questioned the USA about this in October 1995.[13] It was raised in paragraph 59 of G/SG/M/13 on 23 April 1999, in questions asked at the SG Article 12.3 consultations on 4 May 1999 (question 25) and 14 July 1999(question 13), and the DSU consultations on 26 August 1999 (questions 30-32). Australia also stated at the DSB meeting on 27 October 1999 when it first requested the establishment of a panel that:

> "The United States had also breached the non-discrimination obligations of GATT 1994 and the Agreement on Safeguards in the application of its safeguard action"[14];

39. The DSU consultations were attended by Canada who clearly knew that this was an issue. Indeed, the USA allowed Canada to attend on the basis of a substantial trade interest in the matter even though the request was outside the 10 day period provided for in DSU Article 4.11 but denied the EC the right to attend. Moreover, the USA, by admitting that it understood the claim on GATT Article I necessarily knew that paragraph 2 of SG Article 2 was also an issue.

<u>SG Article 3</u>

40. As for SG Article 3, these requirements are purely procedural. Either the USA followed the simple procedural requirements, or it did not. The USA cannot, and indeed does not, set forth any particular prejudice that it suffered because the specific aspects of Article 3 under challenge were not expressed in more detail in the panel request.

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[13] See question 2 in G/SG/W/39 and the answer in G/SG/W/160 at Exhibit AUS-38.
[14] Under Item 5 of WT/DSB/M/70 at Exhibit AUS-39.

41. This article also has only two paragraphs. Even in the absence of knowledge about a case, a reference to SG Article 3 must concern paragraph 1 of SG Article 3 as the legally pertinent provision. Paragraph 2 of SG Article 3 is only about the treatment of confidential information in the investigation. Australia has not raised any issues about the USITC's handling of confidential data, in that Australia has not put forward any concerns about information being leaked by the USITC or the USITC refusing to receive data that an interested party considered should be kept confidential. There was no reason for the USA to consider that paragraph 2 of SG Article 3 is at issue for Australia let alone the only paragraph at issue for Australia. Even if it considered that Australia might raise something under this provision, what possible prejudice could it have suffered?

42. Australia has emphasized its concerns in respect of the procedural aspects of the case after the USITC reported to the US President and the absence of a public report setting out the findings and reasoned conclusions for the actual measure imposed, which go to the heart of compliance with paragraph 1 of SG Article 3. For example, see questions 2-5 asked at the SG Article 12.3 consultations on 14 July 1999 and questions 1-6 and 25 asked at the DSU consultations on 26 August 1999. In addition at the DSB meeting on 27 October 1999, Australia said that:

> "the United States had failed to meet its obligations regarding" ... "as well as its obligations in respect of" ... "notification and publication."[15]

43. This necessarily meant that Australia was challenging the measure under paragraph 1 of SG Article 3.

44. Therefore, the USA was fully aware that paragraph 1 of SG Article 3 was an issue before the Panel.

Third country rights

45. The USA's sudden concern about the rights of third countries (in paragraph 10 of its letter of 5 May 2000) is unexpected. Moreover, Australia regards it as being misplaced. First, the USA has no standing upon which to raise third country concerns. Second, no other Member has raised such concerns with Australia or in the DSB with respect to the panel requests. Members were given several opportunities to raise such concerns if they failed to understand the request for the establishment of a panel. Australia' s first panel request, which was made at the DSB meeting on 27 October 1999, was blocked by the USA. The second panel request was made at the DSB meeting on 19 November 1999. After the Panel was established at the 19 November 1999 DSB meeting, third countries were given ten days in which to reserve their third party rights. Members could have raised concerns at any time or asked questions about the panel, but none did.

46. Of course, four Members did reserve their third party rights. The scope of the complaint was made out adequately through the request for the establishment, which was also complemented by the Australian statement at the DSB meeting on 27 October 1999, and before that Australia's concerns had been set out at the Safeguards Committee meeting on 23 April 1999. Any Member interested in the case had ample opportunity to inform itself of the issues involved. Any Member familiar with the Safeguards Agreement and even slightly familiar with this case, would be fully aware of which legal provisions were at issue.

47. Like the Appellate Body in *Korea – Dairy Safeguard*, the Panel should focus on whether the USA itself has been truly prejudiced by the panel requests at issue.

[15] Under Item 5 of WT/DSB/M/70 at Exhibit AUS-39.

Conclusion

48. Given the manner in which this claim has been raised after so many months and the particular circumstances of this case, the USA's claims of prejudice are simply not credible. Australia urges the Panel to disregard the USA's request in its letter dated 5 May 2000, and thereby permit this case to proceed as scheduled.

B. EXCLUSION OF US STATUTE FROM PANEL TERMS OF REFERENCE

49. Australia is not asking the Panel to make a finding that the US legislation itself is inconsistent with the USA's obligations under the Safeguards Agreement, GATT 1994, and WTO Article XVI:4.

50. On the other hand, Australia is not saying that the legislation is consistent with the requirements of the Safeguards Agreement, but is simply asking the Panel to find that this measure is inconsistent with the requirements of the Safeguards Agreement and GATT 1994 Articles II and XIX. As a matter of fact, Australia does consider that the legislation is flawed, but has sought to simplify the Panel's task by avoiding a mandatory legislation debate over the flexibility of the USITC and the discretion of the President to obtain a WTO consistent outcome.

C. BUSINESS CONFIDENTIAL INFORMATION (BCI)

51. Neither of the confidentiality provisions of the Safeguards Agreement, Articles 3.2 and 12.11, are listed in Appendix 2 of the DSU. Accordingly, they are not applicable to this panel process. Moreover, the USA's domestic legislation on the provision of information is also not relevant, if the Panel considers that it needs the information to carry out its responsibilities under DSU Article 11. Australia is concerned that one reading of the USA's letter would be that this issue might be used to delay the panel proceedings. The confidentiality provisions in SG Article 3.2 and in domestic legislation are aimed at preventing commercially sensitive information being leaked and compromising commercial interests. Australia is not asking for BCI information to be publicly released but only that it be made available under conditions that would prevent commercial interests from being damaged.

52. Australia's view is that the Panel would have difficulty in examining some aspects of the USITC findings in the absence of the BCI in the full USITC Report to the President. Accordingly, the Panel may need to have that information to determine the consistency or otherwise of the measure with the Safeguards Agreement. Of course, the Panel might not require the information sought in paragraph 15 of Australia's First Submission to find that the measure is inconsistent in respect of all of Australia's claims. However, Australia's concern is to ensure that the USA is not allowed to rely explicitly or implicitly on any information to support its case that it is not prepared to provide to the Panel and Australia. In addition, the USA should not be allowed to selectively provide information that supports its case. Thus the Panel would need to draw adverse inferences if the USA is not prepared to provide the information expeditiously.

53. Australia noted that the USA has referred to "business confidential information" in its letter. Australia' s request is set out in paragraph 15 of Australia's First Submission. This went beyond the issue of BCI in seeking information from the second phase of the process after the USITC reported to the President. In the absence of that, Australia considers that the Panel should draw adverse inferences about the consistency of the measure with SG Article 5.1 and the USA's obligation to ensure at the time that the necessity test was met. Moreover, without some insight into the process that followed the USITC report to the US President, how could the Panel determine whether there had been a breach of SG Articles 3 and 12?

54. As requested in the Panel's letter of 10 May 2000, Australia is prepared to provide further arguments required in respect of Australia's request for a preliminary ruling on the provision of information by the USA to the Panel.

AUSTRALIAN EXHIBITS 35-39

35. Opening statement by Australia at the SG Article 12.3 consultations on 4 May 1999.

36. Opening statement by Australia at the DSU consultations on 26 August 1999.

37. Extract from the Minutes of the Safeguards Committee Meeting on 23 April 1999 (G/SG/M/13).

38. Replies to questions posed by Australia concerning the notification provided by the United States of laws and regulations under Article 12.6 of the Agreement (G/SG/W/160).

39. Extract from the Minutes of the DSB Meeting on 27 October and 3 November 1999 (WT/DSB/M/70).

ANNEX 1-4

ORAL STATEMENT OF AUSTRALIA CONCERNING
USA'S REQUEST FOR PRELIMINARY RULINGS

(25 May 2000)

1. Australia's letter of 17 May 2000 responded to the USA's request for a preliminary ruling on the sufficiency of the panel request. Australia rejects the basis for the US request and considers that in view of the nature of the request no further elaboration was required in this particular case and that no point would have been served in simply listing paragraphs of articles such as Article 2.1 and 2.2 rather than Article 2.

2. It may be useful, however, to the Panel to elaborate further on the allegation of prejudice by the USA. While the USA asserted that it had suffered prejudice, it did not explain what the nature of that prejudice was and how it had affected the USA.

3. The USA said that it did not assert substantial prejudice with respect to claims of the complainants under Articles I, II, and XIX of GATT 1994 and Articles 5, 11, and 12 of the Safeguards Agreement, since it could "discern those subprovisions that would be implicated on the basis of the context of this proceeding." Therefore, the USA did not sustain prejudice in respect of these claims. The USA did not mention SG Article 8 at all, and so did not assert prejudice in respect of Article 8. Thus there is no issue before the Panel in respect of prejudice on any provisions except Articles 2, 3, and 4 of the Safeguards Agreement.

4. As we explained in the letter of 17 May 2000, the USA was well aware of Australia's concerns on these provisions. Australia had dwelt on them at great length in Article 12.3 consultations and DSU consultations to give the USA every opportunity to answer our concerns about the inconsistency of first the USITC finding and recommendation, and then the measure imposed by the USA. This was supplemented by statements in the Safeguards Committee and the DSB.

5. Indeed Australia went much further than is required under the DSU in setting out the detail of our concerns in the form of questions as well as statements. These were bolstered by oral explanations in the May and August consultations in Geneva.

6. The USA has made no allegation that Australia in some sense misled it about what our concerns are. The USA has made no allegation that it thought that it had satisfied Australia about one or more issues and so thought that they would not be raised.

7. In paragraph 7 of its letter of 5 May 2000, the USA said that it was unclear what claims Australia was stating in respect of Article 4.

8. Given that this is a case about threat of serious injury being caused by increased imports and that Australia had objected to the finding right through the USITC proceedings, in the Article 12.3 and DSU consultations, the Safeguards Committee, in the DSB, and at the highest political levels in our two countries, it is inconceivable that the USA did not know that it was going to be challenged by Australia on Article 4.1(b) and hence also on Article 4.2(a) and (b). Moreover, Australia repeatedly raised with the USA the issue of "clearly imminent". We also repeatedly raised issues such as the poor quality of the data, other factors and causation. Indeed, it is difficult to believe that there is any major line of argumentation used in respect of Article 4 that the USA would not have discerned.

9. Again, Australia has been absolutely clear that it was going to challenge the issue of "domestic industry", i.e. Article 4.1(c). There can have been no doubt in the USA's mind over this. This was an issue before the USITC inquiry. Australia dwelt on it in the Safeguards Committee and in the Article 12.3 and DSU consultations.

10. The USA was mistaken in its statement in saying that Australia had raised SG Article 4.2(c) in its First Submission.

11. As we explained in our letter of 17 May 2000, we cannot understand how the USA could not discern that the reference to Article 2 included claims relating to both Article 2.1 and 2.2. It is inconceivable that a case, which referenced Article 4 would not take on Article 2.1. Australia, including in the DSB when making the first request for a panel, said explicitly that it was challenging the inconsistency with the non-discrimination provisions of the Safeguards Agreement. That could only be Article 2.2. Similarly, any reference to Article 3 would have to include Article 3.1, and it would have been difficult to imagine that it would have included Article 3.2. In any case, what sort of prejudice would the USA have sustained if it had prepared a defense for Article 3.2?

12. In respect of the issue before us, the USA has made no attempt to say how it sustained any real prejudice.

13. At paragraph 9 of its letter the USA says that it was hampered in the preparation of its defense. As we have shown there is nothing that the USA could not have discerned that was going to be raised. The process between Australia and the USA has been exceedingly open and transparent and it is difficult to see what arguments Australia has run about SG Articles 2, 3, and 4 that the USA would not have expected in one form or another.

14. At paragraph 8 of the USA's letter, it talks of only having three weeks to prepare its First Submission. It knew what was going to be challenged. This is not a case involving uncertainty or questions about what the measure at issue is. The USITC Report and the subsequent process leading up to the imposition of the measure were always the agenda for Australia, and the USA knew that. In any case the USA did receive an extra four days for lodging its First Submission. The USA now has more than two months between receipt of Australia's First Submission and having to put in its rebuttal submission. It has a further month until the second meeting with the Panel. It is difficult to see in what way the USA could have sustained any prejudice.

15. If the USA did not understand the case, why did it not say so in at least October 1999? Why did it wait until 5 May 2000?

16. At the end of its paragraph 7, the USA says:

> "The United States can only conclude that the claims in this case will continue to evolve, and that this evolution will be uncontrolled by the terms of reference because of the vagueness of the panel requests."

17. It is unclear to us whether the USA is saying that there is threat of sustaining prejudice. That would be clearly in the hands of the Panel to prevent if the Panel considered at some point in the future that somehow the USA was at risk of prejudice.

18. On third countries, it is difficult to see which Members the USA is talking about in paragraph 10 or how they would have sustained prejudice. Any Member with a systemic interest in the Safeguards Agreement would have been fully aware of the extent of the case by the panel request alone. In addition it would have been alerted by at least Australia's statement in the DSB on 27 October 1999 and could have indicated third party interest.

19. In relation to what the Appellate Body actually found in *Korea – Dairy Safeguard* on the sufficiency of the EC panel request, Australia notes that the actual finding was conditioned by *the particular circumstances of that case*.

20. In summary, Australia asks the Panel to reject in full the USA's request for a preliminary Ruling on the insufficiency of the panel request and to consider all of the claims made by Australia on their merits

ANNEX 1-5

ORAL STATEMENT OF AUSTRALIA CONCERNING
AUSTRALIA'S REQUEST FOR PRELIMINARY RULINGS

(25 May 2000)

1. The request falls into two parts. Firstly, there is the request for information excluded from the USITC Report. Secondly, there is the information covering the process after the USITC reported to the President.

2. Additional views have been set out in Australia's letter to the Panel on 17 May 2000 regarding the USA's request for preliminary rulings.

USITC Report

3. Australia's concern is that the USA has not been prepared to provide the information in time for Australia prior to the panel proceedings. Yet the USA relies on that data for its defense before the Panel. Australia considers that results in a high degree of procedural unfairness. On the one hand, Australia is challenging the findings of the USITC Report. On the other the USA by relying on the USITC Report, as it must in this case on certain issues, is implicitly saying that the Panel must take for granted the USITC's assessment of confidential issues. The only way around this is either for the USA to provide that information, or for the Panel not to allow the USA to rely on the information either explicitly or implicitly, including in the examination of relevant factors under SG Article 4.2(a).

4. It is difficult to see how the Panel can carry out its responsibilities under DSU Article 11, if it unable to have access to information that the USA considers relevant but is unwilling to provide. The confidentiality provisions of the Safeguards Agreement, i.e. SG Article 3.2 and 12.11, are not listed in DSU Appendix 2 and so are not part of the DSU provisions. Accordingly, they do not affect the Panel's right to seek this information.

5. As a point of clarification, Australia's request is in respect of information omitted from the USITC Report, not for all confidential information from the USITC record.

6. Australia is prepared to consider any reasonable procedures for protecting the information. Australia notes that it is the sole responsibility of the USA to provide access to information that it holds.

Investigation Process after the USITC reported to the President

7. The Australian request is cast widely because Australia does not know precisely what happened. We learn from the USA's First Submission that there was modelling work done, presumably by the USITC. What data was used and what other investigations were carried out, Australia does not know.

8. The problem faced by the Panel is that there was a further internal inquiry and decision-making process after the USITC reported to the President. The Panel may feel that it can find on the basis of what the USA has put in its First Submission that the USA has breached at least SG Articles 3.1, 12.2, and 12.6. However, if it cannot do that, then it will need to determine what the actual process was. Our request for a ruling by the Panel requesting additional information would

help the Panel to fulfil its responsibilities to make an objective assessment and get at the truth of the matter.

9. There is also the issue of whether the USA has complied with SG Article 5.1. The issue is two-fold. Firstly, what the justification was and, secondly, whether it was made before the imposition of the measure, as required by SG Article 5.1. Again we do not see how the Panel can get at the truth of the matter without seeking the information requested.

10. Australia asks that if the USA is not prepared to come forward with the requisite information, then the Panel should draw adverse inferences about this.

11. In the USA's covering letter to the Chair for its First Submission, the USA says:

> "As the United States explains in detail elsewhere in this submission (*see* ¶¶ 231-236, 275), the Safeguards Agreement does not require a Member to justify its choice of a safeguards measure. Rather, the only obligation is to ensure that the measure is applied "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment." Any requirement that would seek to reveal the reasons why a Member decided between alternative measures, or between applying a measure and refraining from doing so, would inappropriately intrude on the Member's deliberative process regarding the application of safeguard measures. Australia's request should be rejected."

12. Australia cannot understand the line of argument that on the one hand the USA accepts that there is a WTO obligation, but that on the other it cannot be tested. There were investigatory processes beyond the USITC Report. The USA now admits this in paragraph 216 of its First Submission. The USA says that it ran its own models. Since it does not say that it limited itself to the data on the USITC record, there is a presumption that it used later data of one sort or another.

Conclusion

13. In summary, the provision of the information requested, both that in the USITC Report and that relating to the post-USITC Report investigations, is an issue of fundamental importance to the working of the WTO disciplines. Without this information how can the Panel make an objective assessment of whether the USA has complied with the disciplines of the Safeguards Agreement and Article XIX of GATT 1994.

ANNEX 1-6

FIRST ORAL STATEMENT OF AUSTRALIA

(25 May 2000)

INTRODUCTION

1. This is an important case both for Australia and the WTO safeguards disciplines. In essence, it is a case about industry protection – or rather whether the protective measure taken by the USA is justified and whether in applying this measure the USA has adhered to its WTO obligations. It is not just that Australia disagrees with what the USITC found and recommended - though it does. The US Administration then went on with no public inquiry to impose a more restrictive measure than that found by the USITC to be justified. The USA did this without providing any basis for its decision.

2. The approach taken by the US Administration strikes at the heart of the Safeguards Agreement, which is supposed to ensure a public process where parties can defend their interests and be provided with the findings and reasoned conclusions on which decisions are taken. If the USA is allowed to get away with this approach, then there is the risk that other Members will also seek to write major provisions on transparency and natural justice out of the Safeguards Agreement.

3. In addition this is a case of threat of serious injury being caused by increased imports, i.e. where the USITC found that there was no serious injury being experienced. While clearly under the Safeguards Agreement, it is permissible to impose measures in the case of genuine threat, special care must be taken. Thus SG Article 4.1(b) emphasizes that "[a] determination of threat of serious injury shall be based on facts." It is not easy to make a finding of threat and that is quite appropriate. Safeguard action is permitted under the WTO as a derogation from key provisions of GATT 1994 and so is carefully circumscribed. In the words of the Appellate Body 'safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be in short, "emergency actions."[1] Under the Safeguards Agreement there already is provision for provisional measures in critical circumstances. A Member cannot take pre-emptive action on the basis of a threat finding unless the requirements of the Safeguards Agreement and, in particular SG Article 4, are clearly met. The USA did not meet these requirements.

MAIN POINTS IN AUSTRALIA'S FIRST SUBMISSION

4. Australia's case against the USA falls under the following main headings.

- The failure of the USA to comply with the requirements under GATT 1994 Article XIX regarding the need to show that the threat of material injury being caused by increased imports was the result of "unforeseen developments". It did not show these, and could not have, since there were no such "unforeseen developments".

- The failure of the USA to comply with the SG Article 5.1 to ensure that the extent of the measure was no more than was necessary.

- The failure of the USA to comply with a number of critical procedural obligations on investigations and reports under SG Article 3.1.

[1] At paragraph 86 of WT/DS98/AB/R – *Korea – Dairy Safeguard*.

- The failure of the USA to comply with the obligations under SG Article 4 in demonstrating threat of material injury and causal link in particular:
    - inconsistency of "domestic industry" with SG Article 4.1 (c)
    - inconsistency with SG Article 4.1(b) of the need for the serious injury to be "clearly imminent" and for the finding to be based on facts
    - inconsistency with SG Article 4.2(a): to examine all relevant factors because of the poor quality of the data and the lack of examination of certain listed factors; to demonstrate a significant overall impairment of the position of the domestic industry; and to prove threat of serious injury
    - inconsistency with SG Article 4.2(b) on causation because the USITC failed to set to one side injury that is threatened by other factors.
- The failure of the USA to comply with SG Article 8.1 to endeavour to maintain a substantially equivalent level of concessions or other obligations with Australia.
- The failure of the USA to comply with a number of critical procedural obligations on notification and consultation under SG Article 12.
- The inconsistency with SG Article 2.2 of the exclusion of certain countries from the scope of the measure despite their inclusion in the injury analysis, in particular NAFTA members.
- The inconsistency of the measure with SG Article 11.1(a).
- The inconsistency of the measure with SG Article 2.1.
- The violation of the USA's tariff bindings on lamb meat under GATT 1994 Article II.

5. To avoid belabouring the point throughout, it should be noted that while this statement goes through a range of provisions with which the measure is inconsistent, many of the provisions are closely linked. For example, if the Panel agrees with Australia that the USA's choice of "domestic industry" is inconsistent with SG Article 4.1(c), then automatically the USA has failed to comply with SG Articles 2.1, 4.1(b), 4.2(a), 4.2(b), 5.1, and 11.1(a).

GATT 1994 Article XIX

6. The Appellate Body found in *Korea-Dairy Safeguard* and *Argentina – Footwear Safeguard* that a Member was obliged to comply with GATT 1994 Article XIX as well as the explicit provisions of the Safeguards Agreement and so to demonstrate that it was as a result of "unforeseen developments" that increased imports were threatening to cause serious injury to the domestic industry. The USITC did not address this issue in its Report. Thus the USA did not address this issue before imposing the measure and so did not comply with the requirements of GATT 1994 Article XIX. In any case, as a matter of fact, there were no such "unforeseen developments" as required under GATT 1994 Article XIX.

SG Article 5.1 and the extent of the measure

7. The USITC only found that there was threat of serious injury to the " domestic industry". It found that no serious injury was being experienced by the "domestic industry", let alone serious injury being caused by imports. Therefore, the current level of imports was not causing serious injury. Moreover, the USITC did acknowledge that there were other factors impacting on the domestic industry.

8. The USITC found that its tariff quota proposition was **sufficient** to prevent the threat of serious injury being caused by imports. It also proposed other domestic measures to assist with some of the domestic factors that are the real problems facing the various industry segments. However, nowhere does the USITC Report prove that it was **necessary** to impose a tariff quota starting at only the 1998 level of imports with such high out of quota tariffs, and only one small increase in the second year. This was the tariff quota system that was notified to the Committee and the only one for which any pretence at justification was provided.

9. Following its report to the President, and as we are now told the further investigations by the US Government, a much more restrictive tariff quota system was actually imposed. The initial out of quota tariff was twice as high as that found to be sufficient by the USITC. Then to add insult to injury, a very high tariff was imposed on in-quota product.

10. There has been no public report on the findings and reasoned conclusions for imposing this tariff quota system. Nothing has been notified to the Committee. Indeed, what justification could be made for doubling the USITC's recommendation for the tariff quota wall? Given the restrictive nature of the tariff quota, what justification could be made for imposing a punitive in-quota tariff? The USA was obliged to impose a measure no more restrictive than necessary to prevent serious injury being caused by increased imports and to facilitate adjustment. Instead, it imposed a harsh, punitive regime that went well beyond what could be justified. Indeed, if a justification had been made, the USA would presumably have made it public, or at least provided it in the SG Article 12.3 or DSU consultations with Australia.

11. The USA was obliged to have made a legally valid justification of the measure before imposing the measure. By 7 July 1999, there had to be a piece of paper with that justification written on it. If this existed, the USA would have been remiss in its obligations under DSU Article 4 not to have produced it in consultations, so that the claims before the Panel could have been reduced.

SG Article 3.1 - obligations in respect of investigations and reports

12. The procedural obligations under the Safeguards Agreement are critical to its functioning. The Safeguards Agreement is supposed to create a transparent decision making process, in contrast to the hidden internal procedures so often followed for Article XIX under the GATT.

13. After the USITC reported to the President, the matter disappeared from public view apart from the occasional press story. Clearly there was political pressure on the US Administration to impose a measure, and indeed to impose a measure more restrictive than that recommended by the USITC. In the end that is what happened. No information has been forthcoming on what investigations took place or what justification was made for the necessity of the extent of the measure imposed.

14. Clearly something happened. As we now know from the USA's First Submission, there was a further investigation.[2] This was in breach of the transparency and natural justice requirements of

[2] At paragraph 216 of the USA's First Submission.

SG Article 3.1. All interested parties should have had access to the material being used and given the opportunity to defend their interests. They were not. There should have been a public report of the investigations. There was not.

15. The USA seems to consider that just because it says that the USITC is the competent authority, transparency stops with the USITC Report. However, if a Member could just decide unilaterally that it could circumvent SG Article 3.1 by limiting the scope of the activity of its competent authority, then that would undermine the effectiveness of this provision, if not write it out of the Safeguards Agreement altogether.

16. The USA appears to consider that it does not matter what the competent authority finds and recommends, the Member can impose something different to its finding and does not have to justify it. This would mean that a Member could reject a negative finding on injury and causation but still impose a measure without further justification.

17. The crux of the issue is that the USA now admits in its First Submission that there was a subsequent investigation, and so the USA has failed to comply with its obligations under SG Article 3.1 in respect of publishing its procedures, reporting the findings and reasoned conclusions, and in giving parties the opportunity to defend their interests.

18. SG Article 3.1 starts off saying that: "[a] Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994."

19. One question facing the Panel is whether "following" has a purely temporal meaning, i.e. it does not matter what the outcome of the investigation is, provided some mock investigation is carried out. Or does it mean that the Member must rely on the outcome of that investigation for the justification of the measure. Only the latter interpretation provides the basis for an effective agreement. However, the latter interpretation finds the USA in breach of SG Article 3.1.

SG Article 4 - the assessment of injury and causation

"Domestic industry"

20. The determination of what is the "domestic industry" is the foundation stone for the injury investigation. If that determination is wrong, then the whole of any injury assessment is fatally flawed and cannot be cured. Similarly, the determination of what is the "domestic industry" is critical to any decision on the measure, since the requirement in SG Article 5.1 to show "necessity" as to the extent of the measure cannot be complied with if the wrong "domestic industry" is being used.

21. The first thing to do in determining the "domestic industry" is to decide what is "like or directly competitive products" in respect of the imported product, lamb meat. In this case, the USITC found that the like product to the imported lamb meat is domestic lamb meat, not breeder lambs, not feeder lambs, and not slaughter lambs, but lamb meat – the product produced by packers and breakers.

22. The USITC determined the "domestic industry" for this case on the basis of "like product" alone and not on the basis of "directly competitive products". The USITC's justification for including growers and feeders was no more than that that was the USITC's practice consistent with statutory provisions for anti-dumping and countervailing. The USITC limited itself to analyzing the application of this practice to the case. It made no attempt to argue why compliance with its own test should mean compliance with the requirements of the Safeguards Agreement. Indeed how could it? For example, growers produce feeder lambs and lambs for breeding, as well as wool and cull ewes,

they do not produce lamb meat, the like product. Feeders produce slaughter lambs bought by packers who produce carcasses, lamb meat.

23. In the USA's First Submission at paragraphs 61-67, it seeks to argue an economic interest test but does not make any argument that this approach has support in the text of the Safeguards Agreement.

24. The USITC by including all the industry segments in its definition of "domestic industry" fundamentally flawed its investigation from the start. This cannot be cured. An injury finding on the basis of the wrong "domestic industry" cannot be used to justify the imposition of a safeguard measure. Therefore, the measure is inconsistent with the USA's obligations under SG Article 4, in particular SG Article 4.1(c).

SG Article 4.1(b) – the requirement for proving "threat"

25. This provision also explicitly incorporates the requirements of SG Article 4.2. Accordingly, these aspects will be dealt with in respect of SG Article 4.2(a) and (b).

26. Two key areas in which the USA has failed to comply with its obligations are: the failure to show that the alleged serious injury to be caused by imports was "clearly imminent"; and the failure to provide the demonstration of the existence of the threat "be based on facts and not merely on allegation, conjecture or remote possibility."

27. The USITC did not say what it meant by "clearly imminent". The USA in the SG Article 12.3 and the DSU consultations refused to say what it meant by "clearly imminent". If there had been a determination that the requirement of "clearly imminent" was met, why did the USITC not prove it. If the USA knew that it had been proved and was somehow in the USITC Report, why did it not tell Australia? Instead, the USA seeks to write the obligation out of the Safeguards Agreement by saying that "imminent" is undefined. So are many words in the WTO Agreement, in which case the normal rules of interpretation must be applied. In order to comply with SG Article 4.1(b), the USA had to have determined that all requirements were fulfilled, including "clearly imminent". It did not, and so the measure is inconsistent with SG Article 4.1(b).

28. The USITC based its injury finding on industry data largely up to September 1998, though in some cases the latest data were for 1997. The injury finding was in February 1999 at which time it was found that the industry segments were not experiencing serious injury. The measure was imposed in July 1999. When was this serious injury going to occur? The USA would not and will not say because it did not know. What could possibly be known about threat of serious injury in late 1999 from 1997 data – nothing. Even for those firms with data up to September 1998 nothing can be said about serious injury going to be caused imminently in July 1999 based on a finding in February 1999.

29. A finding of threat following a finding of no injury must necessarily be based on a dynamic analysis. It can not be based on the static analysis, since that found no injury. Some compelling quantification is required to demonstrate that a significant deterioration in the state of the "domestic industry" was going to occur imminently. The USITC did not provide such an analysis.

30. While addressed also under comments on SG Article 4.2, the poor quality of the data used by the USA is inconsistent with the requirements to base findings on facts. The object and purpose of that is to have an accurate and complete factual picture of the "domestic industry" and the causal link. This was impossible to have, given the data used by the USITC.

SG Article 4.2(a) - proof of threat of serious injury

31. The industry data collected by the USITC for its injury assessment was of such poor quality as to completely flaw any affirmative determination based on it There was no attempt to justify the data as being representative of the various industry segments either singly or as a whole.

32. Only 110 questionnaires were sent out to growers out of more than 70,000 without any statistical basis. Less than half of these growers sent useful data back. The response rate for the other industry segments was also poor and there was no statistical basis for believing that the responses represented the segments. For growers/feeders, no interim data was provided, i.e. for Jan-Sep 1998. Financial data was only provided by two packers, two packer/breakers and one breaker, i.e. the coverage of the actual producers of the product, lamb meat was risible. There is no evidence that the USITC followed up on questionnaires and sought more information from other firms. It simply accepted what it got, and presumably much of the data that was provided came from those firms associated with the original petition.

33. No objective analysis and determination could be based on the poor quality of data used by the USITC. The poor quality of the data was such that in reality the USITC did not carry out an acceptable analysis for any factor listed in SG Article 4.2(a) and examined in the threat analysis by the USITC on pages I-16 to 21 as set out on page 53 following paragraph 223 of Australia's First Submission.

34. Not only was the information inadequate, the USITC did not even try to carry out an analysis for every one of the factors listed in SG Article 4.2(a) for all of the industry segments as it was required to do, or alternatively explain why the analysis carried out for other segments gave the situation for all the industry segments collectively.

35. There was no demonstration of a significant overall impairment of the position of the domestic industry based on a segment by segment analysis or aggregation of all the firms in the definition of "domestic industry" used by the USITC.

36. Finally, the USITC reached its conclusion on threat of serious injury on the basis of the analysis on pages I-16 - 21. This was a remarkable conclusion. It relied on industry data through to Sept 1998, or in some cases only to 1997, and reached the conclusion of no serious injury being experienced. Then on the basis of the same data, and before it performed any analysis of the impact of imports, reached the conclusion that the "domestic industry" was "threatened with imminent serious injury". No objective basis was provided for this conclusion.

SG Article 4.2(b) - causation and "other factors"

37. There has been a long-term secular decline in the USA's industry segments, in particular in the sheep and lamb industry. This was exacerbated by the removal of the National Wool Act subsidies. The US industries face a number of long term problems, including marketing the product in the USA and halting the decline in consumption. The Australian and New Zealand exporters and importers were engaged in promoting lamb meat consumption in particular by providing more marketable product for niche markets in competition with other meats. The USITC recognized that there are domestic difficulties. Moreover, as was shown at paragraph 144 and the accompanying Graph 3 in Australia's First Submission, imports over the period 1993-1997 were not displacing domestic product but only making up for just some of the shortfall in domestic production.

38. The USITC first found that the "domestic industry" was threatened with imminent serious injury and then went on in a subsequent causation analysis to claim that imports were a substantial cause, i.e. no less important than any other cause.

39. The USITC failed to properly examine and assess the impact of other factors in its causation analysis. SG Article 4.2(b) requires that injury caused by factors other than increased imports must not be attributed to increased imports. The USITC found that there were other causes. However, the USITC did not examine the injury being caused by all the other factors in aggregate. Instead by its approach it attributed to increased imports all of the adverse impact of all factors other than increased imports. This is inconsistent with SG Article 4.2(b).

40. Therefore the USA failed to comply with all relevant provisions in SG Article 4 and the measure is inconsistent with SG Article 4.

SG Article 8.1 - maintenance of an equivalent level of concessions and other obligations

41. Under SG Article 8.1, the USA had an unequivocal obligation to endeavour to maintain a substantially equivalent level of concessions and other obligations with Australia to those existing under GATT 1994. The USA did not try to do so and indeed considered that there was no such obligation for the first three years of a measure. There was a clear nullification and impairment of Australia's rights not only through the high tariff quota walls but also the high in-quota tariff.

42. SG Article 8.3 suspends the right to unilateral retaliation where there is an absolute increase in imports and the measure conforms to the provisions of the Safeguards Agreement. This is a trade-off in the Safeguards Agreement, i.e. that in return for stricter provisions on imposing a measure, the right to immediate unilateral retaliation was removed. Instead Members have to pursue the imposition of a safeguard measure under the DSU.

43. There is nothing in SG Article 8 or elsewhere in the Safeguards Agreement that says that the obligation under SG Article 8.1 is also suspended. The obligation to try to maintain a balance under GATT 1994 remains, even if the failure to do so can only be pursued through a dispute. This is an important element of the balance of rights and obligations under the Safeguards Agreement.

44. The length of time it can take to obtain an outcome through the dispute settlement system will in a practical sense, dissuade Members from taking this issue to a dispute by itself. This provision will only be effective if all Members recognize the clear obligation under SG Article 8.1.

SG Article 12 - notification and consultation

SG Article 12.2

45. The USA did not notify the Committee of the reasons justifying the measure actually imposed. The justification of the measure is "pertinent information" and SG Article 12.2 requires that "all pertinent information" be provided to the Committee. Therefore there was a breach of SG Article 12.2.

46. In addition, USA did not notify the Committee of any finding by the USITC of why the requirement in respect of "unforeseen developments" had been satisfied. However, this, being a legal requirement, is "pertinent information" that should have been provided, if the USITC had fulfilled the requirements of GATT 1994 Article XIX.

SG Article 12.3

47. The nature of the measure was unknown until the President announced it on 7 July 1999. The USA failed to use the consultative process to meet the objective of SG Article 8.1. Indeed, the USA considered that the one meeting on 14 July 1999 concluded the SG Article 12.3 consultations, i.e.

only 7 days after the announcement of the measure. This reflected the fact that the USA had no intention of meeting its obligations under SG Article 12.3 and 8.1.

SG Article 12.6

48. Since the USA apparently carried out an investigation after the USITC reported to the President, then those procedures were not notified to the Committee, in breach of SG Article 12.6.

SG Article 2.2 - non-discrimination

49. SG Article 2.2 requires that measures be applied in a non-discriminatory way. Australia is not arguing whether or not FTA partners can exclude themselves from the application of safeguard measures. Rather a Member has to decide whether its FTA partner is in or out. If it is to be part of the injury analysis, then it has to be subject to the measure in the same way as other countries. If it is to be excluded from the measure, it must be excluded from the injury assessment, except as an "other factor".

SG Article 11.1(a) - conformity with the provisions of GATT 1994 Article XIX applied in accordance with the Safeguards Agreement

50. Since the measure is inconsistent with not only GATT 1994 Article XIX, but also, other provisions of the Safeguards Agreement, the measure is inconsistent with SG Article 11.1(a).

SG Article 2.1 - the injury assessment required to impose a safeguard measure

51. SG Article 2.1 only allows a safeguard measure to be imposed if the Member has determined in accordance with the provisions of the Safeguards Agreement that, in this case, increased imports are threatening to cause serious injury to the domestic industry that produces like or directly competitive products. Since the USA did not comply with the requirements of SG Article 4, the measure is inconsistent with SG Article 2.1.

GATT 1994 Article II - tariff bindings on lamb meat

52. Since the measure is inconsistent with the Safeguards Agreement and GATT 1994 Article XIX, the USA has no legal cover for the tariff quota system, which is inconsistent with its tariff bindings. Therefore, the USA is in violation of its bindings on lamb meat under GATT 1994 Article II, both for the out of quota tariff rate and the in-quota rate.

COMMENTS ON USA'S FIRST SUBMISSION

53. We shall now provide initial comments on the USA's First Submission. More detailed comments will be provided in the context of Australia's rebuttal submission.

Standard of review

54. The USA mischaracterizes the responsibilities of a panel in reviewing what was done by a Member to justify the use of the derogation under GATT 1994 Article XIX and the Safeguards Agreement to take emergency action in the form of a safeguard measure. Australia set this out in paragraphs 119 and 120 of Australia's First Submission.

55. At paragraph 42 of the USA's First Submission, the USA seeks to paraphrase the standards set down in the Argentina and Korea safeguard panels and Appellate Body reports and so to inject its own version of the standard of review in Article 17.6 of the Anti-Dumping Agreement by stealth. There is no basis for the USA's position as was found by the Appellate Body at paragraph 118 of *Argentina - Footwear Safeguard*, the Appellate Body found that DSU Article 11 sets forth the appropriate standard for reviews for panels. Indeed here the USA is arguing that the USITC should be shown utmost deference by the Panel, indeed more deference than was shown to the USITC by the US Government in rejecting its recommendation on remedy.

56. At paragraph 43, the USA continues by arguing that the Panel must show complete deference to the US Government in determining the extent of the measure. Since the USA argues in its First Submission that it does not have to provide any justification for the choice of the measure, its view seems to be that, unless the measure is a QR, SG Article 5.1 entails no obligation, or at least no obligation that a complainant is allowed to bring to a panel.

57. The USA also alleges at paragraph 43 that Australia is asking the Panel to carry out a *de novo* review. This is simply not true. Australia is asking for no more and no less than that the Panel should follow DSU Article 11 in carrying out its responsibilities.

58. Tellingly, the USA after accusing Australia of seeking a *de novo* review, then went ahead with a *de novo* reconstruction of the USITC Report. In paragraphs 78 to 82 the USA rewrites what the USITC did and confuses the threat analysis with the causation analysis. The USITC's finding that the "domestic industry" was "threatened with imminent serious injury" was on the basis of the analysis on pages I-16-21 in the section titled "Serious injury or threat of serious injury". There was no analysis of such factors as projected imports and shifts in the mix of product being imported in the finding that the "domestic industry" was "threatened with imminent serious injury". This reconstruction by the USA is illuminating. It reveals that the USA considers that the USITC should have done this analysis as part of its investigation - but it did not.

"Inferences about the Imminent Future"

59. At paragraphs 134-136, the USA mischaracterizes the issue, again in effect seeking to be allowed to conduct a *de novo* investigation. The facts show that the analysis being described by the USA is not what the USITC did to determine threat of serious injury. The attempt by the USA to now include such an analysis implies that the USA agrees that a sequential analysis is bound to be flawed, as the USITC one is.

"Clearly imminent"

60. Paragraph 134 mischaracterizes the record of the USITC Report. It confuses the threat of injury finding and the subsequent causation analysis by the USITC.

61. Australia is not trying to be highly prescriptive about what the USITC might have done. However, benchmarks are required for such a determination in relation to what serious injury was and when it would occur. Analysis and justification is required given that injury can occur at different times and in different degrees to different segments. Australia submits that the USA should not be able to simply sidestep the substantial obligations under the Safeguards Agreement because its choice of "domestic industry" makes it difficult to comply with the obligations under the Safeguards Agreement.

"Unforeseen developments"

62. In a similar vein, in addressing the issue of "unforeseen developments" under GATT 1994 Article XIX, the USA undertakes an analysis in paragraphs 47-60 to show that: "[t]he USITC's findings demonstrate, as a matter of fact, circumstances constituting unforeseen developments".[3] Again this is illuminating.

63. First, the USA makes no attempt to argue that there was no obligation for it to demonstrate "unforeseen developments" at the time as part of the USITC Report. Indeed, since this is a legal requirement for a safeguard measure to be imposed, it necessarily has to be demonstrated before a measure is imposed. It is not a question of whether the USITC might have been able to construct a case, but whether the USITC did demonstrate that this legal requirement was fulfilled. The USA has not rebutted Australia's claim that the USITC did not do so. Recall that the Appellate Body said at paragraph 98 in *Argentina - Footwear Safeguard* that: 'whether the Argentine authorities have, in their investigation, demonstrated that the increased imports in this case occurred "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … ".' This reinforces the point that this was a legal requirement that the USA must have met before imposing the measure. It did not do so.

64. The USA in its First Submission tries to remedy this in paragraphs 47-60. However, the deficiency can not be cured after the event. Nevertheless, we shall look briefly at what the USA says.

65. The USA relies on the change in market shares of fresh or chilled and frozen imports. It implies that this was a significant factor in the USITC's considerations and that this was an "unforeseen development". However, to the contrary, the USITC Report concludes that fresh, chilled and frozen lamb meat are used in the same way. The USITC's analysis of this product mix was really aimed at trying to rebut respondents' claims that imported and domestic lamb meat are not like product. The USITC Report does not examine changes in the market shares of fresh or chilled and frozen lamb meat and draw conclusions on “unforeseen developments” in the way implied by the USA's First Submission.

66. In any event, it is unclear what the USA is seeking now to prove. It seems to be arguing that there was injury because of changes to the product mix. That is not the issue. What is at issue is whether, inter alia, increased imports occurred as a result of "unforeseen developments" etc. This is not even mentioned by the USA let alone the USITC.

67. Even if the USITC had made such a comment, it is unclear in what way a change in the mix of the like product under investigation could be regarded as an "unforeseen development". Such

[3] At paragraph 60 of the USA's First Submission.

changes are part and parcel of normal trade and are to be expected rather than being unforeseen. Thus the USA is left in paragraphs 47-60 with the only change addressed by the USITC being increased imports, which it addresses in paragraph 57 and 58. However, increased imports can not satisfy the requirement of "unforeseen developments". Safeguard action can not be taken at all unless there is an increase in imports. If an increase in imports were to be considered as being "unforeseen developments", then that would be to write this condition out of GATT 1994 Article XIX. Rather the USA had to prove before imposing the measure that: "the increased imports occurred as a result of unforeseen developments etc."

SG Article 5.1 - extent of the measure

68. On the one hand the USA seems to accept that there is a WTO obligation under the first sentence of SG Article 5.1 , but on the other is trying to ensure that the obligation cannot be effectively challenged in a dispute. The cursory explanation in paragraphs 216ff does not constitute a justification under SG Article 5.1. All the USA is saying is that safeguard measure imposed by the President was justified. There is an obligation on the USA to ensure that the measure was no more restrictive than necessary.

69. No reason is given in paragraph 218 why the higher out of quota tariff rate was necessary. Indeed at paragraph 202 the USA is saying that a 40 per cent tariff is no more restrictive than a 20 per cent tariff. While this is clearly nonsense, the implications of the statement are interesting. Firstly, if that was true, why did the USA impose the higher out of quota tariff? Secondly, through this statement the USA is admitting that it had no justification for imposing a 40 per cent rate rather than a 20 per cent one, and so is in breach of Article 5.1.

70. In paragraph 217 the USA simply says that the additional in-quota tariff was projected to lead to higher domestic prices. That is not an unexpected result, but is not a justification under SG Article 5.1.

71. The USA's First Submission at paragraphs 206-209 seeks to argue that the USITC actually made a range of recommendations to the President. Under US law there was only one recommendation from the USITC, the plurality recommendation. That was the only recommendation notified to the Safeguards Committee. Individual Commissioners put in their own comments as individuals. If a Member can say that it could pick and chose between any comments made, then that would simply throw away any discipline. The USITC process is the approach under US law, but US law does not alter the USA's WTO obligations. Moreover, if the USA's argument is correct, it would also apply to injury determinations. Thus if an investigating authority came to a split decision on injury with the recommendation under law being no injury but with a minority report of injury, the Member could reject the majority report and impose any measure that it wants. The Member could then turn around and tell affected Members and any Panel that it is inappropriate to pry into the justification for this action. That would effectively undermine the Safeguards Agreement.

Change in the proclamation

72. At paragraph 222, the USA discusses the modification to the measure so that the TRQ applies from the date of export rather than the date of entry into the USA. Australia certainly did welcome this to deal with product on the water, given that it would otherwise have been subject to the punitive 9 per cent in-quota tariff. However, it is not accurate to say that it allowed the entry of additional product that would not be subject to the TRQ. What it did was push the effective period of application of the measure out. For example, if the measure nominally terminated on 22 July 2002, then any product shipped by that date would still be subject to the measure even though it entered the USA after 22 July 2002.

Duration of the measure

73. At paragraph 201 the USA argues that the measure is less restrictive in some way than the USITC recommendation, since its duration is only for three years and a day rather than four years. Unless the USA is making an undertaking that the measure will not be extended beyond the three years and a day, that does not make any sense. The USA could have terminated the four year measure in less than three years and the USA might seek to extend the current measure. The maximum period of each is eight years and the conditions for a WTO consistent extension would presumably be similar. In any case, what is at issue is whether the measure is no more restrictive than necessary as it applies to actual trade.

"Domestic industry"

74. We shall now briefly look at the USA's arguments on the "domestic industry" issue. The USA relies on the assertion that there is a coincidence of economic interest among all the industry segments. The USA does not explain the relevance of this economic interest test to SG Article 4.1(c).

75. The USA makes play of vertical integration of the industry segments, but again does not explain why this is relevant to the Safeguards Agreement. Moreover, a claim of vertical integration is difficult to sustain; for example, consider growers. There are more than 70,000 growers. Only a small fraction of these would be integrated into feed lots. Of the 49 growers for which the USITC had financial data 42 were not feeders. Clearly there is no vertical integration of growers to feeders let alone to packers. The USA does not point to any provision of the Safeguards Agreement that says all upstream industries should be included as producers in the definition of "domestic industry" provided that together they add up to a large proportion of the total value added.

76. Moreover, while for a grower that sells lambs to feeders, this may be the largest part of the business, it is not the only source of revenue. For example, in Fiscal Year 1997, Table 12 on II-27 of the USITC Report suggests that for a grower that is not a feeder, the sale of feeder lambs accounted for only 2/3rd of revenue, with sales in particular of cull ewes and wool.

77. The USA's First Submission referred to *United States - Definition of Industry Concerning Wine and Grape Products*. There the issue was whether there was separate identification of the production of grapes and wine:

> "the Panel found that, irrespective of ownership, a separate identification of production of wine-grapes from wine in terms of Article 6:6 of the Code was possible and that therefore in fact two separate industries existed in the United States - the growers of wine-grapes on the one hand and the wineries on the other."[4]

78. There is clearly a separate identification of the production of feeder lambs and lamb meat with little vertical integration into feeders and virtually none from growers into packers and breakers.

Quality of the evidence

79. Regarding the comment at paragraph 161, that the information was "comprehensive as practicable" and "most comprehensive data available", there is a positive obligation on the USA to obtain demonstrably representative information. The USA did not do this even for the actual producers, the packers and breakers. It failed to do so completely for growers and feeders. In the absence of either a high level of responses by all companies in an industry or a statistically valid set of responses by companies, information can not be assumed to apply to an entire industry or industry

[4] At paragraph 4.3 of United States - Definition of Industry Concerning Wine and Grape Products.

segment. The most that can be said is that the findings relate to some companies without any information about the industry or industries as a whole.

80. Unless the investigating authority demonstrates that the data is representative, no conclusion can be drawn for the producers as a whole. To take one breaker and assume that that applies to all breakers is mere conjecture. To take what the USITC admits is not a representative sample of 42 non-feeder growers and assume that that applies to 70,000 other growers is mere speculation.

Non-treatment of factors in SG Article 4.2(a)

81. Safeguard action is an extraordinary act that impacts adversely on affected Members. In particular the requirements in SG Article 4.2(a) are that all relevant factors, including those listed must be evaluated. To consider a factor the data must be reliable, otherwise the factor can not be evaluated.

82. The poor quality of the data means that wherever the USITC relies on such data for examining factors, in particular those listed in SG Article 4.2(a), the USITC did not evaluate them in respect of the industry segment at issue. While the USITC uses language that implies that it is talking about sets of producers as a whole in reality it is simply talking about a small, or in the case of growers a truly minuscule, subset of producers. This does not satisfy the strict obligations under the Safeguards Agreement.

83. At paragraphs 167-171, the USA argues that the USITC only had to evaluate a factor listed in SG Article 4.2(a) when it had "objective and quantifiable" data. SG Article 4.2(a) requires the evaluation of all relevant factors of an objective and quantifiable nature, in particular all those listed, i.e. those listed are deemed to be relevant factors of an objective and quantifiable nature. It is not good enough to say that they are difficult to measure, or that it would be too much trouble to obtain accurate, representative survey data.

84. A feed lot is just like any other business. It is difficult to believe that a firm will construct a feed lot and conduct business without knowing how much product is, and could be, produced. Similarly, it is difficult to believe that a grower with a breeding flock has no idea of how many lambs it does, and could, produce for lamb meat.

Determination of the industry as a whole or for each segment

85. With regard to paragraph 125 of the USA's First Submission, the issue in what is meant by "overall impairment to the position of a domestic industry" especially in a threat case. The USA accepts that it was obliged to look at the position of the producers as a whole. It had to show that serious injury was clearly imminent to the producers as a whole. The USITC finding is neither fish nor fowl. There is no clear finding about what injury will be caused to each industry segment or when it will be caused. If the USA is saying that USITC did not have to do an analysis on a segment by segment basis, then what exactly did the USITC show? It did not attempt to aggregate the impact on the industry segments. It admits, as does the USA in paragraph 129, that the impact and timing of market cycles differs from segment to segment. Therefore, the USITC did not prove that serious injury was clearly imminent to the producers as a whole or to each of the segments. It made no attempt to argue that three or some other number of segments would do.

86. This is an issue that arises because of the choice of "domestic industry" and is exacerbated by the fact that it is a threat case, not a case of actual serious injury. However, the USITC having gone down that path had to live with it. Of course, the Safeguards Agreement does not talk about how to deal with 4 separate industries producing quite distinct products in a vertical chain because that is not

envisaged under SG Article 4.1(c). But that does not relieve the USA of its obligation to comply with SG Article 4.1(b) and 4.2.

"Displacement"

87. At paragraph 97, the USA mischaracterizes what Australia said at paragraph 144 and showed in Graph 3. The fact that imports during the period were less than 1/3rd of the drop in production underlined the fact that imports were not displacing domestic production but were only slowing the drop in consumption. Without imports, consumption would have fallen even further.

National Wool Act subsidies and "other factors"

88. The USA says at paragraph 98 that the USITC found that there had been some recovery by 1997 from the removal of the National Wool Act subsidies. It goes on at paragraph 100 to say that: "apart from the effects of imports, the prior decline had largely come to an end by 1997."

89. Contrary to the comment in paragraph 100 cited above, nowhere does the USITC find that the endogenous factors behind the decline in the US lamb industry and the other industry segments had been removed. Indeed it would be remarkable that the removal of a subsidy could so quickly make a sick industry healthy, and begs the question why the USA did not remove the subsidy many years earlier, if its removal was the magic elixir for the lamb and other industry segments.

90. The issue here is two-fold. Firstly, the recovery tended to be on the financial side because the flock liquidation following the 1994 legislative action removing the subsidies led to a temporary lift in prices. The subsequent fall in prices due to the instability following the removal of the subsidies cannot be attributed to imports. The USITC attempted to show a decline in the position of the industry segments by comparing Jan-Sept 1998 with this one-off high price period. Secondly, there continued to be a decline in the flock without these subsidies, which underwrote the inefficient lamb industry. Again, this lack of government action cannot be attributed to imports.

91. If a Member could simply say that there is injury and there are imports, therefore the causation requirement is met, that would effectively write the causation requirement out of the Safeguards Agreement. In order to get to first base under the Safeguards Agreement, there must be increased imports. SG Article 4.2(b) requires a more stringent test of separating out the injury attributable to all other factors. Moreover, under the final sentence of SG Article 4.2(b), it is the injury caused by "factors other than increased imports" that must not be attributed to increased imports. Thus the impact of all other factors must be cumulated and that injury not attributed to increased imports.

SG Article 8.1

92. We note that at paragraphs 259-267, the USA discusses SG Article 8.1 but does not address the issue that SG Article 8.3 only suspends the right to take unilateral action and does not suspend the obligation on the importing Member and the right to take the issue to a dispute.

SG Article 2.2

93. We shall just make two comments at this time. Firstly, on the issue of what Australia does, an Australian investigation would not include imports of New Zealand origin in the injury assessment. Indeed they would be an "other factor" and Australia would not apply a safeguard measure to product of New Zealand origin. This is of course the opposite of what the USA does.

94. At paragraph 242, the USA said that it was required to apply SG Article 9.1. If it applied SG Article 9.1, then why did it not notify that? Of course the terms of the exclusion under SG Article 9.1 and that for CBERA and ATPA beneficiary countries are different.

95. At paragraphs 244, 254, 255, and 257 the USA says in various ways that (using the words for Canada) "Australian and New Zealand are simply wrong in claiming that Canadian lamb meat imports figured in the USITC's threat of serious injury determination."

96. This is at odds with both the USITC's findings and the US statute. Today we shall focus on Canada. It is quite clear from I-26 of the USITC Report that the consideration of Canada under section 311(a) of the NAFTA Implementation Act took place only after the USITC had made its affirmative injury determination. The exclusion of Canada (and Mexico) was under a separate statute. There is nothing in the Safeguards Agreement that allows some countries to be excluded on different thresholds. SG Article 2.2 provides for non-discrimination, whereas the USA discriminated in favour of Canada as one of the countries subject to the injury investigation and finding.

CONCLUSION

97. In sum, Australia has shown that the measure is inconsistent with SG Articles 2.1, 2.2, 3.1, 4.1(b), 4.1(c), 4.2(a), 4.2(b), 5.1, 8.1, 11.1(a), 12.2, 12.3, and 12.6. The USA has failed to rebut the arguments made by Australia, but has confirmed the inconsistencies shown by Australia.

ANNEX 1-7

ANSWERS BY AUSTRALIA TO QUESTIONS BY THE PANEL

(22 June 2000)

Was the "unforeseen developments" provision of Article XIX:1 of GATT 1994 fulfilled?

1. You seem to argue (citing to the Appellate Body reports in *Korea Dairy* and *Argentina Footwear*) that since developments subsequent to the negotiation of a trade concession could have been foreseen there was no basis for the safeguard measure to be applied to US imports of lamb meat. How could it ever be proven by a Member that has applied a measure that it could not have foreseen or did not foresee a given development occurring after its negotiation of a concession?

Answer 1:

Australia's arguments were limited to the circumstances of this case. The circumstances to establish "unforeseen developments" will differ from case to case. The issue is that increased imports have resulted from "unforeseen developments", not that all developments have to have been able to be foreseen or expected. In this case, the increased imports of lamb meat must have been as the result of "unforeseen developments" after the concession has been *incurred*, i.e. after the Member has made itself subject to the concession, which is the date of entry into force of the concession.

Where this is not the case, a Member cannot take safeguard action under the Safeguards Agreement and GATT 1994 Article XIX. This is appropriate given the extraordinary nature of safeguard action.

Finally, Australia's arguments were not simply that "unforeseen developments" did not exist but also the legal requirement that the USA was obliged to address the issue before applying the measure, i.e. in the USITC Report, but it did not do so. The argument about the lack of "unforeseen developments" is an argument in the alternative.

2. You seem to argue that the existence of "unforeseen developments" in the sense of Article XIX is a "prerequisite" (NZ) or a "legal requirement" (AUS). The Appellate Body in *Korea –Dairy Safeguard* and *Argentina – Footwear Safeguard* explicitly stated that "unforeseen developments" do not constitute an "independent condition" for the application of a safeguard measure but rather constitute a "circumstance" the existence of which "must be demonstrated as a matter of fact". By arguing that it is a "prerequisite" or "legal requirement", are you not in effect arguing that "unforeseen developments" constitutes a "condition"? How would you define the difference if any between a "legal condition" and a "factual circumstance"?

Answer 2

Australia's argument was that, since the existence of the circumstance "must be demonstrated as a matter of fact[1], it is a "pertinent issue of fact and law" that must be addressed, in this case, by the USITC in its report. The purpose of a procedural agreement, is to have a Member ensure that the requirements for taking an action are satisfied before taking that action.

[1] For example, at paragraph 85 in the Appellate Body report on *Korea - Dairy Safeguard* (WT/DS98/AB/R).

If "unforeseen developments" "must be demonstrated as a matter of fact", then this demonstration must occur at or by some particular time. The two obvious times are (for this case) in the USITC Report and an *ex post facto* examination of the circumstances during the panel process of the USITC record by way of a *de novo* review. Australia's argument is that this is a pertinent issue that was required to dealt with in the USITC Report.

In respect of the Panel's question on the distinction between "legal condition" and "factual circumstance", Australia reads the Appellate Body[2] as contrasting the three subsequent "*independent conditions*" *[Underlined emphasis added.]* set out in GATT 1994 Article XIX:1(a) and "'circumstance" the existence of which "must be demonstrated as a matter of fact"'. This does not make it any the less a *legal requirement* to demonstrate the existence of "unforeseen developments" as a matter of fact.

3. You also seem to argue that there must be an explicit "finding" of, in so many words, "unforeseen developments" in a report on an investigation. If this is your position, on what treaty language do you base this contention, particularly in the light of the above-quoted language of the Appellate Body? If the "existence" of "unforeseen developments" can be discerned from the report of a competent authority, even if these precise words are not found in that report, why would this element of Article XIX not be fulfilled?

Answer 3

This is also dealt with in the answer to the previous question. The Appellate Body considered that the existence of "unforeseen developments" must be demonstrated as a matter of fact. *To demonstrate* in this context is to:

> "establish by logical reasoning or argument, or by practical proof; prove beyond doubt, prove the existence or reality of".[3]

By contrast *to discern* in this context is to:

> "make out by looking".[4]

Thus to meet the finding by the Appellate Body, it would not be sufficient to simply allow the existence of the circumstances to be able to be discerned by a Panel in a dispute from the USITC Report .

In addition, the USA had an obligation to conform with its obligations under the Safeguards Agreement, e.g. under the *pacta sunt servanda* rule[5], A Member could only do that in respect of "unforeseen developments" by a determination before applying the measure. Unless the USA had demonstrated this before applying the measure, it could not have known that it was in compliance with its WTO obligations. The demonstration of the existence of the circumstance is a pertinent issue of fact and law. Thus it must be covered in the report by the competent authority.

Moreover, GATT 1994 Article XIX:1(a) says:

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[2] For example, again at paragraph 85 in the Appellate Body report on *Korea - Dairy Safeguard* (WT/DS98/AB/R).

[3] New Shorter Oxford English Dictionary, CD Edition, January 1997 (NSOED).

[4] NSOED.

[5] As codified in Article 26 of the Vienna Convention that a treaty must be performed in good faith.

> "If, as a result of unforeseen developments ... 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."

This entails that the Member is only "free" to impose a measure if the existence of "unforeseen developments" has been demonstrated, i.e. the demonstration must occur first.

Finally, it is implicit in the Appellate Body findings in *Argentina - Footwear Safeguard*[6] that a *demonstration* of "unforeseen developments" made as part of an investigation by the competent authority is a legal requirement under GATT 1994 Article XIX:1(a). After resting its ultimate decision in the case on other grounds, the Appellate Body found it unnecessary to further inquire "whether the Argentine authorities, have *in their investigation*, demonstrated that the increased imports in this case occurred as a result of unforeseen developments". *[Emphasis added.]* Thus, while the Appellate Body considered that it was not necessary to complete the analysis, it considered that the issue involved a demonstration in the actual investigation, i.e. in this case by the USITC in its report.

4. You seem to focus in your arguments concerning unforeseen developments on the contention that the increase in imports, as such, must be the result of "unforeseen developments" and in turn must cause or threaten to cause serious injury, for a safeguard measure to be permissible. The relevant language of Article XIX:1 of GATT 1994 seems broader than this, however, in that it refers to imports "in such increased quantities and under such conditions" resulting in part from unforeseen developments. The Appellate Body in Korea – Dairy Safeguard and Argentina – Footwear Safeguard also referred to both "increased imports" and "under such conditions" in its discussion of unforeseen developments. The text of Article XIX:1 thus might imply that in a given case, the "unforeseen developments" might be in respect of the "conditions" under which the increased imports are competing in the importing country market, rather than solely in respect of their quantity. In such a case, this "unforeseen" change in the conditions of competition (rather than some other unforeseen factor bringing about an increase in imports as such) might be the reason that the increased imports are causing or threatening to cause serious injury. Please comment.

Answer 4

In the Hatters' Fur case[7], at paragraph 4 the Working Party agreed that one of the three sets of conditions that had to be fulfilled was:

> "*(a)* There should be an abnormal development in the imports of the product in question in the sense that:
>
> (i) the product in question must be imported in increased quantities;
>
> (ii) the increased imports must be the result of unforeseen developments and of the effect of the tariff concession; and
>
> (iii) the imports must enter in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products."

[6] WT/DS121/AB/R.
[7] GATT/CP/106, 27 March 1951.

The Appellate Body at paragraph 98 of *Argentina - Footwear Safeguard* said:

> "For this reason, we do not believe that it is necessary to complete the analysis of the Panel relating to the claim made by the European Communities under Article XIX of the GATT 1994 by ruling on whether the Argentine authorities have, in their investigation, demonstrated that the increased imports in this case occurred "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … "."

This confirms that the Appellate Body considered that there had to be a demonstration, in the investigation in respect of "increased imports". Moreover, it also clearly implies that the Appellate Body considered a demonstration of "unforeseen developments" necessary to comply with GATT 1994 Article XIX.

Australia has focused on the requirement for the US' authorities to have, in their investigation, demonstrated that the increased imports in this case occurred "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … '.'

GATT 1994 Article XIX reads: "in such increased quantities ***and*** under such conditions ...". *[Emphasis added.]* If "and" could have been read as "or", i.e. that "as a result of unforeseen developments" need not apply to "in such increased quantities", then recourse to Article XIX would have been allowed even in the absence of increased imports, contrary to interpretation under GATT 1947.

It is difficult to imagine what "change in the conditions of competition" would satisfy the requirement to demonstrate the existence of "unforeseen developments" to satisfy GATT 1994 Article XIX. This would have to be looked at on a case by case basis.

Australia submits that it certainly does not apply in the case before the Panel. While imports of some cuts may have increased more than others, this is no more a change in the "conditions of competition" than would apply for any increase in imports. To allow that as a "demonstration" of the existence of "unforeseen developments" would be to say that any increase in imports is such an "unforeseen development": this would have the effect of writing this requirement out of the WTO.

Is the definition of the "domestic industry" that was used in the USITC's investigation consistent with the Safeguards Agreement and GATT 1994?

5. The USITC noted some vertical integration and common ownership between companies operating in the grower, feeder, packer and breaker industry segments. Australia and New Zealand do not contest that fact *per se* but argue that there are few such examples in the US industry. In WTO dispute settlement practice (e.g., *EC – Bananas III*) vertically integrated companies have been deemed potential suppliers of like distribution services. By the same token, any grower or feeder of live lambs could at the same time actually or potentially enter the packing or breaking business. On what basis could such potential producers of lamb meat be excluded from the domestic industry producing like or directly competitive products?

Answer 5

Regarding the Panel's comment, Australia contests any implication by the USA that there is a high degree of vertical integration through the four industry segments, and indeed any claim that there can be no separation out of activities. The USA has not produced any evidence that "vertical integration" was an issue affecting the USITC's ability to assess financial information to determine whether the actual producers were experiencing or were going to imminently experience serious injury. Indeed all the evidence in the USITC Report is that "vertical integration" is very limited. Virtually none, if indeed any, of the 70,000 growers is part of a vertically integrated operation to the packers and/or breaker stage. If "vertical integration" was an issue, it would have been expected that such firms would have been significant in the USITC's selection of firms. However, what we see is that out of the 49 firms growers and grower/feeders providing financial information as growers, 42 were not even integrated with feeder operations let alone packer and or breaker operations. While the USITC Report says at page II-12 that "[s]ome growers engage in more than one sheep-raising activity, such as feeding and sometimes slaughtering their lambs" the implication here is that they are not integrated into packers or breakers as substantial commercial operations (despite the implication in paragraph 66 of the USA's First Submission). If those operations are to be considered as part of the packer and/or breaker industry segments, then the packer/breaker activities of such firms should have been part of the USITC questionnaire survey - it appears that they were not. Moreover, the fact that some packers might have feeder operations, and that some different feeders might have grower operations, does not justify sweeping up such feeders into the "domestic industry", let alone independent growers.

In respect of the analogy drawn with *Bananas II*[8], the definition of "domestic industry" in SG Article 4.1(c) refers to "the producers as a whole". It does not talk of "potential" producers but only actual producers. This case is about actual producers of lamb meat and whether serious injury caused by increased imports was clearly imminent to those producers as a whole. A firm that does not produce lamb meat, including one that no longer produces lamb meat, cannot be threatened with serious injury caused by increased imports of lamb meat. The WTO agreements on anti-dumping and countervailing have definitions of injury that include "material retardation of establishment". However, this does not apply to the Safeguards Agreement. For this particular dispute there is common ground that the "domestic industry" exists, the difference in view is over the true scope of that industry.

With regard to *Bananas III* the Appellate Body said at paragraph 227 of WT/DS27/AB/R:

> 'In our view, even if a company is vertically-integrated, and even if it performs other functions related to the production, importation, distribution and processing of a product, to the extent that it is also engaged in providing "wholesale trade services" and is therefore affected in that capacity by a particular measure of a Member in its supply of those "wholesale trade services", that company is a service supplier within the scope of the GATS".'

Suppose for the sake of analogy that there was a firm that was vertically integrated from grower to breaker. That part of the firm producing and so supplying feeder lambs, could potentially sell those feeder lambs to an outside feed lot. It would be involved in selling, but it would not be selling the same product as the breaker part of the firm. That grower part of the firm would still be carrying on the same activities as independent growers and would not be producing carcasses or primal and sub-primal cuts of lamb meat, but would be "engaged" in producing feeder lambs. A trading firm could buy feeder lambs from growers and sell them to feedlots. Such a firm would be involved in the same

[8] WT/DS27/R/USA

potential service but it would not be producing feeder lambs as a good, let alone producing sub-primal cuts of lamb meat.

On the other hand, for a grower to enter the packing or breaking business, i.e. to be "engaged" in producing carcasses or cuts, requires a substantial investment. It is not something that can be done at whim. If it did, then it would be producing lamb meat, but until then it would not. Similarly, any company can become a packer or breaker. In particular, any packer or breaker of meat other than lamb meat could move into the industry. This is irrelevant to the question whether such firms are already part of the "domestic industry" for this dispute and were imminently about to suffer serious injury caused by increased imports of lamb meat.

6. Suppose a market situation where virtually all of the value of the end-product is added through raw materials and intermediate goods and where the industry segment producing the end-product is highly concentrated and has the market power to "pass back" virtually all injury caused by imports of like or directly competitive end-products to producers of those raw materials or intermediate goods. In such a situation, why should not all of these producers be included in the domestic industry? In your view, in the absence of serious injury suffered by the industry producing the end-product due to the "pass-back" effect, would it simply become practically impossible to impose safeguard measures on like or directly competitive end-products of foreign origin? How would Australia or New Zealand treat such a situation under their own domestic safeguard procedures? Please explain in detail.

Answer 6

The Safeguards Agreement specifically defines the relevant industry as the producers as a whole of the "like or directly competitive products" to the product under investigation. There is nothing in the text of the Safeguards Agreement regarding the issue of being able to "pass back" injury in some sense from breakers to growers, nor in the normal meaning of the word, "producer".

Moreover, the hypothetical case posited by the Panel would seem not to be relevant to the dispute before the Panel. As noted by the Panel in Question 10, the USA has asserted that it could have come to the same injury determination if it had limited the "domestic industry" to packers and breakers. Therefore, the USA is not asserting that there was no injury to packers and breakers, and so as a result growers and feeders should be included in the "domestic industry".

The USITC determined the "domestic industry" on the basis of "like product" because there were producers of the "like product", which was in this case domestic lamb meat. The determination of "domestic industry" had then to be done on the basis of who produced "domestic lamb meat".[9] Findings on issues of injury, including causation, can only be made in the context of the decision on the "domestic industry". The "domestic industry" cannot be chosen on the basis of which set of firms will give an affirmative injury finding and which set will give a negative finding - that would lead to an à la carte approach to the Safeguards Agreement, which would undermine its disciplines.

The Australian safeguard procedures are set out in G/SG/N/1/AUS/2 and reflect the text of the Safeguards Agreement. It would be up to the designated competent authority (the Productivity Commission) to interpret them on a case by case basis, and then up to the Government to decide whether it would be consistent with Australia's WTO obligations to impose a measure on the basis of the Productivity Commission's report. Australia has not introduced a safeguard measure under Article XIX since 1983 and has not applied a measure under the WTO Safeguards Agreement.

[9] Hypothetically, if the USITC had gone to "directly competitive products", then its task would have been to decide what they were and who produced them.

Did the USITC demonstrate that there was a "threat of serious injury" due to "increased imports"?

7. Could you specify how a *prospective* analysis of injury factors should be conducted in order to assess whether a "threat of serious injury" exists? Under which conditions would you consider projections of how injury factors would develop in the near future a sufficient basis for an analysis of threat? What in your view are the flaws of the US methodology in making such projections in this case? Would you consider that certain injury factors are more important for an analysis of "threat" than others? If so, which ones? How could any such "prospective" analysis about future developments in the various injury factors be anything other than "allegation, conjecture or remote possibility"?

Answer 7

SG Article 4.1(b) requires that a determination of "threat of serious injury" be based on evidence that the serious injury is "clearly imminent". Where a determination of serious injury is not supported by the evidence and, therefore, not made, an analysis supported by facts must demonstrate that the situation of the domestic industry will change markedly and that such a change is imminent. (In the case before the Panel it was found that serious injury was not being experienced.) It is not sufficient to take a static analysis which does not support a determination of serious injury and simply base a threat determination on:

> "In view of the declines during the period of investigation in the domestic industry's market share, production, shipments, profitability, and prices, among other difficulties that the domestic industry is facing, we conclude that it is threatened with imminent serious injury."[10]

The Period of Investigation was 1993 to Sept. 1998. These conclusions were based on an inadequate data set, which ran to Sept 1998 for some firms and only to 1997 for others in the "domestic industry". There is no analysis in the USITC Report how "the declines" and "other difficulties" during the Period of Investigation proved that serious injury was clearly imminent in February 1999 let alone July 1999 when the decision was taken to apply the measure.

If firms in the "domestic industry" are unable to come forward with prospective facts to allow an evaluation to determine that serious injury will occur imminently, then a safeguard measure cannot be applied. Since a measure can only be applied if such serious injury is *clearly imminent*, this is not a matter of long or even medium term forecasts.

Action on the basis of threat alone are deservedly rare. Given that action can be taken quickly under SG Article 6 if critical circumstances arise, there is limited justification for action on the basis of "threat of serious injury". Such action can only be taken where the Member has sufficient evidence to determine that serious injury *is imminent* . The Safeguards Agreement does not provide for action on the basis of "threat of serious injury" as a precautionary action, or as a consolation prize to the petitioners, where an investigation fails to prove actual serious injury.

8. Please clarify your argument at para. 13 of New Zealand's oral statement and para. 37 of Australia's oral statement (and the similar arguments in your first written submissions). In particular, you seem to be arguing both that the US industry is in a long-term decline because of declining consumption, as demand for lamb meat has contracted due to changing consumer tastes, (i.e., that US supply was significantly in excess of demand), and that the reason that imports increased was to fill demand that was not being filled by domestic supply (i.e., that US

[10] At page I-21 of the USITC Report.

supply was significantly below demand). Is this a correct understanding of your argument? Please explain.

Answer 8

Notwithstanding the fact that total consumption of lamb meat in the USA is declining, US supply is insufficient to meet US demand. As a result, there is a gap between domestic supply and demand, which is being filled by imports. The fact that the gap is increasing (i.e. that increased imports are necessary to fill demand) is a function of US supply decreasing at a faster rate than US demand. To the extent that supply is contracting faster than demand, imports will increase. This does not mean that imports are displacing US production. In fact, quite to the contrary, as US supply decreases it creates demand for imports.

On the supply side, US lamb production has declined persistently because the grower industry segment is inefficient with high costs, low returns and consequently low investment relative to other US agriculture production systems. As a result, production resources continue to be shifted to other uses with higher returns - especially beef production. That trend dominates the grower industry segment and is diminishing production in spite of high prices for lambs and lamb meat in relation to other red meats marketed in the USA. This situation has been true for several decades.

Because lamb production is declining, consumption of lamb meat, in turn, is also restricted. Very high and growing US incomes, strong preferences for lamb by many ethnic groups, and the growth in numbers of those ethnic groups in the USA, have not benefited lamb meat in the USA at the retail level. Declining availability limits the ability of retailers to promote lamb meat, keeps prices above those of other meats, and restricts the ability of lamb meat to compete with other meats at the retail level. Indeed, total red meat consumption continues to increase while lamb meat consumption declines as US production continues to fall.

While both US production and consumption of lamb meat were falling, the data for 1993-97 in Graph 3 on page 40 of Australia's First Submission[11] show that imports were not displacing domestic product over the period of the investigation. Indeed, imports were not able to stabilize supplies.

The USITC focused extensively on the increase in imports in 1998, but the trend in imports during that period does little to refute the fact that imports were not displacing domestic production. Specifically, when domestic supply stopped falling in 1998, the rate of increase in imports declined reflecting the slight increase in domestic supply. However, at the same time there was an increase in domestic consumption, which accounted for the increase in imports in interim 1998.

On the demand side, the sector has tended to miss the market with wasteful, heavy lambs, has failed to develop any "fast-food" markets in contrast to their effective promotion by beef and poultry, and has not worked effectively with retailers to promote lamb or make it attractive to new customers.

Thus, it is a combination of domestic supply and demand developments that are causing chronic problems for the all the industry segments, rather than competition from imports.

9. What specific information in the USITC report shows that the effect of the termination of the Wool Act subsidies had not finished by 1996?

[11] Also at Exhibit 10 of Vol. 1 of Exhibit AUS-28.

Answer 9

The Australian argument is not just based on the findings in the USITC Report, since there is a difference in view about what the implications are as shown, for example, at pages II-78-79. Australia argues that the USITC Report understates the impact of the removal of the subsidies

Thus Australia's concerns over the treatment of the subsidies relate not only to the market destabilization but the flawed comparison that the USITC Report makes between different periods. While the last payments were made in 1996, a comparative analysis requires that the effect of the removal of the subsidies be taken into account in considering other factors.

The impact of the termination of the National Wool Act subsidies appears throughout the USITC Report.

On the issue of comparison, as was shown in the table on page [12] of Australia's First Submission, drawn from data in the USITC Report, any decline in the apparent profitability of growers was entirely due to the removal of the National Wool Act subsidies. Similarly, on page II-78 of the USITC Report, it is estimated that US wool producers would have received an additional US$60m. if the phase-out had not taken place (presumably over the period of the investigation).

The discussion on pages II-78-79 (last paragraph and first three full paragraphs, respectively) set out (conflicting) views on the impact of the termination of the subsidy programme.

The last paragraph on page I-24 going on over to page I-25 of the USITC Report recognizes that there is an ongoing impact beyond 1997.

Other references to the National Wool Act are at the last paragraph on page I-17, the second dot on page I-30, and the second final paragraph on page 31.

10. The United States has argued that even if the domestic industry would be defined as comprising only packers, packers/breakers and breakers, the investigation would have led to a determination that a safeguard measure is necessary to prevent a "threat of serious injury" and facilitate adjustment. On the basis of which specific elements in the USITC report do you consider that this statement is unfounded?

Answer 10

There is the critical legal issue of whether the USA can only apply a measure following a valid finding on injury by its competent authority, or whether it is possible to rewrite an invalid finding after the event to validate measures applied pursuant to an invalid finding. The USITC Report is based on a particular definition of "domestic industry". If that is flawed, then the investigation and determination are flawed and cannot be cured.

In fact, the USA admitted at paragraph 123 of its First Submission that the USITC had not made a determination on the basis of a definition of "domestic industry" other than its flawed definition:

> "While the USITC gathered data with regard to the various economic factors for each of the four industry segments, the USITC did not make, and was not required to make, separate threat of injury determinations with respect to each of the segments."

[12] Following paragraph 153.

Having not made a determination based on a properly defined "domestic industry," for the Panel to uphold the application of measures based on a properly defined "domestic industry" it would have to both determine that the record evidence permitted such a determination and make a *de novo* investigation on the basis of the USITC record. The Panel's function is to determine whether the application of measures are consistent with the obligations of the Safeguards Agreement not to conduct a de novo investigation to determine whether the application of measures *could have been consistent with the Safeguards Agreement* if the underlying determination had been made in a manner consistent with the Safeguards Agreement.

The analysis of causation is also fundamentally different depending on the definition of "domestic industry." The situation of the growers and feeders is no longer part of the injury analysis, but instead part of the analysis of the factors causing injury to the breakers and packers. The USITC Report does not attempt to address this issue or provide record evidence addressing this issue.

Therefore, Australia submits that the USA cannot cure the incorrect definition of "domestic industry" by rewriting the USITC Report.

Nonetheless Australia does make the following comments in the alternative.

For the packers and breakers, apart from lamb meat production and shipments, the USITC Report's investigation was based essentially on its questionnaire survey. The USITC's sample of firms had no statistical basis and any conclusions drawn from it are speculative and so do not meet the requirements of SG Article 4.1(b). Similarly, due to the quality of the data, the analysis of factors is inadequate and so SG Article 4.2(a) is also not satisfied. While the flaws for packers and breakers are also set out in the context of Australia's First Submission, the following is relevant.

USDA data showed an increase in shipments in Jan-Sept 1998 compared to Jan-Sept 1997.[13] USITC data showed production by packers fluctuated during the period of investigation, while that of breakers trended upwards during the period of investigation.[14]

Moreover, for packers capacity rose during the latter part of the period of investigation, a major cause of the decline in capacity utilization. The capacity of breakers increased significantly during the period of investigation and this, *not imports*, was the cause of the fall in capacity utilization.[15]

For both packers and breakers productivity remained constant during the period of investigation.[16]

The USA did not collect data on employment for packers and breakers in breach of SG Article 4.2(a).

No information is indicated on profits and loses as such by packers and breakers in the public USITC Report apparently in breach of SG Article 4.2(a).

The same arguments by Australia also apply to the failure by the USITC Report to demonstrate that serious injury was clearly imminent. Similarly, the same problem of anecdotal information apply.

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[13] The third full paragraph on page I-18 of the USITC Report.
[14] Footnote 78 on pages I-18-19 of the USITC Report.
[15] See second full paragraph on page I-20 of the USITC Report.
[16] See third full paragraph on page I-20 of the USITC Report.

In addition, the USITC Report describes its injury finding at Footnote 61 on page I-16 thus:

> "While we find that all sectors show evidence of a threat of serious injury, we recognize that the economic effect of the increase *[unspecified]* may manifest itself in different ways and at different times in the four different sectors." *[Italicized comment inserted.]*

Thus the USITC Report only found that "all sectors *show evidence* of a threat of serious injury" *[Emphasis added.]*. The USITC Report also acknowledged that the economic effect may manifest itself in different ways and at different times. Nothing can be read into this about what this would mean for packers and breakers by themselves. Indeed, it just reinforces comments by Australia about the inconsistency with SG Article 4.1(b) and 4.2(a) and (b) for the USITC Report's definition of "domestic industry". This admits that the USITC did not find that serious injury was clearly imminent, and could not have found serious injury being threatened for its "domestic industry", since it did not seek to cumulate its findings across the four segments and so could not have made a finding for the producers as a whole.

Accordingly, the USITC Report did not demonstrate in a manner consistent with SG Article 4.1(b) and 4.2(a) that packers and breakers were threatened with imminent serious injury.

Moreover, even if the Panel allowed the USA to do a *de novo* investigation on the basis of the USITC Report regarding the issue of whether there was a threat of imminent serious injury for packers and breakers, this would still leave the question of causation. As noted above the analysis of causation is fundamentally different depending on the definition of "domestic industry". The causation analysis in the USITC Report is again for all four industry segments and the assertions on substantial cause are such that they could not be revisited for a *de novo* investigation on the basis of the USITC Report. In addition, there would be the question of what the basis would be for the USA to claim compliance with SG Article 5.1 - if the demonstration had been carried out for the wider definition of "domestic industry" in the USITC Report, how would that now be valid for the narrower "domestic industry" comprising just packers and breakers.

Therefore, Australia submits in the alternative that even if the USA were to be allowed to attempt to cure the incorrect choice of "domestic industry" through a re-examination of the USITC Report, it would still fail to meet the requirements of the Safeguards Agreement.

11. On what statement(s) in the USITC report do you base your argument that the USITC made a "finding" that there was no serious injury?

Answer 11

For example, the first paragraph on page I-29, says:

> "the US lamb industry is not currently experiencing serious injury, but rather is threatened with serious injury."

Apart from the above quote, the USITC Report seeks to determine whether increased imports are a substantial cause of serious injury or threat thereof to the "domestic industry". In so doing it first looks at whether the "domestic industry" is experiencing serious injury or whether it is threatened with serious injury. If in this first step it only finds threat, it is limited to threat in the causation analysis. Therefore, logically a finding by the USITC Report of threat alone in the first stage means that actual serious injury was absent.

Is the USITC's finding that increased imports were a "substantial cause" of threat of serious injury consistent with the Safeguards Agreement and GATT 1994?

13. We note New Zealand's arguments (i) that if there were three equal causes of a threat of serious injury of which imports was one, imports would be a "minority cause" of the threat of serious injury (para. 51 of New Zealand's oral statement), and (ii) that a determination that a threat of serious injury has been caused by increased imports when in fact not *all* of that injury has been caused by increased imports constitutes blaming increased imports for injury caused by other factors (para. 57 of New Zealand's oral statement).

(b) To Australia: Is it your position that imports must be the sole cause of serious injury or threat thereof for a safeguard measure to be permissible? If so, how do you reconcile your position with the reference in Article 4.2(b) to factors other than increased imports that are causing injury "at the same time"? If this is not a correct understanding of your argument, please explain.

Answer 13

Under both SG Articles 2.1 and 4.2 of the Safeguards Agreement, to apply a measure increased imports must have been proven to be causing or threatening to cause serious injury to the "domestic industry". If increased imports only cause or threaten to cause a lesser level of injury[17], the requirements of SG Articles 2.1 and 4.2 are not met.

SG Article 4.2(b) reinforces the requirement that a measure cannot be applied where the domestic industry is experiencing serious injury but some portion of that injury is due to factors other than imports. The last sentence of SG Article 4.2(b) reads:

> "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.]*

The text sets out that if imports and other factors combine to cause serious injury or threat thereof, that increment of the injury caused by other factors cannot be included in the analysis of whether imports are causing serious injury. By referring to "injury" rather than "serious injury," the text reinforces that in determining the existence of serious injury, *any* contributing effect of factors other than imports to the injured state of the "domestic industry" must be excluded so long as its effects on the domestic industry are simultaneous (i.e. "at the same time") with the effects of imports. Once *all* injury attributable to other factors is excluded, if the injury caused by imports is not serious, measures may not be applied.

14. In a hypothetical situation in which increased imports were one of three equal causes of serious injury, in your view would this by definition mean that a safeguard measure could not be applied? What if it could be shown that the portion of the injury attributable to increased imports by themselves could be characterized as "serious" injury (i.e., that the total injury suffered by the industry far surpassed the "serious injury" threshold, such that one-third of that level of injury was still "serious")?

[17] Such as, for example, only "material injury" in the sense of the WTO agreements on anti-dumping and countervailing.

Answer 14

Please also see the answer to question 13.

If increased imports are causing serious injury to the "domestic industry" within the meaning of SG Article 4, then that condition for the application of a measure is satisfied. However, the situation outlined above is unlikely to occur, especially in a case of "threat of serious injury".

Is the measure imposed by the US President, which differs from the USITC's recommendation, consistent with the United States' obligations under the Safeguards Agreement and the GATT 1994?

15. It appears to be your view that Article 5.1 requires, where a measure is to be applied, that that measure be *the* least trade restrictive measure that would prevent or remedy serious injury and facilitate adjustment. Is this a correct understanding of your position? If not, please explain. How in your view should the burden of proof be allocated under Article 5.1?

Answer 15

Regarding the question on what SG Article 5.1 requires, the Appellate Body said at paragraph 103 in *Korea - Dairy Safeguard* that:

> "For these reasons, we uphold the Panel's finding, in paragraph 7.101 of its Report, that the first sentence of Article 5.1 imposes an *obligation* on a Member applying a safeguard measure to ensure that the measure applied is *not more restrictive than necessary* to prevent or remedy serious injury and to facilitate adjustment" *[Emphasis added.]*

Australia's position is that the necessity must be seen in the context of the increased imports, not only because that is the purpose of the action taken under the Safeguards Agreement and GATT 1994 Article XIX, but also because the measure is a border measure and so must be aimed at the increased imports.

The issue of the burden of proof depends on the obligation. Australia submits that the USA was obliged to ensure that the conditions of SG Article 5.1 were satisfied before applying the measure. In accordance with Article 26 of the Vienna Convention, Members have an obligation to ensure compliance with the WTO Agreement, including the Safeguards Agreement and GATT 1994 Article XIX. This can only be done before the application of the measure and not afterwards in a dispute. Thus the USA must have reached a formal determination before 7 July 1999. Of course, Australia also argues that that should have been notified to the Safeguards Committee and the findings and reasoned conclusions published. But even in the absence of that, the USA must still have reached the determination.

If the Panel agrees that the determination should have been notified to the Safeguards Committee and the findings and reasoned conclusions published, then the USA is in breach and the measure is inconsistent, since it admits that it did not.

If, alternatively, the Panel disagrees with the last point but does agree that the USA had to have made the determination before applying the measure, than Australia submits that the USA still has the obligation to produce the evidence. In that case, the burden of proof shifts to Australia to rebut the USA's case. Of course, if the USA cannot produce the evidence because it does not exist, then the USA is in breach and the measure is inconsistent. If the USA refuses to produce the evidence

but refuses to admit that it does not exist, then Australia submits that the Panel should draw adverse inferences.

As a further alternative, even if the Panel found that Australia needed to establish a *prima facie* case on the facts rather that on the legal requirement for the USA to have made the determination before imposing the measure, Australia has done this. As Australia has shown the USITC Report came to a conclusion that the measure should be less restrictive than that imposed. Moreover, the USITC Report found that the "domestic industry" was not experiencing serious injury even with the increased imports of the 1998 level. No reasons were given why imports should be restricted to that level. Moreover, for that level of increased imports, serious injury was not being experienced let alone being caused by the increase imports, thus there is no basis for restricting those imports by the punitive additional tariff surcharge. Australia established a *prima facie* case that the measure is inconsistent with SG Article 5.1. Therefore, the burden of proof to show that it has complied with SG Article 5.1 lay with the USA. The USA's comments in its First Submission and in its statements at the meeting of the Panel on 25-26 May 2000 will be further addressed in Australia's rebuttal submission.

16. In view of the infinite number of potential safeguard measures that could be applied, how could a Member ever conclusively determine that the measure that it chose to apply in fact was *the one measure* that was the least trade restrictive measure that would prevent or remedy serious injury and facilitate adjustment"?

Answer 16

It could not. Australia has not argued that it could.

17. On what basis, specifically, do you argue that the measure applied by the United States is more restrictive than the measure recommended by the USITC, given that the recommended measure was of four years duration, while the measure applied is of three years duration only?

Answer 17

The actual measure is more restrictive than the USITC recommendation, since:

- it imposes an additional tariff on in-quota imports in all three years, whereas the USITC recommendation was for the bound rate to apply

- it imposes a much higher tariff on out of quota imports in all three years. Indeed, the rate for the third year (24 per cent) is still higher than the rate recommended by the USITC for the first year (20 per cent).

As Australia noted at paragraph 73 in its Opening Statement on 25 May 2000, it cannot see the relevance in the USA's comment about the difference in duration in respect of the issue of "more restrictive". If the USA had imposed the USITC recommendation, then it could have terminated it before the end of the four-year period. Similarly, in the absence of an undertaking by the USA that it will not extend the actual measure, then it might well extend it up to a total of eight years. In sum, the initial announced period of application does not determine the duration of the measure. Therefore, the difference in the periods of the recommended and applied measures is irrelevant to the issue of whether one is more restrictive than the other.

Moreover, SG Article 7.1 says that:

> "A Member shall apply safeguard measures only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment."

This is a separate obligation from SG Article 5.1, i.e. the obligations with regard to "the extent" of the measure and the "period of time" of the measure are distinct obligations. Thus, if the USA had imposed the USITC recommendation, and if it had then found during its mid-term review of the measure that it was no longer necessary to have it for four years, it would have had a WTO obligation to terminate the measure earlier than the four years.

18. Article 5.1 provides that "a Member shall apply safeguard measures only to the extent necessary to prevent … serious injury and to facilitate adjustment". In order to fulfill that standard, does a Member imposing a safeguard measure have to apply, e.g., (i) an "effective" measure, (ii) the least-trade restrictive measure, (iii) a "proportionate" measure, or something else?

Answer 18

In a case of "threat of serious injury" the application of the border measure is necessarily focused on the increased imports that are alleged to be going to cause serious injury imminently. Thus it would be "effective" in the sense of being *potentially* restrictive against the projected level of increased imports. However, that does not mean that it would be restrictive in terms of the current level of trade. For example, it had been determined that imports were going to double starting immediately and that anything over a 50 per cent increase would cause serious injury, then imports could be restricted to a 50 per cent increase.

SG Article 5.1 requires that the measure be "not more restrictive than necessary ... ". There will necessarily be no unique prescription of how to arrive at the extent of the measure, which has to be on a case by case basis.

The measure has to be limited to dealing only with the injury attributed to increased imports and not with all other factors affecting the "domestic industry" in question. Thus the measure cannot be disproportionate to the circumstances.

Is the exclusion of Canada, Mexico and Israel from the safeguard measure consistent with the Safeguards Agreement and GATT 1994?

19. In the light of the interpretative note to Annex 1A to the Agreement Establishing the WTO, what is the relationship between Article 2.2 and the last sentence of footnote 1 to Article 2.1 of the Safeguards Agreement, on the one hand, and Article XXIV:8(b) of GATT 1994 on the other?

Answer 19

The final sentence of Footnote 1 to SG Article 2.1 only refers to the relationship between Articles XIX and XXIV:8. That sentence does not refer to any other paragraph of Article XXIV, in particular it does not refer to Article XXIV:5.

Focusing on FTA's, the final sentence of Footnote 1 simply says that the provisions of the Safeguards Agreement cannot be used to resolve the issue whether the use of Article XIX action is allowed between parties to a FTA claiming to comply with the definition in Article XXIV:8(b).[18]

If the provisions of a FTA preclude the parties taking Article XIX action against each other, then the last sentence of Footnote 1 to SG Article 2.1 must be interpreted to allow a derogation from SG Article 2.2 for the sentence to have any meaning. Any other interpretation would have the effect of writing the provision out of the Safeguards Agreement, which is not permitted under the principle of effectiveness in the interpretation of treaties.

Assume for the sake of argument that parties to a particular FTA were able to apply Article XIX to each other and still comply with the definition in Article XXIV:8(b). There is nothing in either Article XIX or Article XXIV:8(b) that stipulates or even implies that this can be done in anything but a MFN, non-discriminatory, manner. Even if Article XXIV:5 could be interpreted to allow discriminatory treatment in the application of such Article XIX action, this would not be subject to the last sentence of Footnote 1. In such a case there would be a conflict between provisions of GATT 1994 and the Safeguards Agreement. In light of the General interpretative note to Annex 1A of the WTO Agreement, the provisions of the Safeguards Agreement would prevail. Thus, if the definition of a FTA under Article XXIV:8(b) allows safeguard action between its parties, any such action must be on a non-discriminatory basis, to be consistent with SG Article 2.2.

As the Appellate Body has said in paragraph 81 of *Korea - Dairy Safeguard*:

> 'In light of the interpretive principle of effectiveness, it is the *duty* of any treaty interpreter to "read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously."' *[Footnote 43 omitted.]*

In this context, Australia has also made arguments in its First Submission based on the principle of parallelism about the inconsistency with SG Article 4 of the inclusion of FTA parties in the injury assessment but their discriminatory exclusion from the application of the measure.[19] This is the only reading that gives meaning to SG Article 2.2 in such a circumstance. This leads to the conclusion of inconsistency with SG Article 2.2 of such discriminatory action and the consequent inconsistency with the Safeguards Agreement of any such measure.

[18] These comments refer to trade covered by the FTA.
[19] See paragraphs 259-265 in Australia's First Submission.

ANNEX 1-8

SECOND SUBMISSION OF AUSTRALIA

(29 June 2000)

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1. INTRODUCTION

1. This second submission:

- rebuts certain statements and assertions by the US in its First Submission, at the first substantive meeting with the Panel, and in answers to the Panel's questions of 31 May 2000; and

- recalls the main claims and arguments by Australia in this case.

2. The other points of law, procedure and fact already advanced by Australia should also be considered to be confirmed here.

1.1 SUMMATION OF ARGUMENTS

3. The Appellate Body explicitly ruled in *Korea – Dairy Safeguard* and *Argentina – Footwear Safeguard* that compliance with GATT 1994 Article XIX:1(a) entails, *inter alia*, a demonstration of the existence of the circumstance of "unforeseen developments" as a matter of fact. It is also implicit in the Appellate Body's findings in *Argentina – Footwear Safeguard* that such a demonstration by a Member must take place in the investigation by that Member's competent authority. In the instant case, this means by the USITC in its report.[1]

- The USITC Report, which is the basis for the record upon which this case must be decided, is devoid of any consideration or demonstration of "unforeseen developments."

- The US argues that "unforeseen developments" can be discerned from the USITC Report given the Report' s comments on the change in proportions of imported chilled and frozen lamb meat. The US arguments are both misleading and insufficient to establish a positive demonstration of "unforeseen developments." In fact, the USITC Report only discussed the mix of chilled and frozen lamb meat in the context of substitutability of domesti c and imported lamb meat.

- Even if the Panel accepted the US's arguments that a mere mention of the rising proportion of chilled lamb meat somehow constituted a demonstration of "unforeseen developments," it would leave the necessity of the US's resulting measure highly suspect. Specifically, the US's arguments on the extent of the measure are based on all imported lamb meat. If the US considers chilled lamb meat to be the source of the threat to the "domestic industry," then its assertions on the basis for the measure, including action against frozen lamb meat, are fundamentally flawed.

- Therefore, the US has not complied with GATT Article XIX:1(a) and the measure is inconsistent with GATT Article XIX, and hence also not in conformity with the Safeguards Agreement, in particular SG Article 11.1(a).

4. The demonstration of compliance with SG Article 5.1 is a highly pertinent issue of fact and law, which should be subject to an investigation and public report provided for under SG Article 3.1 and notified under SG Article 12.2. SG Article 5.1 requires that the US ensure that the measure applied in the instant case was not more restrictive than necessary. A plain reading of SG Article 5.1 in conjunction with SG Articles 3.1 and 4.2(c) further dictates that such an assurance by the US must take place before the measure was applied – i.e. in the investigation and USITC Report.

[1] See Questions by the panel to the Parties – 31 May 2000, Answers by Australia, answer to Question 3.

- There was no demonstration, or effort to demonstrate, in the USITC Report or by the President that the measure applied was not more restrictive than necessary, whether implicit or explicit.

- The US claims doing modelling work after the USITC Report to ensure compliance, but has not produced evidence of such work or any justification of its actions or findings. It does not even claim that it demonstrated that the measure was not more restrictive than necessary. Indeed, the USITC recommended a measure that it considered *sufficient* (but did not show that it was not more restrictive than necessary) to prevent serious injury and to facilitate adjustment, while the actual measure applied was even more restrictive. Thus, the measure eventually applied was applied with no demonstration either by the USITC or the President that it was not more restrictive than necessary.

- The US cannot now "ensure" compliance. An explicit finding had to be made before the measure was applied and not conjured into existence through a *de novo* review of the USITC Report or *ex post facto* rationales.

- Finally, Australia has demonstrated that even the USITC recommendation was more than necessary given that this was a case of threat with no serious injury being experienced.

5. The definition of "domestic industry" in the USITC Report has no basis in the Safeguards Agreement and is inconsistent with SG Article 4.1(c).

- There is common ground on the "like product" in this case – lamb meat. No effort has been made by the US to identify a "directly competitive product." Instead, the US includes producers of *unlike* products by asserting that where self-defined conditions of "continuous line of production" and "substantial coincidence of economic interest" prevail, the "domestic industry" includes upstream producers. In a multi-tier industry structure such as lamb and lamb meat, this has the effect of equating live lamb to lamb meat. There is no textual basis within the Safeguards Agreement for the US to apply these conditions.

- "Substantial coincidence of economic interest" as applied by the US to find the "domestic industry " in the instant case confuses issues of causation with issues of definition of the "domestic industry." There is no basis within the Safeguards Agreement to have defined "domestic industry" based on a "coincidence of economic interest."

- The analytic framework changes substantially based on the definition of "domestic industry." Because the USITC investigation did not comply with the SG Article 4 it cannot be cured. The measure remains inconsistent with SG Articles 2.1 and 4.

6. The USITC Report did not demonstrate that its "domestic industry" was going to suffer from serious injury imminently within the meaning of SG Article 4.1(b) and 4.2(a).

- The USITC Report made no positive demonstration that serious injury was threatened and imminent. Specifically, the USITC failed to identify the new or changed circumstance that would cause serious injury to the domestic industry. Moreover, the USITC failed to demonstrate why this serious injury was "clearly imminent."

- The USITC relied on inadequate data to reach a finding of threat of serious injury, in the process choosing not to examine some factors for some of the industry segments without explanation. It relied on a static analysis on data to Sept 1998 and in many cases only to 1997, which cannot provide the basis for proving that serious injury was "clearly imminent."

- Overall, questionnaire data used by the USITC was inadequate as evidence to prove threat of serious injury or a causal link to increased imports. As a consequence, the USITC did not examine the factors listed in SG Article 4.2(a) in an adequate manner to enable it to reach an affirmative decision.

- Because the USITC's flawed approach is inconsistent with SG Articles 2.1 and 4, it cannot be cured. It remains inconsistent with the Safeguards Agreement.

7. The US's evidence of a causal link required in SG Article 4.2(b) is not objective and the causation analysis is irremediably flawed.

- The USITC's causal link cannot be based on "domestic industry" data that are plainly inadequate and sometimes limited to information only through 1997.

- Beyond the use of inadequate data, the USITC Report did not effectively take into account "other factors" that may be the cause of injury, thereby failing to demonstrate that serious injury was imminent due to increased imports.

- Because the USITC's causation analysis is flawed, the measure is inconsistent with SG Articles 2.1 and 4.2, and cannot be cured.

8. The US admits that it did not comply with the requirements of SG Article 8.1 and 12.3 regarding consultations on the maintenance of a substantially equivalent level of concessions and other obligations. This cannot be cured by the US, making the measure inconsistent with the Safeguards Agreement.

9. By including its FTA partners in the injury assessment but excluding them from the measure, the US has acted inconsistently with SG Article 2.2. This cannot be cured and the measure remains inconsistent with the Safeguards Agreement.

10. Finally, since the measure is not in conformity with Safeguards Agreement and GATT 1994 Article XIX, the measure is in breach of the US's tariff bindings on lamb meat as demonstrated in Australia's First Submission. Therefore, the measure is in violation of the US's obligations under GATT Article II.

11. In total, the US is in breach of its obligations under Articles II and XIX of GATT 1994 and of Articles 2.1, 2.2, 3.1, 4.1(b) and (c), 4.2(a) and (b), 5.1, 8.1, 11.1(a), 12.2 and 12.3 of the Safeguards Agreement. These inconsistencies cannot be remedied and the US should revoke the measure without delay.

2. STANDARD OF REVIEW AND BURDEN OF PROOF

12. The approach taken by the US in its First Submission and statements at the first substantive meeting of the Panel confuse the task of the Panel in addressing the standard of review and the burden of proof required in this case.

2.1 STANDARD OF REVIEW

13. The Safeguards Agreement, as with the other trade remedy agreements on anti-dumping and countervailing, is a procedural agreement that sets out the requirements of a Member seeking to apply a measure that is inconsistent with its obligations under GATT 1994, in particular for safeguard measures, GATT 1994 Articles II and XI. The Safeguards Agreement and GATT 1994 Article XIX

set out the detailed procedures a Member must follow, including transparency and natural justice requirements. Compliance with these procedures is an essential part of the derogation provided in allowing an importing Member to impose such extraordinary measures in taking safeguard action.

14. The US accepts[2] that it must at least rely on the USITC determinations of injury, including causation, even if it considers that the USITC recommendation has no bearing on the restrictiveness of actual measure applied. Accordingly, the US is dependent on the actual USITC Report and its reasoning. This is not a matter of whether the USITC could have come to the same conclusion by different reasoning or whether it could have used its record to have argued differently. The US cannot redo the case, even on the basis of the record, or ask the Panel to do so.

15. The positions of the complainant and the respondent are asymmetrical. It is the Member applying the measure that is claiming a derogation to its obligations under GATT 1994, it is the complainant whose rights to trade in accordance with commitments under GATT 1994 have been abridged. The Member imposing the measure is obliged to defend what it did before applying the measure to ensure that it was complying with the prerequisites set out in the Safeguards Agreement and GATT 1994 Article XIX. Moreover, as the panel report on *Korea - Dairy Safeguard* said at paragraph 7.30:

> "For us, an objective assessment entails an examination of whether the KTC had examined all facts in its possession or *which it should have obtained in accordance with Article 4.2 of the Agreement on Safeguards (including facts which might detract from an affirmative determination in accordance with the last sentence of Article 4.2 of the Agreement on Safeguards),* whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of Korea. Finally, we consider that the Panel should examine the analysis performed by the national authorities at the time of the investigation on the basis of the various national authorities' determinations and the evidence it had collected."*[Emphasis added.]*

Thus the Panel has the responsibility of not just looking at the findings in the USITC Report, including the analysis by the USITC set out in its Report, but also, *inter alia*, determining whether the data collected by the USITC was an adequate basis for its findings.

2.2 BURDEN OF PROOF

16. Similarly, the US has raised the issue of the burden of proof in this case. This may be because it is challenging what its procedural obligations were. Australia agrees that the burden of proof lies initially with Australia to establish a *prima facie* case. However, in four key areas, the claims by Australia relate to the failure of the US to comply with procedural requirements of the Safeguards Agreement and GATT 1994 Article XIX, i.e. those relating to: "unforeseen developments" under GATT 1994 Article XIX; the decision on the extent of the measure under SG Article 5.1; SG Article 8.1; and SG Article 12. For these four areas, the US does not seek to argue that it has complied but rather that it had no such obligations.

17. Australia has also argued in the alternative and demonstrated, that for "unforeseen developments" and the extent of the measure, the requisite circumstance of "unforeseen developments" did not exist and that the measure applied was more restrictive than required under SG Article 5.1. For example, in respect of SG Articles 5.1 and 3.1, the issue of the burden of proof depends on what precisely the Panel considers to be obligations of the US before applying the

[2] For example, at its answer to Question 2 from Australia.

measure.[3] Consequently, Australia has provided in its submission a layered approach of demonstrating its case according to the obligation.

3. KEY LEGAL ISSUES

3.1 "UNFORESEEN DEVELOPMENTS"

3.1.1 Australia's arguments

18. The Appellate Body found that:

> "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 … " – describes certain *circumstances* which must be demonstrated as a matter of fact".[4]

19. The USITC Report did not seek to demonstrate the circumstance of "unforeseen developments", and so the US did not demonstrate it. Australia has dealt with this issue at length in its First Submission and in its answers to Questions 1-4 of the Panel. Accordingly, Australia will focus here on assertions by the US.

3.1.2 US's assertions

20. In its First Submission, its statements to the Panel on 25&26 May 2000, and in its answers to questions by the Panel, the US seeks to rewrite the USITC Report. The US focuses on an argument that the "unforeseen development" was the change in the mix between fresh/chilled and frozen lamb meat. This is not a valid argument, since it amounts to no more than a statement that imports have increased. Moreover, for the purpose of this section, the point is that this argument was not even made in the USITC Report. It is not just that the USITC Report does not address "unforeseen developments" explicitly, but that the mix argument was not put forward as being the reason for the increased imports. The change in the mix was raised in the context of the substitutability of imported and domestic lamb meat under conditions of competition. To suggest that the USITC had in mind or that the USITC Report purports to prove that the change in product mix was an "unforeseen development" leading to increased imports misrepresents the facts. The US is obliged to stand on the USITC Report, since that is what it put forward and published as being the justification for the application of a safeguard measure.

21. In paragraph 4 of its answer to Question 1(a) from the Panel, the US says that:

> "The choice of "If, as a result of" makes plain that, as the Appellate Body concluded in *Korea–Dairy* (at ¶ 85), "unforeseen developments" do not constitute an additional condition for the application of a safeguard measure. Rather, its focus on result rather than causation suggests that the "unforeseen developments" language is meant to characterize the unexpected ("unforeseen") nature of injurious import surges of the type described in Article XIX:1(a). Seen in this light, "unforeseen developments" are simply a restatement of the "emergency" character of those situations that Article XIX is designed to address."

22. The Appellate Body did not say that "unforeseen developments" is not an additional condition. It said that it is not an "independent condition". The argument put forward by the US that

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[3] As Australia set out in its answer to Question 15 from the Panel.
[4] At paragraph 92 of the Appellate Body report on *Argentina - Footwear Safeguard*.

the "unforeseen developments" language is a ***characterization*** of import surges and so is simply a ***restatement*** of the "***emergency" character*** of Article XIX situations would have the effect of writing out of the WTO the obligation found by the Appellate Body to require the Member applying a safeguard measure to ***demonstrate the circumstance of "unforeseen developments" as a matter of fact***.

23. In the last sentence of paragraph 8 of its answer to Question 1(a) from the Panel, the US says:

> "Because Members cannot be presumed intentionally to place their industries in jeopardy through the grant of tariff concessions, it must be presumed that later developments which imperil their producers are of a kind that were "unforeseen" when the concessions were negotiated."

Such a presumption would write the obligation set out by the Appellate Body out of GATT 1994 Article XIX.

24. The US in paragraph 9 in answer to Question 1(b) from the Panel is simply stating the US's position in Hatters' Fur, a position different from that taken by all other members of the Working Party. The other members of the Working Party found that the fact that hat styles had changed did not constitute an "unforeseen development".

25. In any case it is irrelevant to this dispute. There was no change in consumption preferences. US consumers did not suddenly prefer chilled product. To the extent that there were increased imports of chilled product, this is part of the increased imports of the product subject to the measure. To claim that increased imports of chilled lamb meat was an "unforeseen development" is to say that increased imports of the product under investigation was an "unforeseen development". This is simply the same attempt by the US to write the obligation out of the WTO Agreement.

3.1.3 Conclusion on "unforeseen developments"

26. The US did not comply with its obligation to have demonstrated the circumstance of "unforeseen developments" set out in the first clause of GATT 1994 Article XIX:1(a) as a matter of fact before applying the measure. Therefore the measure is inconsistent with GATT 1994 Article XIX, and hence it is also not in conformity with the Safeguards Agreement, in particular SG Article 11.1(a).

3.2 SG ARTICLE 5.1, 3.1, AND 12.2

3.2.1 US's obligations

27. The US was obliged:

- to ensure that the extent of the measure was not more restrictive than necessary to prevent serious injury being caused by the increased imports and to facilitate adjustment;
- to have done this formally before applying the measure; and
- to have done this consistently with SG Article 3.1 through public inquiry and report and also to have notified the Committee.

28. If the Panel agrees that the US had to have complied with the last of these obligations, then the measure is immediately inconsistent with SG Articles 3.1 and 12.2, since the US did not do so.

29. If the Panel agrees that the US had to comply with the second of these, then again the measure is immediately inconsistent with SG Article 5.1, unless the US is prepared: to produce proof that there was such an investigation to ensure compliance with SG Article 5.1; and to submit the basis of the decision on the extent of the measure. The issue then is whether that demonstration was satisfactory.

30. Finally, on the first obligation, Australia has shown in its First Submission and in its answers to Questions 15, 17, and 18 by the Panel that the measure was beyond the extent necessary, and indeed even the USITC's recommendation was beyond the extent necessary.

3.2.2 US's assertions

3.2.2.1 The US misconstrues the scope of SG Article 3 to involve only issues of injury and not the extent of the measure applied

31. The US asserts that the obligations under SG Article 3.1 are limited to the injury investigation.[5] This is despite the fact that this would make SG Article 4.2(c) effectively redundant. It is also despite the fact that, if SG Article 3.1 refers only to the injury determination under SG Article 4, it begs the question why it does not say so.

32. The principle of effectiveness in the interpretation of treaties does not allow an interpretation that would have the effect of writing a provision out of the Safeguards Agreement. Moreover as the Appellate Body says in paragraph 81 of *Korea - Dairy Safeguard*:

> 'In light of the interpretive principle of effectiveness, it is the *duty* of any treaty interpreter to "read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously."' *[Footnote 43 omitted.]*

33. Australia submits that the only harmonious way in which to read SG Articles 3.1 and 4.2(c) in conjunction with the obligation under SG Article 5.1, is to require the investigation and public report under SG Article 3.1 to include the analysis on the extent of the measure as well as injury considerations.

34. Paragraphs 232 and 233 of the US's First Submission confuse two separate issues. The US argues that a Member does not have to explain its decision whether to apply a safeguard measure, or indeed the nature of the measure. Australia agrees that the government's decision whether or not to impose a measure does not have to be justified, and is clearly a matter for the government. Moreover, where there is a report on the extent of the measure, the Safeguards Agreement does allow flexibility in the choice of the measure, e.g. quota or tariff quota or flat tariff, though the last sentence of SG Article 5.1 does say that: "Members should choose measures most suitable for the achievement of these objectives."

35. The US's approach seeks to divert attention from the issue that a Member has to comply with SG Article 5.1 regarding the extent of the measure. This is about minimizing the nullification and impairment of exporting Members' rights. A Member does not have to justify why it imposed a less restrictive measure than it has demonstrated that it could have applied in compliance with SG Article 5.1. However, it is obliged to ensure that it is not more restrictive than necessary to comply with SG Article 5.1. The US recognizes this in, for example, paragraph 184 of its First Submission.[6] Thus the extent of the measure and its justification are issues of "fact and law" under

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[5] For example, paragraphs 225-239 of the US's First Submission, in particular paragraph 226. See also paragraph 149 in its answer to Question 18(b) from the Panel.

[6] "Taken as a whole, the sentence says that safeguard measures may be applied only to the degree required to prevent or remedy serious injury and facilitate adjustment."

the Safeguards Agreement. The US makes no attempt to explain why some issues of fact and law should be covered by SG Article 3 and some not.

36. In, for example, paragraphs 235 and 236 of its First Submission, the US seeks to distinguish between the Member and the "competent authority". Australia submits that a Member cannot reduce its WTO obligations by its choice of "competent authority". This is simply the particular way in which the government of each Member complies with the obligations of the Member under the WTO. Of course, it is the Member that ultimately applies a measure, and the government of that Member that takes the decision and implements it according to domestic law. To seek to distinguish in respect of WTO obligations on the basis of one particular set of domestic arrangements in a text drafted to cover a wide range of domestic legal systems would be inconsistent with any reasonable standard of interpretation of the object and purpose of the treaty.

37. The paradox in this case is that the US's statute is set up to allow it to comply with the Safeguards Agreement, including having the USITC provide a justification with SG Article 5.1. The fact that the statute allows greater flexibility to the government to impose a more restrictive measure does not mean either that such a measure is WTO compliant or that the US statute is WTO inconsistent. The matter at issue before the Panel is that, in this particular case, the US did not comply with its WTO obligations and that the measure is inconsistent with the Safeguards Agreement.

38. At paragraph 145 of its answers to the Panel's Question 18(b), the US says that:

> "New Zealand and Australia have suggested that Article 3.1 requires competent authorities to justify, in the reports they are required to publish under that article, the ultimate safeguard measure that a Member chooses to apply."

This is a mischaracterization of what Australia argues. Australia has not argued that the government is bound in a way that would not allow it to apply a less restrictive or no measure at all. Neither does Australia argue that the matter cannot be subject to further investigation and report. Australia argues that the government must in the first place demonstrate that it will be complying with SG Article 5.1 - SG Article 5.1 says "only to the extent necessary" it can be less restrictive than that without breaching the Safeguards Agreement, but cannot be more restrictive. Australia also argues that that demonstration is covered by SG Articles 3.1 and 12.2.

39. At paragraph 147 of the US's answers to the Panel's Question 18(b), the reference to an assistance package would seem to be a red herring. On the one hand, recourse to a derogation from GATT 1994 Articles II and possibly XI under GATT 1994 Article XIX and the Safeguards Agreement is not a matter that is necessary for the assistance package. On the other, action under the Safeguards Agreement does not provide a derogation from other WTO provisions such as on agricultural domestic support or the Subsidies Agreement. There is no legal basis for that and it is not an issue before the Panel.

40. At paragraph 149 of the its answers to the Panel, the US notes that SG Article 4.2(a) refers to "***the*** investigation to determine" on injury. This simply refers to the fact that there is an investigation on the injury side and this is dealt with under SG Article 4. This, if anything, indicates that there is a second line of investigation that needs to be pursued, i.e. in respect of the measure. Indeed, this is a natural way of describing the two-stage nature of a safeguards inquiry, first the injury and causation analysis, and then the remedy analysis.

41. At paragraph 151 of the US's answers to the Panel, the reference to the clause in SG Article 3.1 allowing for public interest submissions on whether there should be a safeguard measure does not indicate that an investigation on the actual measure is not called for. It simply ensures that a wide breadth of parties are allowed to make presentations to the investigation. The

reason for a reference to "a safeguard measure" is that "the safeguard measure" does not exist until it is applied, and so submissions to the investigation could hardly be about "the safeguard measure".

42. The Appellate Body found that there was an ***obligation*** to ensure conformity with the first sentence of SG Article 5.1 before applying the measure. Thus this is a legal requirement and so a highly pertinent matter of fact and law under both SG Article 3.1 and 12.2. The implication of paragraph 153 of the US's answers to the Panel is that the scope of "all pertinent issues of fact and law" subject to investigation and report under SG Article 3.1 does not include recommendations and comments on proposals for a measure.

43. In contrast the final sentence of paragraph 161 of the US's answers to the Panel says:

> "The question of whether a Member has applied a safeguard measure that is commensurate with the serious injury or threat of serious injury that domestic producers have sustained should be discernible by examining the measure in light of the findings and determinations set out in the competent authority's report."

44. The US's argument, however, is that there is no need for any investigation or report on the measure. If the US's argument were to be accepted, then it would mean that in the context of its own domestic legal arrangements, the US could dispense with the remedy phase of the USITC's work and simply publish the injury findings. It is difficult to see how compliance with SG Article 5.1 would be discernible from such an abbreviated report in most circumstances. Moreover, in the Lamb Meat case, the US rejected the measure that the USITC found was "commensurate". If the USITC could not discern the actual measure from its own full Report and record, how could other Members be expected to be able to do so, especially if the US's view were to be followed and the published report be reduced to pages I-16-26 (on injury and causation).

3.2.2.2 The US's interpretation of SG Article 5.1 threatens to eliminate the obligation to demonstrate compliance with the Safeguards Agreement

45. The US at paragraph 209 of its First Submission acknowledges that:

> "in imposing a safeguard measure Members must ensure that the measure imposed – whatever form it takes – is appropriate for the purpose of preventing or remedying the serious injury and facilitating adjustment and is not applied beyond the time and extent necessary to accomplish those objectives."

Thus the US agrees that ("in imposing") the Member must have ensured compliance before applying the measure. However, it proposes a lower threshold than the Safeguards Agreement, i.e. simply that it must be "appropriate", presumably in the eyes of the government of the Member applying the measure.

46. The US goes on in the last sentence of paragraph 209 of its First Submission to say:

> "Australia and New Zealand have not established a *prima facie* case that the US lamb meat safeguard measure fails that test."

47. The US confuses the obligation to have demonstrated compliance in advance with the issue of whether that demonstration satisfied the requirements of the Safeguards Agreement. Australia in the first place asked to see whether there had been such a demonstration and whether it was satisfactory. Once having been provided with that demonstration, then Australia would have had the opportunity to make a *prima facie* case rebutting that demonstration. In the absence of access to the actual demonstration, if it exists, it is not possible to make a rebuttal of whether the demonstration satisfied

the requirements of the Safeguards Agreement. If it were accepted that such a demonstration need not be provided, it would have the effect of making in impossible to assess the consistency of the demonstration and place this requirement of consistency beyond the reach of the WTO dispute settlement system.

48. The US's approach to the obligation to have undertaken the demonstration in respect of SG Article 5.1 is in effect that there is an obligation but it is not justiciable, since it is impossible to provide a *prima facie* case rebutting something that is unavailable. This would be to write the obligation out of the Safeguards Agreement except for quantitative restrictions under the second sentence of SG Article 5.1. Of course, it is also possible, though more difficult, to provide a *prima facie* case about the extent of the measure, but that is an issue distinct from the obligation to have performed the demonstration in advance.

49. The US had an obligation to conform with its obligations under the Safeguards Agreement, e.g. under the *pacta sunt servanda* rule.[7] A Member could only do that in respect of SG Article 5.1 by an assessment and determination before applying the measure. The US has conceded that it ran models before determining the extent of the measure. However, that is not the same as determining that the extent was not more than was necessary.[8] The US has yet to produce the required determination. Australia submits that the Panel should take an adverse view of the existence and content of such as assessment unless the US is prepared to produce and allow it to be tested. In this context the US has seemingly taken care not to assert that it met the obligation, for example, in paragraph 212 of its First Submission, it says:

> "it is prepared for purposes of completing the factual record in the case to describe the basis on which it designed that measure and why the measure is appropriate in light of the objectives of that article."

Thus the US talks of the measure being appropriate and deliberately avoids saying that the modelling work proved that the measure was applied "only to the extent necessary". This approach was continued in answer to Australia's Question 8, which said:

> "What aspect of this model did the US use to ensure that the measure was applied "only to the extent necessary" in order to satisfy SG Article 5.1"

and to which the US answered

> "The United States used the model to try to predict the effects of various combinations of in-quota and out-of-quota tariffs. The United States explained the model's predictions in ¶¶ 217-219 of its first written submission."

See also the US's answers to Questions 17 and 20 from the Panel where again the US avoids the issue of whether it did perform a demonstration of the compliance with SG Article 5.1.

50. In respect of paragraph 116 of the US's answers to Question 17 from the Panel, Australia considers that the issue of the extent of the measure is a matter of fact and law, and so falls within SG Article 3.1, including the requirement of the first sentence of SG Article 3.1. It would provide carte blanche to governments to impose punitive measures beyond what is allowed for under

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[7] As codified in Article 26 of the Vienna Convention that a treaty must be performed in good faith.

[8] Paragraph 216 of the US's First Submission does skirt around this by saying:

"used an economic model to test various combinations of in-quota and out-of-quota tariffs in order to find the combination of variables that would address the injury without going beyond the extent necessary." *[Footnote 220 is omitted.]*

SG Article 5.1, if the rules said that there is no need for an investigation on the extent of the measure and that a government can essentially do what it likes by way of a measure once there has been a finding on injury and causation. Given the length of time for a dispute to be resolved through the DSU, there would be little incentive for a government not to give in to demands by its industry for protection.

3.2.2.3 Arguments by the US defending the extent of the measure fall short of a demonstration that the measure was not more restrictive that necessary

51. To provide an argument in the alternative, Australia will now address the US's assertions about the restrictiveness of the measure.

52. The US's First Submission deals with this issue in paragraphs 210-224. In sub-paragraph 210(4) the US agrees with the Appellate Body that a not more restrictive than necessary standard applies.

53. Paragraph 216 of the US's First Submission reveals that the US used an economic model after the USITC Report was made, but the information in paragraphs 217-219 of its First Submission simply says no more than that the "US industry" would benefit from the measure. This was hardly a proof that the measure was not more restrictive than necessary. Also the US focuses on the first year of the measure without reference to subsequent years.

54. In addition, the US provides no explanation of which segments of the "domestic industry" were going to benefit and by how much - any demonstration of "not more restrictive than necessary" would have to have some analysis along those lines. Paragraph 219 of the US's First Submission says that the TRQ in the first year was estimated to reduce exports by between 4.4 per cent and 11.9 per cent from the 1998 level. Thus, even though the USITC found that there was no serious injury being experienced at the 1998 level of imports, the US seeks to justify the measure on the basis of modelling that estimated that the measure would reduce imports by up to 12 per cent below that level in the first year. That is clearly far more than necessary to prevent serious injury being caused by increased imports. Moreover, in respect of adjustment, this same paragraph estimates that domestic consumption will fall by 4 to 12 per cent in the first year, thereby accelerating the long-term trend of declining lamb meat consumption in the US. Such an outcome would not facilitate adjustment by the "domestic industry".

55. The US's competent authority, the USITC, came forward in the first place with a measure that it considered to be sufficient to deal with the case. Australia showed in the answer to Question 17 of the Panel that the measure imposed by the US was more restrictive than that recommended by the USITC. Clearly, a 40 per cent out of quota tariff in the first year is more restrictive than the 20 per cent level found by the USITC to be sufficient. If it was not, why did the US not apply the 20 per cent recommended by the USITC? Similarly, in subsequent years the out of quota tariff of the measure is much higher and more restrictive than that recommended by the USITC Report. The punitive in-quota tariffs imposed by the measure, starting at 9 per cent in the first year are more restrictive than the bound rate of about 0.2 per cent. Indeed, the US's model on which it based its decision estimated that the 9 per cent, together with the 40 per cent out of quota tariff, would limit trade to below the 1998 level, i.e. the quota level. Accordingly, the US designed the measure on the basis that it would be more restrictive than the USITC recommendation. Therefore, the US had in the first place to rebut the determination of its own competent authority to demonstrate that the USITC's recommendation of a less restrictive measure could not prevent serious injury and facilitate adjustment.

56. The US at paragraphs 4, 25, and 206-209 of its First Submission seeks to argue that the USITC Report contains several recommendations on remedy. However, as Australia pointed out at

paragraph 71 of its Opening Statement on 25 May 2000, under US law there is only one recommendation by the USITC, and that was the only recommendation notified to the Safeguards Committee.

57. At paragraph 218 of its First Submission, the US pursues the same theme in referring to findings by three USITC Commissioners. None of this goes to the required demonstration, but is an attempt at an *ex post facto* justification for applying a more restrictive measure.

58. Australia, however, also showed that the USITC's recommendation was in any case more than was necessary. Even on the basis of the USITC Report the "domestic industry" was not experiencing serious injury at the level of 1998 imports of lamb meat. There was no basis for limiting imports to a level of 1998, i.e. a level where no serious injury was being experienced. No indication is given that some modest increase in imports would suddenly tip the scales to not just serious injury but serious injury caused by increased imports.

59. Therefore, the measure is far more restrictive than allowed under SG Article 5.1, and so is inconsistent with the Safeguards Agreement.

3.2.2.4 The US assertions about SG Article 12.2

60. At paragraph 273 in its First Submission the US's reference to the Appellate Body's view that found that SG Article 5.1 did not impose a general requirement to justify a measure is inaccurate. The Appellate Body in *Korea - Dairy Safeguard* found that *SG Article 5.1* did not impose an obligation to notify that justification. Australia argues that the requirements on notification (and publishing and publishing) are found in SG Article 12.2 (and SG Article 3.1).

61. The extent of the measure is a critical issue in the application of the measure. Once a Member has taken the decision to impose some measure, the extent of the measure will determine the adverse effects on exporters. It is difficult to see what information is more pertinent than why a Member is going to impose one level of restriction on imports rather than another. Without such information, how can a Member defend its interests or make an informed decision about possible dispute action under the WTO. The more that the importing Member considers that it should be granted discretion in determining injury and the extent of the measure, the more there is the necessity for it to provide information on the justification of the measure.

62. In paragraph 275 of its First Submission, the US said:

> "As noted earlier in connection with Article 3.1, any requirement that would seek to reveal the reasons why a Member decided between various alternative measures, or between applying a safeguard measure and refraining from doing so, would intrude on the Member's deliberate process, including its communications with other Members."

63. This misrepresents what Australia is arguing. Australia has never said that the US needed to justify, or indeed say, why it chose a tariff quota regime rather than a flat tariff or a quota. Australia has never said that the US had to justify, or indeed say, why it decided to apply a measure rather than exercise its discretion not to impose a measure.

64. Australia argues that under SG Article 5.1 the US had an obligation to ensure that the extent of any measure it applied was not more restrictive than necessary to prevent serious injury and to facilitate adjustment. Such an obligation means that the US must at the very least have justified the measure to itself before applying it. Australia has gone on to argue that, given this obligation and the importance of the nature of the actual measure, this justification was highly pertinent information under SG Article 12.2 and one of the "pertinent issues of fact and law" under SG Article 3.1.

3.2.3 Conclusion on SG Articles 5.1, 3.1, and 12.2

65. The US has not complied with SG Article 5.1 and the measure is inconsistent with the Safeguards Agreement. I n addition, the US has not complied with SG Articles 3.1 and 12.2 in this context.

3.3 "DOMESTIC INDUSTRY"

3.3.1 Australia's argument

66. The issues on SG Article 4.1(c) are straightforward. The USITC included upstream industries in its determination of "domestic industry" on the basis of:

> "(1) there is a continuous line of production from the raw to the processed product, and (2) there is substantial coincidence of economic interest between the growers and the processors." *[Footnote 31 omitted.]*[9]

67. The US has gone back through two layers of producers to include growers without any analysis of why they should be included as a class within its "domestic industry". There has been no attempt by the US to explain how it applies the requirements of SG Article 4.1(b) and 4.2(a) and (b) to such a diverse group of industries in regarding them as "producers as a whole".

68. It is common ground between Australia and the US that the "like product" is "domestic lamb meat". The USITC relied on "like product" rather than "like or directly competitive products".[10] The US has not sought to use a directly competitive products argument in its submissions and answers to date. Accordingly, the issue focuses on who can be considered to produce the "like product".

69. The firms producing lamb meat are not producing "like product" to growers and feeders, which are producing feeder lambs and slaughter lambs.

70. In order to sustain the US's definition of the domestic industry producing the "like product", the Panel must make two determinations. First, whether the US's criteria for determining the "domestic industry" are consistent with the definition of "domestic industry" in SG Article 4.1(c). More specifically, whether upstream producers may be included in the domestic industry producing the like product based on a "continuous line of production" and a "substantial coincidence of economic interest" between upstream and downstream producers. Second, if these criteria are consistent with the Safeguards Agreement, whether the record of the USITC investigation demonstrated that these two criteria were satisfied.

71. These are threshold issues for the Panel. The US has established its own test for deciding when to expand the scope of "domestic industry" to producers of upstream products. The question is whether this test is consistent with the Safeguards Agreement and, if so, whether its application warranted the inclusion of growers and feeders in the "domestic industry" of firms producing lamb meat.

72. Australia has shown and elaborates further below that this test has no textual basis in the Safeguards Agreement. The US has failed to prove any link between its test and the Safeguards Agreement, SG Article 4.1(c) in particular. Thus the US is not justified in doing this, i.e. to include growers and feeders in the definition of "domestic industry".

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[9] Page I-12 of the USITC Report.
[10] See paragraph 107 in Australia's First Submission.

3.3.2 US's assertions

3.3.2.1 The US's arguments concerning "Vertical Integration" are irrelevant in this case and further belie the fact that the USITC's investigation did not establish a basis for treating the "domestic industry" as if it were vertically integrated

73. Whether "vertical integration" should be able to be taken into account in determining the "domestic industry" is a legitimate question, which may need to be looked at on a case by case basis. However, the extent of vertical integration and the form of such integration (e.g. common ownership of upstream and downstream stages of production and contractual relationships) are not relevant to the Panel's deliberations, since there is no evidence that the US packers/breakers and the growers/feeders were vertically integrated through common ownership or through other forms of integration. This issue has also been addressed by Australia in response to Question 5 from the Panel.

74. The USITC's investigation did not establish any basis for treating the "domestic industry" as if it were vertically integrated and included both growers/feeders and packers/breakers. Indeed, the only evidence of vertical integration is that there is little vertical integration between all the industry segments. There is absolutely no evidence of other forms of relationships between growers/feeders and packers/breakers that would provide a comparable level of vertical integration as common ownership. For example, there is absolutely no evidence of tolling arrangements, the use of cooperatives formed and controlled by growers/feeders to break and pack the product, or any other form of risk sharing, such as contractual agreements to share the risks of price fluctuation of the finished product, between the various stages of production going from growing the lamb to the production of retail cuts of lamb meat. In these circumstances, the Panel does not even need to consider whether and to what extent vertical integration must exist to include upstream producers in the "domestic industry", since there is no evidence of any significant level of vertical integration of any kind.

75. A brief review of the record evidence in the USITC Report makes this clear. If any significant proportion of the more than 70,000 growers were part of a vertically integrated operation to the packers and/or breaker stage, it would have been expected that such firms would have been significant in the USITC's selection of firms for its questionnaire survey. However, what we see is that out of the 49 growers and grower/feeders providing financial information as growers, 42 were not even integrated with feeder operations let alone packer and or breaker operations.[11] While the USITC Report says at page II-12 that "[s]ome growers engage in more than one sheep-raising activity, such as feeding and sometimes slaughtering their lambs" the evidence here is that they are not integrated into packers or breakers as substantial commercial operations (despite the implication in paragraph 66 of the US's First Submission). If those operations are to be considered as part of the packer and/or breaker industry segment, then the packer/breaker activities of such firms should have been part of the USITC questionnaire survey- it appears that they were not. Moreover, the fact that some packers might have feeder operations, and that some different feeders might have grower operations, does not justify sweeping up such feeders into the "domestic industry", let alone independent growers.

76. As noted below the figures about the number of feeders provided by the US in its answers to Questions 4 and 14 from Australia and the Panel, respectively, are inaccurate and misleading on this issue. The US said that there were 11 feeders in paragraph 7 in its answers to Australia. This could give the impression of some degree of integration with packers. However, as noted below (see also

[11] At paragraph 5 in its answers to Australia's questions on 31 May 2000, the US said that: "[a]pproximately 20 per cent of all growers and grower/feeders who responded to USITC questionnaires indicated they were both growers and feeders."

Attachment A) the 1995 USITC report quoted the National Lamb Feeders Association as saying there where at that time about 100 large-volume feedlots and many small-volume feedlots.

77. At paragraph 69 of its First Submission, the US asserts that to limit the "domestic industry" would impede the "all relevant factors" analysis where there was extensive integration. However, the USITC Report had no difficulty in looking at packers and breakers separately from growers and feeders. Either that or such firms were not included in the questionnaire survey list.

78. If "vertical integration" was a genuine issue in this case, the USITC Report would have needed to do no more than look at the grower activities of packers and breakers, not focus, as it did, on independent growers.

3.3.2.2 The US confuses a "coincidence of economic interest" with matters related to the definition of its "domestic industry", as opposed to matters related to injury

79. The issue of coincidence of economic interest was also addressed in Australia's answer to Question 6 from the Panel. Regardless of whether there was complete pass back, some pass back or no pass back, the relevance of the issue remains unclear. The US has not explained why the finding by the USITC of "coincidence of economic interest" allows the inclusion of upstream industries, in particular growers. The USITC has not adequately documented that a "coincidence of economic interest" even exists. Neither the US in this proceeding nor the USITC in its determination provided any rationale for making a "coincidence of economic interest" a consideration in the definition of "domestic industry" rather than a consideration in the determination of causation. The US has made assertions about the economics but provided neither a factual nor a legal basis for these assertions.

3.3.2.3 Producers and Output

80. In paragraph 30 of its answers to Question 3 from the Panel, the US argues that (Footnotes 21 and 22 referring to different dictionaries are omitted):

> 'The ordinary meaning of the term “product” is defined as the “output” of an industry or firm'

and

> ' “production” is defined as the “total output especially of a commodity or an industry.” '

81. SG Article 4.1(c) says:

> '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.'

82. The US is arguing that where something is called an "industry" the concept of "production" and "output" can be attributed to the earliest upstream products (i.e. the feeder lambs) as well as the intermediate products (i.e. the slaughter lambs) of that "industry", rather than the actual output of that "industry", the "like product" (i.e. the lamb meat). The concept of "firms" producing the "like product" is, therefore, in the US's eyes, not relevant.

83. The US is trying to argue implicitly that in the expression *"producers as a whole of the like or directly competitive products"* the individual firms, i.e. the "producers", need not actually produce the

"like product", but need only contribute to its production as part of the "industry". Not only is there no dictionary definition to support this proposition, it is inconsistent with the clear definition of the "domestic industry" in the Safeguards Agreement.

84. Australia submits that *"producers as a whole of the like or directly competitive products"* refers to the producers of the actual "like product" (in this case, since the US relies on "like product"). Thus in the next phrase "those whose collective output ... " refers to producers whose aggregate output is a major proportion "of the like product" output. To argue otherwise would result in "those whose collective output ... " being a larger group of firms than "the producers as a whole" of the "like product" and, according to the US's definition, could include any number of producers of upstream inputs into the "like product".

85. Australia submits that the US has not established any basis for such an interpretation of the text of the Safeguards Agreement. Moreover, while the US claims to limit its practice to certain circumstances (processed agricultural products), there is similarly no support for special treatment for certain products in the text of the Safeguards Agreement. If the US's interpretation were to be adopted, it would expand the definition of the "domestic industry" to producers of upstream inputs into the "like or directly competitive products" without providing any clear guidelines for when upstream producers should be included.

86. The US's approach would extend the Safeguards Agreement and remedies thereunder well beyond any plausible interpretation of the "domestic industry" producing the "like or directly competitive products". For example, the "domestic industry" for imports of passenger motor vehicle would include not just the final manufacturers, but also all the domestic component producers, regardless of their relationship to the final manufacturers. Similarly, an industry manufacturing steel products would presumably include all upstream producers, potentially including suppliers of iron ore, coal, coke, scrap and other inputs into the steel making process. If the US's interpretation were to be adopted, then in many cases involving fabricated products, the Member would *have* to include all upstream industries. The US does not do this - no Member does it. There is nothing in the Safeguards Agreement that suggests that the scope of the definition of "domestic industry" is so expansive, that import relief is intended to be so all encompassing, or that Members may expand the definition of "domestic industry" beyond those producers whose "output" actually is the "like product" (or "like or directly competitive products".)

3.3.2.4 In defending its actions, the US erroneously implies that it can apply the remedy crafted for one definition of "domestic industry" to a subset of firms without a new investigation into injury, causation, and remedy

87. The US is arguing, or at least leaving scope to argue, that even if the “domestic industry” was just packers and breakers, the USITC’s findings would have been the same. Australia also responded to this issue in its answer to Question 10 from the Panel.

88. Redefining the "domestic industry" to include just the packers/breakers fundamentally alters all aspects of the analysis of injury and causation, as well as the determination of the remedy in compliance with SG Article 5.1. In terms of injury, the fact that a "domestic industry" defined as growers, feeders, packers, and breakers is going to experience serious injury in the aggregate, does not allow an *ex post facto* determination that the packers/breakers are going to experience serious injury. In terms of causation, removing the growers/feeders from the "domestic industry" means that they are a potential cause of injury to the remaining "domestic industry", the packers/breakers. Finally, a remedy targeted at the growers, feeders, packers, and breakers and complying with SG Article 5.1 is unlikely to be the same as a remedy targeted at a more narrowly defined "domestic industry". Certainly, the *demonstration* that the measure is "not more restrictive than necessary" must be different for the two cases. In short, the analytical frameworks for causation and remedy - and the factual determinations change depending on the definition of "domestic industry".

3.3.2.4.1 The USITC's determination is wholly based on a wrong definition of "domestic industry"

89. The USITC defined the "domestic industry" that it would use in its determination of injury, causation, and remedy. All aspects of the USITC's determination are based on this threshold determination. It is not simply a matter of the analysis on pages I-16-21 of the USITC Report but also the subsequent causation analysis, the USITC's determination, the USITC 's recommendation of the remedy, and the ultimate determination by the US of the actual measure. The USITC's choice of "domestic industry" affected each and every phase of the investigation and determination, and then the ultimate decision on the actual measure by the US.

90. One of the purposes of the requirements for a public report and to make notifications to the Committee is to enable an affected Member to challenge the basis for the measure under the WTO dispute settlement system. If a Member could simply rebut arguments by revising the reasons for a decision, it would make disputes a farce. It would also fundamentally weaken the obligations on a Member and shift the goal posts about what a complainant has to prove.

3.3.2.4.2 Facts about packers and breakers

91. Nevertheless Australia will make some comments in the alternative, if the Panel considers that it should consider whether US could have come to the same conclusion with a "domestic industry" limited to packers and breakers. As already noted Australia has also made comments on this in its answer to Question 10 from the Panel.

92. The failures of the USITC Report to obtain adequate evidence and to examine all relevant factors apply to packers and breakers in the same way as they applied to the USITC Report's consideration of the "domestic industry" comprising all four industry segments. Similarly, there is the same failure to comply with SG Article 4.1(b) and 4.2(a), including the issue of proof that serious injury was "imminent".

93. Moreover, what can be made of the findings on pages I-16-21 of the USITC Report given that there was no attempt to give any weighting or significance to the seriousness of injury to the various industry segments.

94. In addition, on the basis of the indexed data provided by the US at Exhibit US-41, there is no evidence of "threat of serious injury" to packers and breakers.

95. For *packers*, Table 8[12] shows that for Interim 1998, there were only very small falls in production and shipments, with the reduction incapacity utilization almost entirely due to the increase in capacity. Table 16 shows that net sales were up, and, while it is difficult to read such indexed data, the drop in profits appears to be due to increases in direct labour and other processing costs. Even so the packers are still making a profit. Table 21 shows that there was massive capital expenditure in 1997 (around 12 times the normal annual level).

96. For *packer/breakers*, Table 18 shows that net sales, profit and cash flow were all up for Interim 1998. Table 21 shows that capital expenditure was up in Interim 1998. Table 21 shows that there was massive capital expenditure in 1995 and 1996 (or about 10 times the level over 1993 and 1994).

[12] Reference to tables in this sub-section are to Exhibit US-41.

97. For ***breakers***, Table 3 shows that for Interim 1998, production was up, shipments were up in both volume and value. The decline in capacity utilization was due solely to the very large increase in capacity. An indexed version of Table 20, "Results of operations" has not been provided.

3.3.3 Conclusion on "domestic industry"

98. Thus the definition of "domestic industry" used by the USITC is inconsistent with SG Article 4.1(c). This "domestic industry" was used by the USITC to reach its injury findings, including causation, and its recommendation on remedy. This "domestic industry" was also used in whatever the US did after the USITC Report in deciding on the extent of the measure. Accordingly, the findings on injury and on the measure are irremediably flawed and cannot be cured. Therefore, the measure is inconsistent with SG Articles 2.1, 4, and 5.1.

3.4 "THREAT OF SERIOUS INJURY"

3.4.1 "Clearly imminent"

99. It is an explicit part of the definition of "threat of serious injury" under SG Article 4.1(b) that serious injury to the "domestic industry" must be "clearly imminent". If it has been determined (as in the current case) that the "domestic industry" is not experiencing present serious injury, then there must be some new or changed circumstance that will cause serious injury to be experienced by the "domestic industry". This must involve also a significant change in the overall position of the "domestic industry".

100. The USITC provided no explanation of what circumstances were changing that would cause serious injury or why the serious injury was "clearly imminent". The US was not prepared to explain what it meant in SG Article 12.3 or DSU consultations. The US has still not addressed the question of what is meant by "clearly imminent", either in its First Submission or in its Opening and Closing Statements on 25&26 May 2000. In Australia's view this means that the US accepts that it has not met this requirement, out of many, in the determination of threat of serious injury.

101. There are two aspects: (1) it must be demonstrated that there are circumstances that will lead to serious injury occurring; and (2) the occurrence of the serious injury must be imminent.

3.4.1.1 A determination of threat of serious injury must be based on a finding that serious injury will be experienced absent a significant change in circumstances

102. It cannot be a matter of conjecture or mere possibility that serious injury is going to occur. Where there is no serious injury being experienced, the finding must be that it will occur unless there is some significant change in circumstances. This is quite different from what the USITC Report says in concluding its finding on threat at page I-21:

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

Thus the finding is based on the period 1993 to Sept 1998 (period of investigation) without any substantial reason why there would be some significant change in circumstance so that there would be serious injury in 1999.

103. Moreover, the US in its First Submission[13] adduces as proof the USITC questionnaire survey of Australian and New Zealand exporters about imports in 1999. However, that discussion on imports in the USITC Report comes later than the finding of "threat of serious injury" on pages I-16-21, it is part of the causation analysis. This is a rewriting of the USITC Report by the US.

104. A fundamental problem with the USITC Report approach in reaching the conclusion of threat of serious injury is that it is a static analysis that gives no basis for reaching conclusions on what will happen or when it will happen.

105. Moreover, the USITC Report concluded that the increase in imports would be much lower than the quotation from the US above. For example, at Footnote 171 on page I-34 of the USITC Report projected that imports in 1999 would only rise by 4.5 per cent. If the US is relying on the figure of 21 per cent for proof, then that is at odds, not only with the sequence of reasoning of the USITC Report, but also with the finding of its own competent authority on the projected number.

3.4.1.2 In the threat context, serious injury must be imminent

106. The issue of when the serious injury is going to occur is critical. The US treats this as if "imminent" means no more than injury may occur at some time in the future without any indication of when that might be. In this case the USITC made a finding in February 1999 on the basis of data to Sept 1998 (or in some cases only to 1997) about threat without any indication of when it would occur. The USITC Report was not released until April 1999 and the measure was not imposed until July 1999. Under the Safeguards Agreement the measure was applied in July 1999 on the basis that the "domestic industry" was going to suffer serious injury imminently. The US could not have known what was going to happen and when it was going to happen on the basis of the USITC Report.

107. Australia elaborated on the meaning of "imminent" in its First Submission, in particular at paragraphs 189-206. A threat case is necessarily about the future. To refuse to attribute any substance to "imminent" is to say that it has no meaning. That is to try to write the term out of the Safeguards Agreement. A safeguard measure is an extraordinary measure for emergency action.[14] How more extraordinary then is safeguard action on the basis of threat where no serious injury is being experienced let alone being caused by increased imports. Such action can only be justified under the stringent conditions laid down in SG Article 4.1(b).

108. The approach taken in the USITC Report to the issue of "threat of serious injury" on pages I-16-21 in practice probably precluded it from reaching a meaningful conclusion about "clearly imminent" (regardless of the circumstances of this particular case). However, its approach did not relieve the US of its obligations to have made a meaningful determination in respect of "clearly imminent" before applying the measure.

3.4.1.3 The US seeks to rewrite the USITC Report on "imminent"

109. The US has sought in a number of places in its First Submission to rewrite the USITC Report on "imminent". Its comments essentially misrepresent what the USITC Report claims that the USITC did. For example, the comments on "imminent" are at paragraphs 134-136. In paragraphs 134 and 136 of its First Submission, the US says that the USITC looked at the shift in the mix of imports and the trends in projections for 1998 and 1999. In the second sentence of paragraph 136, the US says:

[13] At paragraphs 24 and 84.

[14] See Appellate Body reports on *Korea - Dairy Safeguard* and *Argentina - Footwear Safeguard* at paragraphs 86 and 93, respectively.

> "Three of the USITC Commissioners expressed the additional view that they did not believe the exporters would have exaggerated their near-term future exports to the United States, since an overstatement would not likely have been in their interest. [Footnote 167: USITC Report at I-23 n.23.]"

110. The problem with this rewrite is that the USITC Report came to the conclusion on "imminent" in the section on "Serious injury or threat of serious injury" on pages I-16-21. However, the arguments the US makes referred to above, are in the section on causation on pages I-21-26. The comment quoted above obviously did not represent the actual facts - at Footnote 171 on page I-34 the USITC projected exports in 1999 to increase by 4.5 per cent.

3.4.1.4 The US seeks to rewrite the USITC Report on "threat of serious injury"

111. At paragraphs 79-82 of its First Submission, the US sets out what it describes as "the essence of the USITC's threat determination". The four points claimed were: the surge and projected surge of imports from Australian and New Zealand; the change in the mix of fresh/chilled and frozen products; falling prices and the USITC finding that prices would continue to fall in the future; and the economic indicators of the "domestic industry" stabilized in 1996 but deteriorated in 1997 and 1998 and when imports surged the deterioration was projected to continue into 1999.

112. A major problem that the US faces with this alleged "analysis" is that it never happened. The US has taken bits and pieces from the threat analysis, from the causation analysis, and from the factual section of Part II and sought to weave them into a new argument. The first three points were not argued by the USITC in its threat analysis - as discussed in the context of causation they are also a rewrite of what the USITC report said. The fourth point is also a blend of misquotation and mixture of causation and threat analysis. The points on imports were again under the section on causation. The only point on stabilization in 1996 or at any other time in the section on threat is at pages I-17-18:

> "While not truly healthy during any part of the period of investigation, by 1996 per capita lamb/ mutton consumption appeared to be stabilizing to some degree, and lamb prices were generally higher, offsetting in part the loss of the Wool Act payments in that year. In mid-1997, economic indicators relating to the industry began to fall. As described below, the deterioration in these indicators that occurred after 1996 confirms that the industry is threatened with serious injury." [Footnotes 59 and 60 omitted.]

113. The stabilization of consumption is shown at table 36 on page II-69, which is no more than that per capita consumption of lamb and mutton was 1.1lbs per capita over 1995, 1996 and 1997, falling from 1.2lbs per capita in 1994. The USITC did not say that "the economic indicators relating to the health of the domestic industry had stabilized by 1996 after the termination of the US Wool Act". Indeed, this would have been untrue. What happened was that there was a temporary spike in prices due to flock liquidation that continued to destabilize the markets.

3.4.2 Consideration of all relevant factors

3.4.2.1 Australia's argument

114. Australia in its First Submission proved that the USITC had relied on inadequate data for its conclusions. Thus the USITC failed to examine those factors for which it relied on such data.

115. The USITC also even in the context of that inadequate data failed to examine all the relevant factors listed in SG Article 4.2(a) as required.

3.4.2.2 US's assertions

116. The US said at paragraph 150 in its First Submission that regarding USITC questionnaire response data:

> "Complainants have not suggested any reason why this approach constituted anything less than an objective evaluation of the evidence."

117. The US uses the same term "objective evaluation" for the heading of the section V.D.5.a.

118. This is simply untrue, unless this is a play on words with the use of "evidence", i.e. the evidence used by the USITC. The US is seeking to lower the requirements of the Safeguards Agreement. SG Article 4 requires an "evaluation of all relevant factors of an objective and quantifiable nature" and the evaluation must be based on "facts". Australia's argument, in part, is that the data set, and the evaluation, were grossly inadequate for an assessment to satisfy the requirements of SG Article 4. Australia proved this in its First Submission.

3.4.2.2.1 The inadequate data for growers

119. At paragraph 150 of its First Submission, the US says that:

> "The USITC noted that the sheer size of the domestic industry – over 70,000 growers in 1997 – made it impossible for the USITC to canvass a large percentage of the industry or even to develop the kind of statistically valid sample used for smaller, less dispersed industries. "

120. No explanation is given by the US either of the basis for the choice of the 110 growers as recipients of the 110 questionnaires or why some form of statistically valid sample could not have been obtained. The USITC Report relies on its questionnaires for financial data. For this it had only 47 responses from growers and only 42 responses from growers that were not feeders. This is 42 out of more than 70,000 without any justification for why this should be considered in any way representative. Moreover, only 27 of the growers had information on operations in Interim 1998. Australia submits that this cannot be considered to be an adequate evaluation of the financial condition of the industry segment, which is the basis for the USITC finding on "threat of serious injury".

3.4.2.2.2 The inadequate data for grower/feeders

121. Paragraph 164 of the US's First Submission says:

> "Australia complains that the USITC obtained data from only three grower/feeder operations, and that the USITC did not receive interim 1998 data from these firms that would have been relevant to a threat finding. It is not clear what point Australia is trying to make here. In finding that the domestic industry was threatened with serious injury, the USITC based its decision in part on the deterioration in the condition of the industry during interim 1998. To the extent that the USITC did not have interim 1998 data on grower/feeder operations, it did not rely on such data." *[Footnote 196 omitted.]*

122. Australia complains that for grower/feeders, the USITC only had information to 1997. Where the US says above that

> "the USITC based its decision in part on the deterioration in the condition of the industry during interim 1998"

this must be on the basis of the condition of other industry segments, since the USITC had no information on 1998 for this group of firms.

123. Australia's argument is that there is no way on the basis of a small number of firms with data only to 1997 that the USITC could have made an adequate examination of the factors concerned to arrive at the conclusion in 1999 that these firms were being threatened with imminent serious injury.

124. Moreover, while the information provided to the Panel in Exhibit US-41 is indexed, Table 14 shows that sales and net sales values by grower/feeders were at record levels in 1997. (Table 14 only contains data to 1997.)

3.4.2.2.3 The inadequate data for packers and breakers

125. The USITC Report says nothing about the coverage of the one breaker, or even of the coverage of the two packer/breakers and the one breaker, of the processing operations for lamb meat.

126. Paragraph 165 of the US's First Submission also says:

> "As the authority's report indicates, many of the packers and breakers devote only a portion of their overall operations to the processing of lamb *[Footnote 200: USITC Report at II-15.]* *and were unable to provide separate data on lamb meat operations*." *[Emphasis added.]*

The comment after the footnote (underlined in italics) does not appear at the same reference and appears to be an interpolation.

127. Nonetheless, the US is saying that because there were no separate data on lamb meat operations those firms should not be considered. The firms at issue move between lamb, older sheep and other species without fuss. If they did not have separate data, it would be reasonable to assume that they were not suffering injury or even threat of serious injury: certainly, the contrary would be pure speculation. In effect these firms were excluded from the consideration of "domestic industry" because there was no injury issue in respect of imports of lamb meat. Nothing in the Safeguards Agreement allows the USITC to pick and choose in this way. The US has said in its First Submission, e.g. at paragraph 124, that the USITC made its determination of "the industry as a whole". Firms that pack or break other meats as well as lamb meat are just as much part of the industry producing lamb meat and cannot simply be disregarded.

3.4.2.2.4 Numbers of firms in each industry segment provided in answers to questions from the Panel and Australia

128. The US provided some data on the numbers in its answers to Questions 14 and 4 from the Panel and Australia, respectively.

129. The number for feeders (11) is misleading and appears to be no more than the number of firms responding to questionnaires. A similar comment may be true for feeder/growers (7). The 1995 USITC report said that:

> "Officials of the National Lamb Feeders Association report that there are probably only 100 large-volume lamb feedlots in the United States, although there are many small-volume feedlots."[15]

This is inconsistent with the US's responses to the Panel's and Australia's questions. Moreover, given the 571 packers, it says exist, 18 feedlots would provide an unusual industry structure.

130. The number of breakers is given at "less than 10 major firms". However, the Panel's question was how many breakers there are. Questionnaires were sent to 16 firms. Presumably, breakers are registered with the government and could be identified. Indeed, given the premium received by domestic lamb meat for being USDA graded, essentially all firms breaking lamb meat would be registered with the USDA.

131. At paragraph 95 of the US's answers to the Panel, the 4 packer/breakers corresponds to the number identified through questionnaires - this says nothing about how many there are.

132. The reference in paragraph 97 of the US's answers to the Panel to receiving useable data on 5 packing operations, from 2 packer/breakers and 4 breakers presumably involves some double counting, or only minimal data was provided by most. On Page II-24 the USITC Report says that data were provided on lamb meat operations by 2 packers, 2 packer/breakers and 1 breaker.

133. At paragraph 98 of the US's answers to the Panel, it is unclear how the figure of 6 per cent is arrived at given that there are two separate products here, feeder lambs and slaughter lambs. The reference to useable data, neglects the fact that only 27 growers and no feeder/growers provided data for Interim 1998 - even though this is a "threat of serious injury" case.

134. At paragraph 100 the US is implying that the USITC Report relied on a major proportion argument. This is not evident from the USITC Report. Moreover, while Australia agrees that the Safeguards Agreement is not prescriptive about what constitutes a major proportion, it must be "those [producers] whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production" of lamb meat. Nowhere does the USITC Report indicate how it determines this in a multi-tier "domestic industry" such as it uses in this case. The US dwells on the proportion of value added by growers. If this is its basis of "major proportion", then it highlights the problem of reaching a determination on the basis of only 27 growers out of more than 70,000 providing no data for Interim 1998.

135. The US notes in paragraph 102 in its answer to Question 15 by the Panel that the growers were selected for the questionnaire survey on the basis of being the largest recipients of National Wool Act subsidies. This emphasizes the non-representative nature of the growers selected and may reflect a greater vulnerability to the termination of the National Wool Act subsidy programme.

136. At paragraph 106 of its answer to Question 16 from the Panel, the US says that:

> "Indeed, nothing in the Agreement requires the authority to issue questionnaires at all."

137. Australia does not dispute this. However, the Safeguards Agreement does require that the investigation be based on facts and as the *Korea - Dairy Safeguard* panel report at paragraph 7.30 said:

[15] At page 2-5 of electronic copy -see Attachment A.

> "For us, an objective assessment entails an examination of whether the KTC had examined all facts in its possession or *which it should have obtained in accordance with Article 4.2 of the Agreement on Safeguards (including facts which might detract from an affirmative determination in accordance with the last sentence of Article 4.2 of the Agreement on Safeguards),* whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of Korea. Finally, we consider that the Panel should examine the analysis performed by the national authorities at the time of the investigation on the basis of the various national authorities' determinations and the evidence it had collected." *[Emphasis added.]*

Thus, as a practical matter, in virtually all cases questionnaires would be required in order to comply with the evidentiary requirements of the Safeguards Agreement.

3.4.2.2.5 Australia did not suggest that the USITC should have "compelled" firms to answer questionnaires

138. At paragraph 160 the US's First Submission says that:

> "Australia's suggestion that the USITC should have compelled answers to questionnaires, or obtained a particular response rate or level, has no basis in the Safeguards Agreement. The Agreement sets forth no specific standard of investigative thoroughness." [Footnote 191 omitted.

139. It is simply untrue to say that Australia suggested that the USITC should have compelled answers to questionnaires in respect of growers or any of the industry segments. Australia submits that there is an obligation on a Member to ensure that an investigation is thorough and is properly carried out in all details. The Safeguards Agreement does set forth a high standard of investigative thoroughness on all issues, including the injury investigation under SG Article 4.

140. There is no obligation under the WTO for a Member to take safeguard action. The US did not have to do this. The investigation was being held, and the measure was imposed, to benefit the "domestic industry". All parts of this "domestic industry" were supposed to be being threatened with imminent serious injury. Indeed, the petitioners argued that serious injury was already being experienced. However, the US is saying that to have got more than 27 growers, 8 feeders, 0 grower/feeders, 2 packers, 2 packer/breakers, and 1 breaker to provide data on lamb and lamb meat operations for Interim 1998, the USITC would have had to have *compelled* them to answer. The situation begs the question why the USITC was reluctant to ask a wider number of firms and why so many of those firms asked, who allegedly considered that they were suffering serious injury caused by increased imports, were so reluctant to answer questionnaires. All the USITC had to do would have been to point out that it would be in their interest to respond, since without adequate data it would have to reach a negative determination. If the case was genuine with widespread support, then such a statement should have been sufficient to draw forth a high level of responses.

3.4.2.2.6 Panel's responsibilities in assessing the adequacy of data and consideration of the examination of factors under SG Article 4, in particular those listed in SG Article 4.2(a)

141. As set out at paragraph 120 of Australia's First Submission, Australia submits that: "the Panel needs to assess objectively whether the US met its obligations in examining the data that it had collected. However, the Panel also has the responsibility to decide whether the US met its obligations in collecting the right data to allow it to make a determination in conformity with the requirements of the Safeguards Agreement, and in particular SG Article 4."

142. The Panel's assessment of adequacy must also be against the background of what the USITC claimed to have found. In particular the USITC Report made a finding of threat of serious injury on the basis of poorly collected data up to September 1998, or in some cases only to 1997, where it also found that serious injury was not being experienced on the basis of the same data.

143. Paragraph 151 of the US's First Submission says:

> "In view of the relatively small coverage of these responses, the USITC did not place decisive weight on questionnaire data received from growers."

144. This is a revealing acknowledgement in light of what the questionnaire data show for the factors listed in SG Article 4.2(a) for growers:

- increase in imports - none for feeder lambs (not questionnaire data)
- share of the domestic market - 100 per cent for feeder lambs (not questionnaire data)
- changes in the level of sales - increased
- production - increased
- productivity - not calculated for questionnaire data but would appear to have increased in 1998 (see Footnote 78 at pages I-18&19)
- capacity utilization - not examined
- profits and losses - net income without subsidies positive compared to negative for each year over 1993-96 (see Table on page 42 following paragraph 153 in Australia's First Submission)
- employment - increased.

145. At the top of page I-19 the USITC Report notes the emphasis that it puts on the financial data from the questionnaires ("in particular questionnaire data on the declining financial condition of the industry") in its threat finding. On page II-24, the USITC Report says that: "[t]here is no data available from the USDA on the financial condition of the lamb industry." Without the questionnaire data the USITC Report would have failed to provide even comment on even more of the factors listed in SG Article 4.2(a). For example, for growers, the questionnaire data was required for profits and losses and for employment, and was used for sales. The USITC Report was similarly dependent on questionnaire data for the other industry segments.

146. The WTO Agreement does allow such an extraordinary action as applying a safeguard measure, but only if the requirements of the Safeguards Agreement and GATT 1994 Article XIX have been properly complied with, which includes a thorough investigation. The investigation in this case fell well below what was required of the US.

147. The US has not answered the key issue about inadequacy of the data in examining the factors on which a finding the industry segments were threatened with imminent serious injury.

3.4.3 Causation

3.4.3.1 Australia's arguments

148. As shown in Australia's First Submission, the USITC Report's finding on causation was seriously flawed:

- the "domestic industry" was not experiencing serious injury - indeed there is no indication in the USITC Report that any industry segment was experiencing serious injury - let alone serious injury being caused by imports

- it was not possible to determine what would happen in the future without some prospective analysis of the conditions prevailing for the "domestic industry"

- no indication was given of the different conditions expected for the different segments of the "domestic industry" and why there was to be serious injury going to be caused to "producers as a whole"

- the finding that the "domestic industry" was threatened with imminent serious injury was based on inadequate data to Sept 1998 or in some cases only to 1997

- the same inadequate data was used for the causation analysis

- no rationale was provided how the USITC could reach a conclusion about causation of serious injury in 1999 on the basis of data to Sept 1998 for the "domestic industry", with data for some groups in the "domestic industry" only to 1997

- not all factors set out in SG Article 4.2(a) were examined even on the basis of the inadequate data

- the USITC Report recognized that other factors were having an adverse effect on the "domestic industry", and indeed were "causes of the threat of serious injury" but made no attempt to assess the collective injury then and in the future attributable to them.

149. SG Article 2.1 requires that increased imports “cause or threaten to cause” serious injury to the "domestic industry". SG Article 4.2(b) provides that the causal link between imports and serious injury or threat thereof must be demonstrated on the basis of objective evidence and in consideration of relevant factors outlined in SG Article 4.2(a). Injury caused by other factors cannot be attributed to increased imports. In light of these requirements, the USITC Report provides an inadequate and flawed causation analysis both in terms of the data used, the factors examined in assessing serious injury, and the USITC’s failure to ensure that it did not attribute to increased imports injury caused by other factors.

3.4.3.2 US's assertions

150. At paragraph 90 of its First Submission the US says:

> "Moreover, the USITC found that the payments had gone only to part of the industry, to lamb growers and feeders; *the packer and breaker segments of the domestic industry never received payments under the Wool Act*." *[Footnote 131 omitted.]*

151. Australia never claimed that packers and breakers received National Wool Act subsidies. The issue is that the removal of those subsidies had a destabilizing impact on growers and the consequent flock liquidation not only reduced the basis for future production of lambs and hence also

lamb meat, but also led to a brief price spike in 1996 and 1997. The impact of this destabilization continued on and led to an incorrect assessment of causation in the USITC Report.

152. The removal of those subsidies affected packers and breakers because it not only destabilized prices but also led to a resumption of the downward trend in the flock size and so to a reduction of the throughput of domestic lamb meat for packers and breakers.

3.4.3.2.1 The US's reference to the Atlantic Salmon Code panel is wrong

153. Paragraphs 54ff and 74ff in the US's answers to Questions 7 and 10 from the Panel, respectively, refer to the panel report on *United States - Atlantic Salmon from Norway* under the Tokyo Round Anti-Dumping Code (ADP/87). At paragraph 55 of its answers, the US approvingly quotes paragraph 555 of the Code panel:

> 'As the panel noted, the Tokyo Round Anti-Dumping Code contained no affirmative guidance on how other causal factors were to be examined. Rather, as it found, the primary focus of the relevant Code provisions concerning injury determinations was on specific factors that authorities should consider in examining the effects of imports. It concluded there was no requirement, "in addition to examining the effects of the imports" under those provisions, that "the USITC should somehow have identified the extent of injury caused by these other factors in order to isolate the injury caused by these factors from the injury caused by the imports from Norway. *[Footnote 50 omitted.]* " '

154. While WTO panels can of course seek guidance from the arguments and reasoning of Code panels, the report was not adopted by the CONTRACTING PARTIES but by Parties to the Code. Thus the adoption was not under GATT 1947 and so not part of GATT 1994.

155. Moreover, there are significant differences between the two cases.

- *United States - Atlantic Salmon* was under the Anti-Dumping Code and was not about safeguards under Article XIX.

- The text of Article 3:4 of the Code is very different from that in SG Article 4.2(b).

- Indeed the text of Article 3:4 of the Code is different from that in Article 3.5 of the WTO Anti-Dumping Agreement.

156. The Code panel's analysis of the provision focused (in its paragraphs 550-553) on the contrast between the specific and mandatory nature of the analysis required in the first sentence of Article 3:4 (including Footnote 4) and the less specific language of the second sentence, using "may" (and using "can" in Footnote 5), regarding the examination of other factors.

157. This language was strengthened in the WTO Anti-Dumping Agreement, suggesting that care should be taken when using the reasoning of the *United States - Atlantic Salmon from Norway* panel. Moreover, despite what the US says about the differences in the language with that in the Safeguards Agreement being insubstantial[16], the differences are marked.

158. The Code text was:

[16] Footnote 69 of the US's answers to the Panel's questions.

> "It must be demonstrated that the dumped imports are, through the effects *[Footnote 4 omitted]* of dumping, causing injury within the meaning of this Code. There may be other factors *[Footnote 5 omitted]* which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports."

159. SG Article 4.2(b) says:

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

160. There is nothing non-mandatory about the language in SG Article 4.2(b). The finding under the second sentence of SG Article 4.2(b) regarding the impact of other factors is necessary for the final determination in the first sentence on the existence of the causal link between increased imports and serious injury or threat thereof. In order to do this an examination is needed of the ***collective*** effect of ***all*** other factors. Once the injury[17], present or future, being caused collectively by other factors has been determined, then, and only then, can a determination be made about whether increased imports of themselves are (in this case) going to cause serious injury imminently to the "domestic industry".

3.4.3.2.2 The US seeks to rewrite the USITC Report on causation

161. Australia will not go over the same ground as before but limit itself to three points.

162. Firstly, the characterization in paragraphs 79-82 of the US's First Submission misrepresents what was actually in the USITC Report section on causation. In particular, it mixes up the sections on "Conditions of competition" and "Analysis of causation". In so doing it misrepresents the issue on product mix of fresh/chilled and frozen. The analysis on the last paragraph of page I-22 of the USITC Report is to the effect that domestic lamb meat and imported lamb meat are substitutable.[18]

163. Secondly, the US seeks to mix up the lines of analysis by the USITC, e.g. at paragraph 88 of the US's First Submission, the US says:

> "The USITC also found that financial performance across all industry segments deteriorated sharply in 1997 and interim 1998, and attributed this decline largely to falling prices *caused by increased imports*. [Footnote: 124: USITC Report at I-20.]" *[Emphasis added.]*

164. The emphasized phrase is not in the USITC Report at page I-20, either explicitly or implicitly - the US has simply added it here to support its argument.

165. Thirdly, an example of where Australia does disagree with the USITC Report (despite the US comment in paragraph 86 of its First Submission), is the issue of the adjustment time of growers and feeders. The USITC Report itself (e.g. page II-52) puts the feed lot time at 2-4 months. This is the time cycle that confronts feeders. Moreover, to the extent that the US argues that feeders can push prices down for growers, then the less that feeders are adversely affected by lower prices for lamb

[17] In SG Article 4.2(b), this refers to all levels of injury and not just "serious injury".

[18] Even that finding was qualified by the USITC Report saying: "[t]here is, nonetheless, evidence of differences between products from different sources."

meat - they may make larger or smaller profits depending on how and when they buy feeder lambs and how and when they sell slaughter lambs in the context of market fluctuations. However, they can adjust quickly. To put the period of 2-4 months in perspective, there were more than 9 months between the filing of the petition with the USITC and the application of the measure. There is no argument in the USITC Report to suggest how an industry with this type of cycle could suffer threat of injury in this manner. If serious injury to feeders was clearly imminent in February 1999, then it must have been over by the time the measure was actually applied.

3.4.4 Conclusion on "threat of serious injury"

166. Thus the USITC Report failed to fulfil the requirements of SG Article 4 on the determination of "threat of serious injury" caused by increased imports. Therefore, the measure is inconsistent with SG Articles 2.1 and 4.

3.5 MAINTAINING A SUBSTANTIALLY EQUIVALENT LEVEL OF CONCESSIONS AND OTHER OBLIGATIONS

167. The US argued in its First Submission that:

> "When read in conjunction with Article 12.3, Article 8.1 requires a Member to engage in consultations in advance of applying a safeguard measure. It does not impose an obligation to offer or provide trade concessions as a condition for applying such a measure." *[At paragraph 261.]*

and

> "Thus, the only obligation that Article 8.1 imposes on a Member considering a safeguard measure is to provide an opportunity for prior consultations. The United States satisfied that obligation." *[At paragraph 262.]*

168. SG Article 12.3 requires prior consultations by itself. The US is arguing that the reference to SG Article 8.1 in SG Article 12.3 is otiose when the right of the affected Member to take immediate retaliatory action under SG Article 8.2 is suspended under SG Article 8.3. That is not a permissible approach to treaty interpretation.

169. Similarly, the US is arguing that the reference to "shall endeavour ... " in SG Article 8.1 is also superfluous when the affected Member cannot take immediate retaliatory action under SG Article 8.2 because of the suspension under SG Article 8.3. Again that is not a permissible approach to treaty interpretation.

170. If "shall endeavour ..." in SG Article 8.1 only applied when SG Article 8.3 did not apply, it would have said so. Similarly, if the reference to SG Article 8.1 in SG Article 12.3 only applied when SG Article 8.3 did not apply, the text would have said so.

171. Both SG Articles 8.1 and 12.3 apply when a Member is "proposing to apply ... or seeking an extension ...". They do not apply immediately after the three year suspension under SG Article 8.3 expires. Thus the US's argument is that the obligation to endeavour to maintain a substantially equivalent level of concessions and other obligations does not apply for the first four years of a safeguard measure.

172. The US also asserts in paragraph 265 of its First Submission that:

> "To ensure this objective, they permitted Members to impose safeguards for a limited period without fear of "having to pay" for such action."

173. The US points to no provision in the Safeguards Agreement where this is specified. If that was the intent of the drafters, it could have been expected to have been spelled out in the text. The actual text of the Safeguards Agreement simply removes the right to take retaliatory action within the first three years of a measure in conformity with the Safeguards Agreement.

174. At paragraph 266 of its First Submission, the US goes on to say:

> "For Australia to now argue that a Member must offer substantially equivalent concessions for the application of safeguard measures during the three-year period referred to in Article 8.3 jeopardizes the objective to re-establish multilateral control because it would encourage Members to find methods outside of the Safeguards Agreement to protect their injured domestic industries. Such an outcome would defeat a key purpose of the Agreement."

175. The US's argument appears to boil down to an assertion that to endeavour to reach some mutually satisfactory arrangement with affected exporters would place too heavy a burden on the Member proposing to apply a measure. However, this is an extraordinary measure and there is nothing in the Safeguards Agreement that suggests that it should be easy and costless to take safeguard action. If a Member can deal with the situation outside the Safeguards Agreement in a manner consistent with the WTO such as through structural adjustment measures, this would be generally welcomed. If, however, the US is saying that if it has to comply with SG Article 8.1, it will act in breach of SG Article 11.1(b) through imposing, for example, so-called voluntary export restraints, then it is saying that it will not comply with its WTO obligations. The refusal of a Member to comply with its WTO obligations is not a legal justification for removing an obligation under the Safeguards Agreement.

176. At paragraphs 279-281 of its First Submission, the US mischaracterizes Australia's arguments with regard to SG Article 12.3. Australia argues that SG Article 12.3 requires a Member proposing to apply a safeguard measure to enter into consultations:

> "with a view to, *inter alia*, ... reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8".

177. This requires more than simply having a meeting. It required the US to try to reach and understanding with respect to the obligation under SG Article 8.1, i.e. "shall endeavour ...". The US admitted[19] that it did not seek to achieve that objective because it considered that it had no such obligation. Thus the US did not enter into such negotiations with good faith to comply with SG Article 12.3.

178. In its answer to Question 9 asked by Australia, the US shows that it has not understood either Australia's position or an answer that Australia made to Canada in 1999 (set out in paragraph 19 of the US's answers).

179. At paragraph 20 of its answer to Australia, the US said:

> "Australia's response to Canada indicates that, in Australia's view, a Member may choose to accommodate the interests of other Members through adjustments in the size and administration of quotas and TRQs, and that compensation under Article 8.1

[19] See in particular paragraph 234 of Australia's First Submission.

> will rarely be appropriate. Australia also appears to view this question as one for the importing Member to decide."

180. The reference by Australia to new legislation was not intended to mean that compensation through tariff concessions would be "***not appropriate***" or that the importing Member should not engage in genuine consultations on a satisfactory resolution of the matter.. The answer was in response to Canada's question. The only legal mechanism for Australia to change tariffs is through legislation, i.e. by in the first place tabling a tariff bill in the Commonwealth Parliament, or giving notice thereof if Parliament is not sitting. It cannot be done by regulation or proclamation. Indeed to apply a safeguard measure in the form of a tariff increase, including a TRQ, would require a tariff bill itself and, if there were agreement on compensation, it would presumably be part of that same bill.

181. The reference to past practice of course reflected the history of Article XIX safeguards, given the leverage of potential retaliation. Australia agrees that a similar outcome could apply for measures under the Safeguards Agreement, i.e. that a negotiated outcome could be that instead of a tariff concession in another product there could, for example, be an increase in the tariff quota or a reduced out of quota tariff. This is entirely consistent with the last sentence of SG Article 8.1. Australia has not argued that the only way of maintaining a substantially equivalent level of concessions and other obligations could only be done through tariff concessions.

182. In this case there was no offer by the US and indeed no consultations on how to achieve the objective of SG Article 8.1. The US says that it complied with SG Articles 8.1 and 12.3 by virtue of the SG Article 12.3 consultations on 4 May[20] and 14 July 1999. However, the US maintains that the USITC recommendation on the measure has no significance in the context of the WTO. Moreover, the actual measure to be applied was not known until 7 July 1999. There could not have been consultations on the measure on 4 May 1999. There was no change in the tariff quota following the announcement on 7 July 1999 and no SG Article 12.3 consultations except for that on 14 July 1999.[21] Indeed, the US notified the Safeguards Committee that it had "introduced" the measure on 7 July 2000[22], i.e. before the consultations on 14 July 2000, to be effective from 22 July 1999. Legally the measure was applied by proclamation of the President on 7 July 1999 before the consultations on 14 July 1999.[23] Thus the consultations were pro forma with no attempt to comply with SG Articles 12.3 and 8.1. The arrangements for handling product in transit and for licensing were subject to separate discussions, but were never regarded as being consultations under SG Article 12.3, which the US notified the Council for Trade in Goods and the Safeguards Committee as being limited to the meetings on 4 May 1999 and 14 July 1999.[24] In the same document the US notified the Committee that "[n]o mutually satisfactory resolution was reached." On that basis Australia maintained its rights through an exchange of letters notified to the Council for Trade in Goods and the Safeguards Committee.[25]

183. On the other hand, if the consultations on 4 May 1999 were regarded by the US as being in respect of SG Article 8.1, as claimed in its answer at paragraph 17 to Question from Australia, then the outcome of the consultations was a more restrictive measure. The actual measure applied ran completely contrary to SG Article 8.1 and the consultations under SG Article 12.3.

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[20] The 28 April 1999 date referred to in paragraph 17 of the US's answer to Question 9 from Australia was with New Zealand, not Australia.

[21] See G/L/313-G/SG/19 – Exhibit AUS-13.

[22] See G/SG/N/10/USA/3 at Exhibit AUS-11. The document was dated 12 July 1999 on the basis of a communication by the US dated 9 July 2000.

[23] Exhibit AUS-5.

[24] G/L/313-G/SG/19 at Exhibit AUS-13.

[25] G/L/339-G/SG/N/12/AUS/1-G/SG/N/12/USA/1 at Exhibit AUS-14.

3.6 NON-DISCRIMINATION - SG ARTICLE 2.2

184. This issue has also been addressed in Australia's answer to Question 19 from the Panel.

185. The US at paragraphs 253-257 of its First Submission appears to be at variance with the facts under its legislation and the USITC Report. The US is saying, or at least implying, that the USITC did not base its injury determination on imports from all sources, including, *inter alia*, Canada.

186. The USITC Report on page I-26 made a determination on injury and then subsequently on pages I-26 and 27 made a finding on NAFTA imports. This is an additional step required under NAFTA and its implementing legislation.

187. As is clear from pages 21 and 22 of G/SG/N/1/USA/1[26], the USITC finding on imports from NAFTA partners is subject to a separate determination by the President. This was confirmed by the US in answers at the time of its legislative review in the Safeguards Committee. For example, in its answers to Australia the US said:[27]

> "*2. If NAFTA imports have been excluded from safeguard action, for example, under § 312 (page 22), then are such imports also excluded from consideration under paragraph 202(c)(1) (pages 4 and 5) and considered as other factors under subparagraph 202(c)(2)(B)? If not, how could that be justified under the Safeguards Agreement?*
>
> The factors listed in Section 202(c)(1) that are considered by the ITC relate to the issue of whether the domestic industry is seriously injured or threatened with serious injury and to causation. With respect to causation, the ITC at this point is considering imports from all sources, including NAFTA countries. Only after the ITC has made an affirmative injury determination with respect to imports from all sources does the ITC make any findings with respect to NAFTA imports alone. The decision to exclude NAFTA imports is made by the President, not the ITC, and only after receiving an ITC report containing an affirmative injury determination.
>
> Moreover, the provisions of US law providing that imports from a NAFTA Party may be excluded from application of a safeguards measure under certain circumstances do not conflict with GATT Article XIX or the WTO Agreement on Safeguards, because these provisions are in the context of a free-trade agreement under GATT Article XXIV. These provisions of US law implement provisions of an agreement between Canada, Mexico, and the United States to eliminate duties and other trade restrictions on substantially all trade with each other."

188. Thus the US said in a document dated 23 April 1996 that: "*With respect to causation, the ITC at this point is considering imports from all sources, including NAFTA countries. Only after the ITC has made an affirmative injury determination with respect to imports from all sources does the ITC make any findings with respect to NAFTA imports alone. The decision to exclude NAFTA imports is made by the President, not the ITC, and only after receiving an ITC report containing an affirmative injury determination.*"

189. Thus the USITC's determination is "with respect to imports from all sources". The US has not attempted to justify this approach, which it followed in this case. The US appears to be limiting itself to arguing that the level of imports from sources excluded, in particular from NAFTA partners was so small as not to cause serious injury. This does not justify a breach of SG Article 2.2.

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[26] §§311 and 312 of the NAFTA Implementation Act, in particular §312(b).
[27] Question 2 in G/SG/W/160 at Exhibit AUS-38.

190. Therefore, Australia asks the Panel to find that the US is in breach of SG Article 2.2.

3.7 THE MEASURE IS IN VIOLATION OF THE US'S OBLIGATIONS UNDER GATT 1994 ARTICLE II

191. Finally, since the measure is not in conformity with Safeguards Agreement and GATT 1994 Article XIX, the measure is in breach of the US's tariff bindings on lamb meat as demonstrated in Australia's First Submission. Therefore, the measure is in violation of the US's obligations under GATT Article II.

4. CONCLUSION

192. In the light of the above and of all the claims and arguments made before the Panel in its first written submission, during the first substantive meeting on 26 and 26 May 2000 and when answering the questions from the Panel, Australia requests the Panel to find that, the US has breached Articles II and XIX of GATT 1994 and Articles 2.1, 2.2, 3.1, 4.1(b) and (c), 4.2(a) and (b), 5.1, 8.1, 11.1(a), 12.2 and 12.3 of the Agreement on Safeguards by applying its safeguard measure on lamb meat.

5. ATTACHMENT A

PAGE 2-5 OF THE USITC REPORT: COMPETITIVE CONDITIONS AFFECTING THE US AND FOREIGN LAMB INDUSTRIES *[Emphasis added.]*

Most growers have small flocks of sheep (50 or fewer animals referred to as farm-flocks) and raise sheep as a secondary enterprise.[1] However, about one-third of the growers in the rangelands of the Western States have relatively large flocks (50 or more animals referred to as range-flocks) and specialize in sheep.[2] ***Officials of the National Lamb Feeders Association report that there are probably only about 100 large-volume lamb feedlots in the United States, although there are many small-volume feedlots***. Sheep and lamb feeding tends to be concentrated in a few States as shown in the following tabulation[3] (1,000 animals):

State	1990	1991	1992	1993	1994
California	225	280	285	305	320
Texas	200	180	210	180	210
Colorado	385	250	310	315	325
Wyoming	100	110	150	190	190
South Dakota	55	85	85	91	103
Iowa	90	85	95	85	85
Oregon	110	106	81	95	90
Kansas	102	63	48	82	60
All other	495	571	566	534	456
Total	1,762	1,730	1,830	1,877	1,839

Growers

US sheep and lamb growers may be divided into categories including:[4] (1) purebred breeders (that is, those who keep purebred sheep and sell rams for breeding purposes;[5] (2) commercial market lamb producers (those who maintain flocks of sheep for the production of lambs that are sent directly

[1] Robert E. Taylor, *Scientific Farm Animal Production: An Introduction to Animal Science*, 4th ed., (New York: Macmillan Publishing Co., 1992), p. 47.

[2] Ibid

[3] Animals in feedlots as of 1 January. USDA, National Agricultural Statistics Service (NASS), *Sheep and Goats*, various issues, 1991-95.

[4] The following description of grower categories was adapted from Taylor's *Scientific Farm Animal Production*, pp. 48-49.

[5] Growers often expand the number of animals in their flocks or replace ewes no longer suitable for breeding purposes by retaining the best ewe lambs from each year's crop. Since the productive life of a ewe is typically 4 to 5 years, about 20 to 25 per cent of the ewe lambs from each year's crop must be retained to maintain breeding herd numbers.

to slaughter; or to (3) commercial feedlot operators (those who maintain feedlots where lambs are fed concentrates until they reach slaughter weight). Some growers engage in more than one sheep-raising activity. Some market lamb producers retain title to their lambs that are placed in feed lots by having

ANNEX 1-9

OPENING STATEMENT BY AUSTRALIA
AT THE SECOND SUBSTANTIVE MEETING

(26 July 2000)

INTRODUCTION

1. Mr. Chairman, Members of the Panel. We have reached an advanced stage in the proceedings. The issues of fact and law have been identified and argued about at length. Although the presentations in this dispute have been detailed and the arguments interrelated, the issues before the Panel are clear. Australia will concentrate on those key issues of fact and law that have been the subject of the most glaring misinterpretations of the USA in this case. These include the failure of the USA to comply with:

- the obligation to demonstrate the circumstance of "unforeseen developments";
- the obligation to define properly the domestic industry in this case, in light of the specific facts being considered;
- the obligation to demonstrate that the threatened serious injury is clearly imminent;
- the obligation to demonstrate that the serious injury will be caused by increased imports; and
- the obligation to apply a measure only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

2. These obligations have to be met in the investigation under SG Article 3.1 and subsequent reporting and consultations. Failure to fully observe any one of these obligations results in the application of measures in a manner inconsistent with the Safeguards Agreement and GATT 1994 Article XIX. In applying the safeguard measure on imports of lamb meat, the USA has failed to observe not just one, but all, of these obligations. The USA has also failed to comply with the other key obligations: to maintain a substantially equivalent level of concessions and other obligations with Australia; and not to discriminate against Australia in favour of other WTO Members in the application of the measure.

3. The other points of law, procedure and fact already advanced by Australia should also be considered to be confirmed here.

THE OBLIGATION TO DEMONSTRATE "UNFORESEEN DEVELOPMENTS"

4. In its submissions to the Panel and responses to Panel questions, Australia pointed out that the USITC Report failed to demonstrate as a matter of fact the existence of "unforeseen developments", within the meaning of GATT 1994 Article XIX. Australia further established that the actual developments to which the USA reacted in imposing its safeguard measure were not unexpected, but were in fact well known and foreseen.

5. The USA has sought to remove the matter of "unforeseen developments" as a pertinent issue of fact and law, and to reduce it to a matter so trivial that its competent authority need not address it at

all. Indeed, in its Second Submission the USA effectively declares the "unforeseen developments" clause in GATT 1994 Article XIX:1(a) to be meaningless verbiage.[1]

6. The USA is simply arguing that the Appellate Body was in legal error in its findings in *Korea - Dairy Safeguard* and *Argentina - Footwear Safeguard*. In its Second Submission, the USA turns to Article 31.3(b) of the *Vienna Convention on the Law of Treaties* to argue that "unforeseen developments" was a trivial consideration under Article XIX of GATT 1947 because of "subsequent practice" by GATT contracting parties. The USA does not demonstrate, however, that such "subsequent practice" established "the agreement of the parties regarding its interpretation."

7. Mr. Chairman, the most conclusive evidence regarding the interpretation and application of Article XIX under the WTO emanates ***not*** from allegations about safeguard practices and views of individual GATT contracting parties such as the USA in the distant past. Neither does it come from an old factual note by the GATT secretariat. Nor does it come from the wrangling of negotiators in the Uruguay Round over the merits of the word "unexpected" versus the merits of the word "unforeseen". Instead it comes from the actual text of the Safeguards Agreement and the outcome of disputes under the WTO DSU, i.e. the Appellate Body reports on *Korea - Dairy Safeguard* and *Argentina – Footwear Safeguard*, which have been adopted by Members.

8. The second preambular paragraph of the Safeguards Agreement recognized "the need to clarify ... the disciplines of ... Article XIX". If there had been agreement among GATT contracting parties that "unforeseen developments" was meaningless, then it would have been explicitly excised in any exercise of clarification. However, it was not excised and the Appellate Body found that it was an issue that had to be demonstrated as a matter of fact.

9. The demonstration of the circumstance of "unforeseen developments" is a legal requirement for a Member to comply with in applying a measure since it ***must*** be demonstrated as a matter of fact. SG Article 11.1(a) incorporates the obligations under GATT 1994 Article XIX. Thus, the requirement under SG Article 3.1 that the competent authority publish a report setting forth its findings and reasoned conclusions reached on all pertinent issues of fact and law applies equally to the issue of "unforeseen developments."

10. As a fall back, the USA has also sought to remedy this defect in the USITC Report by attempting to demonstrate *ex post facto* the existence of "unforeseen developments". This does not provide the demonstration required by GATT 1994 Article XIX nor does it represent the published findings and reasoned conclusions reached on all pertinent issues of fact and law required under SG Article 3.1. This is not a permissible option. The USA must stand on what was demonstrated as a matter of fact in the USITC Report and fall on what was not demonstrated.

11. Even if the USA was allowed to demonstrate *ex post facto* the existence of "unforeseen developments", it has failed to do so. The USA erroneously believes it can point to isolated statements within the USITC Report, offered under disparate contexts unrelated to "unforeseen developments", to demonstrate their existence. The USA has gone so far as to suggest that any increase in imports provides a presumption of "unforeseen developments".[2] To arrive at such a conclusion would be to read any requirement of demonstrating the existence of "unforeseen developments" out of the Safeguards Agreement.

[1] The USA, in particular, relies on the negotiating history of its own negotiators to suggest that the "unforeseen developments" clause in Article XIX:1(a) was either "meaningless" or a form of "semantic window dressing." See paragraph 10 and Footnote 10 of the USA's Second Submission.

[2] At paragraph 8 of the USA's answer to Question 1 from the Panel.

12. In its Second Submission, the USA also continues to press the change in the mix of chilled and frozen lamb as a source of the "unforeseen developments",[3] a conclusion never reached by the USITC Report and one which is not supported by the facts. As Australia has pointed out, USA consumers did not suddenly prefer chilled product. To the extent that there were increased imports of chilled product, it was part of the overall increase in imports of the product subject to the measure. This is yet another thinly disguised attempt by the USA to use an increase in imports, by itself, to demonstrate "unforeseen developments".

13. Australia's argument is simple. The Appellate Body has said that the circumstance of "unforeseen developments" had to be demonstrated by the Member applying a measure. The USITC Report did not ***demonstrate*** it and the USA did not provide any other report or explanation before applying the measure. The USA's combination of the change in the mix of chilled product and of the assertion that a safeguard investigation on an item where there is a tariff binding is an "unforeseen development" in itself, are *ex post facto* rationalizations that do not rebut Australia's argument and the Appellate Body's findings.

"DOMESTIC INDUSTRY"

14. Even more damaging for the continued and proper operation of the Safeguards Agreement than its failure to demonstrate the existence of the circumstance of "unforeseen developments", was the USITC's improper decision to include in the "domestic industry" not only the producers of lamb meat (breakers and packers), but also all growers and all feeders. The decision of the competent authority on the "domestic industry" is critical to everything that follows in a safeguard investigation. However, the USITC's decision on "domestic industry" was inconsistent with SG Article 4.1(c).

15. The USA's position is that upstream firms can be included on the basis of "a continuous line of production" and "a substantial coincidence of economic interest". There is nothing in the Safeguards Agreement that permits an authority to broaden the "domestic industry" on the basis of these criteria. The USA has not made any attempt to show, in the absence of any textual support for its approach, what limitations would be imposed by the Safeguards Agreement on a Member wanting to include upstream firms in the "domestic industry". While the USA might in practice limit this approach to imports of certain agricultural products, there is again no textual basis for that in the Safeguards Agreement. In addition, the USA has made no attempt to set out how this approach to determining the "domestic industry" should be dealt with in the context of the determination on injury and in ensuring that the measure is "not more restrictive than necessary".

16. The Panel is faced with a clear choice on the "domestic industry" issue in this case. The USA has sought to blur the issue with claims of some limited vertical integration between some layers of the industry segments. However, the Panel should not be deflected by such claims. There is no such pervasive vertical integration between growers and feeders and packers and breakers. Indeed there is no integration at all between growers and packers and breakers.

17. Moreover, while the USA has asserted that the choice of "domestic industry" is an issue related to the ability of the USITC to analyse some issues[4], this was not reflected in the USITC Report, either through the selection of firms surveyed or the description of the data obtained. Similarly, the USA says that some growers slaughter lambs. Australia has questioned[5] the extent of this. However, even if it was widespread amongst many of the more than 70,000 growers, none of such growers appears to be part of the trivial number of growers actually selected by the USITC. The USITC Report makes no assertion that it chose this definition of "domestic industry" for analytical reasons. The USITC Report simply asserts that this was on the basis of USITC practice without even

[3] At paragraph 17 of the USA's Second Submission.
[4] For example, at paragraph 73 of the USA's First Submission.
[5] For example at paragraph 75 of Australia's Second Submission.

a requirement in the relevant US statute for safeguard investigations. There were no special circumstances for this case that led the USITC to do this. The selection of growers for which information was used in the injury determination was not on the basis of any ownership or contractual arrangements. It was simply on the level of subsidies received under the National Wool Act,[6] thus even excluding not only smaller growers but also any new entrants, and possibly consolidated farms. There is$ no suggestion in the USITC Report that there was some problem in dissociating the data on grower operations from those of packer operations.

18. All the Panel has to do is decide whether a grower that produces feeder lambs, wool, skins, lambs for breeding, and cull ewes for mutton produces product that is "like product" to the imported lamb meat subject to the measure. If such a grower does not, then it cannot be part of the "domestic industry". Consequently, the USITC's definition of "domestic industry" would be inconsistent with SG Article 4.1(c).

19. The decision on "domestic industry" is critical to the proper findings on issues of fact and law required under the Safeguards Agreement. The USITC Report's error in defining the "domestic industry" infects every step of its analysis. The USA cannot now ask the Panel to review the USITC Report on the basis of excluding growers from the "domestic industry", or excluding growers and feeders. The USITC Report did not perform separate analyses of injury and causation for each segment. Moreover, the definition of the "domestic industry" can critically affect the causation analysis. Finally, the definition of the "domestic industry" must also affect compliance with the decision that a measure is "not more restrictive than necessary" under SG Article 5.1.

20. Accordingly, the USA cannot now change the definition of the "domestic industry" for the review by the Panel. It must stand by the USITC Report. Therefore, if the Panel agrees with our position on the "domestic industry", the measure must be revoked.

21. The USA raises the issue of Australian practice on safeguards in a number of areas, including “domestic industry” and “unforeseen developments”. Australia has not introduced a new safeguard measure since 1983. Australia was subject to considerable criticism under GATT 1947 about Article XIX action and exactly what Australia did in the distant past is hardly determinant of either the rules under GATT 1947 or the rules under GATT 1994 as part of the Agreement Establishing the WTO. Australia has conducted one inquiry under the Safeguards Agreement, into imports of pig meat, and the Government decided not to apply a safeguard measure. Thus there has been no safeguard action by the Australian Government under the WTO, and so there has been no action and no practice by the Australian Government from which the USA can draw comfort for its stance in this case.

INADEQUACY OF DATA

22. Australia has proven that the data set used by the USITC is seriously flawed. The USITC Report reached its determinations on "threat of serious injury" and on causation on the basis of a data set that was insufficient to comply with the standards of the Safeguards Agreement, in particular under SG Article 4.1(b) and 4.2(a) and (b).

23. Before turning to this or any other issue that addresses the evidence in this case, we feel the need to remind the Panel again of the grossly unrepresentative nature of the evidence that formed the basis for the USITC's determination. Any analysis performed by the USITC was necessarily infected with these evidentiary deficiencies. The four segments of the "domestic industry" as improperly defined by the USITC were made up of more than 70,000 firms and cannot be adequately represented by less than 70 firms in all.

[6] At paragraph 101 of the USA's answer to Question 15 from the Panel.

24. The USITC sent out only 110 questionnaires to growers. Among those polled, only 70 bothered to respond, only 57 provided useable replies, and only 27 provided replies with financial information to September 1998. Mr. Chairman, 27 out of more than 70,000 is less than 0.04 per cent, representing less than 3 per cent of the flock. Not only is this dreadfully low coverage unacceptable; the USITC undertook no effort to ensure that the sample it had was statistically valid or representative. A similar story applies to feeders. The data collected on these firms was totally inadequate to form the basis for any determination, whether "threat of serious injury" or causation or that the measure was "not more restrictive than necessary".[7]

25. Data on packers and breakers -- the actual producers of lamb meat -- were also flawed. Only five of seventeen packers polled provided data on their packing operations. As for breakers, of the sixteen firms polled, only five provided useable data. For financial data, information was available only from 2 packers, 2 packer/breakers, and 1 breaker.[8]

26. We are not questioning the coverage and responses of exporters or importers, which was 100%, i.e. the coverage was complete. We are referring to the "domestic industry" that was allegedly being, or going to be, seriously injured by increased imports. It was in the interest not only of the petitioners, but also of all other firms in the "domestic industry", to ensure greater participation in the USITC's investigation. The very low level of participation can only be interpreted as indicating that either (a) many firms in the "domestic industry" did not agree with the petitioners, and/or (b) their responses would have been damaging to the petitioners' case. Whatever the reason, the lack of participation by the very firms that stood to gain from the investigation must be interpreted to suggest that their responses would have damaged the petitioners' case. That the USITC did not use its subpoena power or even its powers of persuasion to obtain more representative data is not the fault of Australian and New Zealand exporters of lamb meat. It was up to the USITC to obtain adequate, objective evidence to support its determinations. Its failure to do so means that it could not, and did not, comply with the requirements of SG Article 4 and the USA could not and did not comply with the requirements also of SG Article 5.1.

27. By the same token, it should be noted that the USITC chose to use its questionnaire data only when it supported its conclusions. If its questionnaire data showed inconvenient trends, the USITC referred to USDA data to support its position. The Panel should not countenance such evidentiary cherry picking.[9]

28. That said, even the paltry evidence on which the USITC relied failed to support its findings, no matter what definition of “domestic industry” is used. In addition, the time frame of the data, i.e. only to September 1998 and in some cases only to 1997 meant that the USITC had no basis for reaching a justifiable decision on the issues of fact and law before it in a case of "threat of serious injury".

29. The Panel has the responsibility to decide whether the data were adequate. If the Panel agrees with Australia, then virtually all aspects of the USITC, and subsequent US Government, findings would be irremediably flawed for that reason alone.

PROVING THAT SERIOUS INJURY WAS CLEARLY IMMINENT

30. There is an absolute obligation on the USITC to have proven that serious injury was "clearly imminent". Even apart from the inadequate data, there was nothing in the USITC Report's finding that showed that it was clear that serious injury would occur. Moreover, there was nothing to show

[7] At pages II-11-13, 24, and 29 (including footnote 89) of the USITC Report.
[8] At pages II-14, 15, and 24 of the USITC Report.
[9] At pages I-18-19 of the USITC Report.

that serious injury was imminent within any normal meaning of the word. Indeed, given the data used, in particular the questionnaire data, up to September 1998 and in some cases only 1997, with no attempt at any prospective analysis, the USITC Report could never have adequately made a finding that serious injury was "clearly imminent".

31. Whether or not the Panel agrees with our position on the USITC's definition of the "domestic industry" for lamb meat, Australia has shown that the facts of this case do not support either a determination that serious injury to the "domestic industry" was imminent or that any such serious injury -- if it occurred -- would be caused by increased imports. We shall briefly address these issues again today.

NOT ALL THE FACTORS LISTED IN SG ARTICLE 4.2(A) WERE EXAMINED

32. Australia showed in its First Submission that not all the factors listed in SG Article 4.2(a) were examined for all the industry segments, and no reason was given why this was not done. The USITC's analysis of these factors was woefully inadequate. Even where the USITC Report went through the motions of examining some of the factors listed, this did not meet any reasonable standard of compliance with SG Article 4.2(a) because of the inadequacy of the data set. As a result, the USITC failed to carry out its most obvious obligations in performing the causation analysis under SG Article 4.2.

FAILURE TO EXAMINE OTHER FACTORS PROPERLY IN THE CAUSATION ANALYSIS

33. It is clear from a plain reading of the Safeguards Agreement that in this case what has to be proved is that increased imports *by themselves* must be going to cause serious injury to the "domestic industry". There may be other causes of injury or even serious injury to the "domestic industry"; however, increased imports must be proved to be going to cause serious injury separately from the *individual and collective* effect of such other factors. The idea, therefore, that the USA was *not* required to prove this is, quite frankly, ludicrous. In effect, it would rewrite the Safeguards Agreement to allow the application of a safeguard measure where increased imports are only, and no more than, a contributing cause of the alleged imminent serious injury and not actually about to cause serious injury by themselves.

34. As to the facts of this case, the paucity of data on firms in the "domestic industry" would in any case have made it impossible for the USITC to *prove* a cause and effect relationship -- if any -- between imports and the health of the "domestic industry", no matter which industry segments were included as being the "domestic industry". The USITC Report acknowledges that there were other factors causing injury and that these “other factors” were causes of the alleged “threat of serious injury”. The factors examined by the USITC Report were: the removal of the National Wool Act subsidies; competition from other meat products; increased input costs; overfeeding of lambs; concentration in the packer segment; and the failure to develop and implement an effective marketing programme for lamb meat. However, the USITC Report only examined these cursorily and only found that individually each was a less important cause of the “threat of serious injury” than imports of lamb meat.

35. The USITC Report did not assess the collective impact of these factors on the “domestic industry” as a whole or on each of the industry segments. The one-by-one analysis of other factors renders even a "substantial cause" standard meaningless. Finally, SG Article 4.2(b) requires that the serious injury be attributed to “increased imports” not just to “imports”. The USITC Report only analyses the impact of the other factors in respect of “imports of lamb meat”, not “*increased* imports of lamb meat”. It makes no attempt to prove even against its own standards that “increased imports of lamb meat” were going to cause serious injury. Moreover, the USITC Report's analysis did not

establish that "increased imports" were going to cause serious injury imminently. The USA in its submissions to the Panel has not shown how the USITC Report proved that "increased imports" were going to be the cause of imminent serious injury.

36. Moreover, the USITC Report's failure to undertake a prospective analysis of other factors in a case of threat alone, results in its affirmative finding being no more than ***speculation*** that increased imports would cause serious injury. The finding of threat of serious injury was taken without regard to prospective events. The finding on causation was based on a small increase in projected imports of around 4.5 per cent, when domestic production was in decline. The finding lacked any prospective analysis of the state of the firms in the "domestic industry" beyond the most anecdotal of testimony. The consideration of the other factors was cursory, with no analysis of their impact on the firms in the "domestic industry". This made the analysis meaningless. If such an approach was accepted, this would make the requirements of SG Article 4.1(b) and SG Article 4.2 superfluous.

USA'S COMMENTS ON THE NEGOTIATING HISTORY OF CAUSATION IN THE SAFEGUARDS AGREEMENT

37. In its Second Submission the USA made lengthy comments on the supposed negotiating history of causation in the Safeguards Agreement. The best that can be said about the negotiating history of SG Article 4.2(b) is that there is little that can be said beyond that there were differences in view among the participants in the negotiations on what the outcome should be in the text.

38. What the Panel has to address is not the differences in national positions during the Uruguay Round negotiations, but what is in the actual text of the Safeguards Agreement.

39. As shown in Australia's Second Submission[10] the wording of SG Article 4.2(b) is clear and straightforward. The mandatory nature of the wording and the strength of the requirement obliged the USITC to have ***proved*** that increased imports by themselves were going to cause serious injury imminently to the "domestic industry".

"NOT MORE RESTRICTIVE THAN NECESSARY"

40. Even assuming *arguendo* that the USA had appropriately made the necessary findings with respect to "unforeseen developments", the domestic industry definition, imminent threat of serious injury, or causation, Australia has shown further that the remedy the USA chose was inconsistent with the Safeguards Agreement. In particular, the USA's interpretation of SG Article 5.1 in trying to reduce its remedy obligations reflects yet another example of its preference to read critical requirements out of the WTO Agreement.

41. In reality the USA is seeking to say no more than that in its view the Appellate Body erred in *Korea - Dairy Safeguard* when it found that there was an obligation to ensure that the measure was "not more restrictive than necessary".[11] Indeed, if the separate test in SG Article 5.1 is redundant, why is it there. In interpreting the Safeguards Agreement, it is not permitted to assume that the drafters made a mistake and gratuitously inserted the word "necessary", which plays such a fundamental role in the WTO Agreement. When interpreting the text it is not permissible to assume that such a key word was inserted simply for appearance sake without intending it to have any meaning.

42. There is an obligation that this be ensured before the measure is applied. However, Australia has demonstrated that the USA did not ensure that its measure was "not more restrictive than necessary". Indeed, no attempt to ensure that the measure was "not more restrictive than necessary"

[10] See paragraph 160 of Australia's Second Submission.
[11] At paragraph 103 of the Appellate Body's report on *Korea - Dairy Safeguard*.

was ever made by the USA before applying the measure. Not only was this a violation of SG Article 5.1, but also SG Articles 3.1 and 12.2 given that the extent of the measure was a pertinent issue of fact and law. The USA did not publish its findings and reasoned conclusions on the matter, nor did it properly notify the Committee on Safeguards on this pertinent information related to the action. We are left only with the USA's *ex post facto* explanation about modelling that the USA claimed to have subsequently undertaken to show that the measure was sufficient rather than necessary - an explanation offered without a scintilla of documentation to back it up.

43. Consistent with its approach to other aspects of this case, such as the issue of demonstrating the circumstance of "unforeseen developments" under GATT 1994 Article XIX, the USA seeks to write its obligations under SG Article 5.1 out of the Safeguards Agreement.

44. In the end, the only documentation and assessment of remedy on the record is the recommendation provided in the USITC Report, which at least was the product of a public examination of the "domestic industry", albeit itself flawed. The USA rejected the recommendation, however, electing to impose a more severe measure. In the first year, a 20 per cent out-of-quota tariff rate recommended by the USITC became a 40% out-of-quota tariff rate and an in-quota tariff of about 0.2 per cent became 9 per cent. Similarly, in subsequent years, the out-of-quota and in-quota tariffs under the measure remain much higher and more restrictive than those recommended by the USITC.

45. The shorter duration of the measure versus the USITC recommendation is irrelevant to the question of whether the measure is more restrictive. The necessity in respect of the duration of a measure, up to eight years, falls under the provisions of SG Article 7.1 and 7.2. In applying this more restrictive measure, the USA has yet to rebut the recommendation of the USITC as to what would be a sufficient response to the increased imports that it alleged were going to cause "serious injury" imminently.

46. To close on this issue, we can only reiterate that Australia has shown that even the USITC recommendation would have fallen short of meeting the obligations of SG Article 5.1. As Australia has pointed out, the USITC recommended limiting lamb meat imports to 1998 levels even though the industry was not experiencing serious injury from imports at those levels.

BALANCE OF CONCESSIONS AND OTHER OBLIGATIONS

47. Article XIX is about maintaining the balance of concessions and other obligations in the event that a safeguard measure is applied. The Safeguards Agreement did not change this, but only limited the right to unilaterally suspend equivalent concessions and other obligations. The removal of that right for the first three years does not remove the requirement on the Member applying a measure to maintain a substantially equivalent level of concessions and other obligations. It only modifies the negotiating leverage, by requiring an affected Member to have recourse to a panel if it considers that its rights have been abridged.

48. The USA has not rebutted Australia's argument that SG Article 8.1 applies, beyond pointing out that Members imposing measures would not want to maintain a substantially equivalent level of concessions and other obligations and that the obligations of SG Article 8.1 would act as a disincentive to pursuing measures consistent with the WTO Agreement. That does not constitute an argument.

NON-DISCRIMINATION

49. At paragraph 124 of its Second Submission, the USA refers to Article XXIV:5(b) of GATT 1994 and mischaracterizes both Article XXIV:5(b) and its relationship to the Safeguards Agreement. Article XXIV:5(b) talks about "duties and other regulations of commerce" not being

higher or more restrictive under a FTA than "prior to the formation of the FTA", not "in the absence of the FTA" as stated by the USA. The USA provides no basis for saying that "it is the relevant *provisions* of Article XXIV, rather than any provision of the Safeguards Agreement, that govern issues related to the application by participants in free-trade areas of safeguard measures."[12]. Footnote 1 in the Safeguards Agreement refers only to Article XXIV:8 and to no other provision of Article XXIV. If the intention was to have paragraph 5 or any provision of Article XXIV other than paragraph 8 apply, then the text would say so. Given the explicit reference to paragraph 8 and 8 alone, it is not permissible to widen the ambit of Footnote 1 to include other provisions.

50. The USA's argument in paragraph 125 of its Second Submission, is that: "Article XXIV:5(b) would prevent a Member from applying a safeguard measure exclusively against third countries in a situation in which the serious injury or threat of serious injury the domestic industry was experiencing was attributable to increased imports from its free-trade partners." The USA does not explain how this is based on Article XXIV:5(b). Under Article XXIV:5(b) the restrictiveness of, for example, a tariff on imports from third country Members is not dependent on whether the tariff is applied to a FTA partner. Thus the USA has provided no foundation that Article XXIV:5(b) imposes any discipline on it actions. In any case this argument is irrelevant. Even if it did impose a discipline, the USA has not explained why it would override the obligation on non-discrimination under SG Article 2.2.

CONCLUSION

51. In the course of this Panel's proceedings, Australia has proved that the USA has breached a range of its obligations under the Safeguards Agreement and GATT 1994 Article XIX in applying the measure. The USA has failed to rebut any of the claims made about the measure and the failure of the USA to comply with its obligations.

52. Therefore, Australia submits that the Panel should find that the USA has not complied with Articles 2.1, 2.2, 3.1, 4.1(b), 4.1(c), 4.2(a), 4.2(b), 5.1, 8.1, 11.1(a), 12.2 and 12.3 of the WTO Safeguards Agreement as well as Articles II and XIX of GATT 1994. Australia requests that the Panel recommend that the USA bring itself into conformity with the Safeguards Agreement and GATT 1994 by revoking the measure forthwith.

[12] At paragraph 124 of the USA's Second Submission. *[Emphasis added.]*

ANNEX 2-1

FIRST SUBMISSION OF NEW ZEALAND

(19 April 2000)

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NZ2. United States Notification Under Article 12.1(b) of the Agreement on Safeguards on Finding a Serious Injury or Threat Thereof Caused by Imports, 15 April 1999 (G/SG/N/8/USA/3/Rev.1).

NZ3. United States Notification Pursuant to Article 12.1(c) and Article 9, Footnote 2, of the Agreement on Safeguards on Taking a Decision to Apply a Safeguard Measure, 12 July 1999 (G/SG/N/10/USA/3).

NZ4. Request for Consultations by New Zealand Under the DSU, 16 July 1999 (WT/DS177/1).

NZ5. Request for the Establishment of a Panel by New Zealand, 14 October 1999 (WT/DS177/4).

NZ6. Meat New Zealand Pre-Hearing Submission, Exhibit 7, “Number of US Lamb Growers and Size of Operations 1994-1997”.

NZ7. Meat and Livestock Australia Pre-Hearing Submission, Vol 1, Exhibit 15, “All US Sheep and Lambs - January 1 Inventory”.

NZ8. Meat and Livestock Australia’s Pre-Hearing Submission, Vol 1, Exhibit 6 “Government Wool Subsidy Payments, Value of Wool Production and Total US Income from Wool".

NZ9. Table of Lamb Import Quantities received from the United States in response to questions during consultations under the DSU on 26 August 1999.

NZ10. Meat New Zealand Pre-Hearing Submission, Exhibit 1, “USITC, Lamb Meat: *Competitive Conditions Affecting the US and Foreign Lamb Industries*, Inv. No. 332-357, August 1995”, pp 2-46 and 2-47, Tables 2-12 and 2-13.

I. EXECUTIVE SUMMARY

1.1 This dispute is about an attempt by the United States to protect its domestic live lamb and lamb meat industries from the consequences of a long-term decline caused by factors within the United States domestic market, and to place the burden of that protection on imports of lamb meat. Such action is contrary to the United States' obligations under GATT 1994 and under the WTO Agreement on Safeguards.

1.2 On 7 July 1999 the United States imposed a three-year safeguard measure against lamb meat imports in the form of a tariff rate quota. Under this measure, imports of lamb meat up to the quota level, which is set at 1998 import levels in the first year, are subject to a tariff substantially in excess of that bound by the United States in respect of imports of lamb meat in its schedule of commitments under the WTO. Additionally, imports of lamb meat above the quota level are subject to tariffs of 40 per cent, 32 per cent and 24 per cent in the successive years of the measure.

1.3 The United States safeguard measure was imposed in response to a long-term and well-known decline in the live lamb and lamb meat industries in the United States, and not as a response to circumstances resulting from "unforeseen developments." Hence, the measure does not comply with Article XIX of GATT 1994.

1.4 In its investigation to determine whether serious injury or threat of serious injury had been caused to a domestic industry, the United States included in that domestic industry, an industry that does not produce a "like or directly competitive" product. Hence, the United States determination does not conform with Article 2.1 of the Safeguards Agreement.

1.5 In determining that an industry had been threatened with serious injury, the United States failed to demonstrate that serious injury was "clearly imminent" within the meaning of Article 4.1(b) of the Safeguards Agreement. In this respect as well, the United States has failed to comply with its obligations under Article 2.1 of the Safeguards Agreement.

1.6 In determining that the threat of serious injury, that it had wrongfully found, was "caused" by increased imports, the United States failed to demonstrate the existence of the causal link between increased imports and the threat of serious injury as required by Article 4.2(b) of the Safeguards Agreement. Again, the United States failed to comply with its obligations under Article 2.1 of the Safeguards Agreement.

1.7 In addition, the safeguard measure adopted by the United States has not been applied "only to the extent necessary to remedy serious injury and to facilitate adjustment," nor has the United States published findings or reasoned conclusions on how its measure is capable of doing so as required by Article 3.1 of the Safeguards Agreement. Accordingly, the United States safeguard measure is inconsistent with the United States obligations under Article 5.1 of the Safeguards Agreement.

1.8 Furthermore, by applying its safeguard measure to the imports of some countries and not to the imports of others, the United States has failed to comply with its obligation under Article 2.2 of the Safeguards Agreement to impose any safeguard measure on all imports irrespective of source. Such action places the United States equally in violation of its basic "most favoured nation" obligation in Article I of GATT 1994.

1.9 Finally, by imposing tariffs on imports of lamb meat that are inconsistent with its bound obligations under the WTO and not otherwise justified under the WTO agreements, the United States is in violation of its obligations under Article II of GATT 1994.

II. INTRODUCTION

2.1 On 7 July 1999, the President of the United States imposed a definitive safeguard measure on imports of lamb meat from New Zealand. This measure, in the form of a tariff-rate quota over a three-year period, followed a determination by the United States International Trade Commission (ITC) that imports of lamb meat were a substantial cause of the threat of serious injury to the domestic industry in the United States producing a product like or directly competitive with lamb meat.

2.2 The imposition of this safeguard measure is not in conformity with the provisions of the WTO Agreement on Safeguards or of GATT 1994. Hence, as New Zealand will show in this Submission, the United States is in violation of its obligations under the Safeguards Agreement and of its obligations under GATT 1994.

2.3 Contrary to its obligations under the Safeguards Agreement, the United States has sought to ascribe to imports effects on a domestic industry that are caused by internal domestic factors. The production of live lambs has been in a long-term decline in the United States for a period going well beyond the period of review selected by the USITC in making its injury determination. Rather than causing the decline in domestic production, increases in imports of lamb meat have been a response to that decline. Imports have filled a domestic demand for lamb meat that could not be met with declining domestic production. Imports have also stimulated increased domestic demand including in new markets.

2.4 A long-term, systemically-caused decline in the domestic production of live lambs has been characterized by the United States as an imminent threat of serious injury to the producers of live lambs and the producers of lamb meat. The United States has then sought to apply a safeguard measure on the basis that a substantial cause of this "threat" is imports of lamb meat. In doing so, the United States has ignored its obligations under the Safeguards Agreement and under GATT 1994.

2.5 The Safeguards Agreement provides Members with the opportunity to derogate from their obligations under the WTO Agreements in carefully defined circumstances. It permits such derogation where a serious injury to a domestic industry or a threat of such serious injury has been caused by increased imports. To allow Members to place on imports the burden of adjustment that a domestic industry must make in response to domestic circumstances, as the United States seeks to do in this case, would undermine the Safeguards Agreement and defeat its objective of circumscribing the derogations by Members from their obligations under the WTO Agreements.

III. CHRONOLOGY OF RELEVANT EVENTS

3.1 On 1 January 1995, on the entry into force of the Agreement establishing the WTO, the United States bound its tariff for imports of lamb meat at 1.1c per kg.1 to decline to 0.7c per kg. by 2001. On 1 January 1999, the rate was 0.8c per kg.

3.2 On 7 October 1998, a petition was filed with the USITC, under section 202 of the Trade Act of 1974,[1] on behalf of the American Sheep Industry Association, Inc (ASI), National Lamb Feeders Association, Harper Livestock Co, Winters Ranch Partnership, Godby Sheep Co, Talbott Sheep Co, Iowa Lamb Corp, Ranchers' Lamb of Texas Inc, and Chicago Lamb and Veal Co.

3.3 On 19 October 1998, the USITC issued a notice of initiation of an investigation to determine whether lamb meat was being imported into the United States "in such increased quantities as to be a substantial cause of serious injury, or threat thereof, to the domestic industry producing an article like or directly competitive with the imported article." The period of investigation chosen by the USITC

[1] 19 USC sec 2252.

was 1993 to September 1998. The initiation of this investigation was notified to the WTO Committee on Safeguards on 30 October 1998.[2]

3.4 On 9 February 1999, the USITC determined that "lamb meat is being imported into the United States in such increased quantities as to be a substantial cause of the threat of serious injury to the domestic industry producing an article like or directly competitive with the imported article." The report of the USITC setting out its determination and its recommendations on remedy was published in April 1999,[3] and forwarded, on 5 April 1999, to the President of the United States for final decision.

3.5 On 13 April 1999, the United States notified the USITC determination to the WTO Committee on Safeguards.[4] Consultations between New Zealand and the United States, pursuant to Article 12.3 of the Agreement on Safeguards, were held on 28 April 1999.

3.6 On 7 July 1999, the United States imposed a definitive safeguard measure on imports of lamb meat, effective 22 July 1999.[5] This measure, which differed from the measure recommended by the USITC, was notified by the United States to the WTO Committee on Safeguards on 9 July 1999.[6] Consultations between New Zealand and the United States, pursuant to Article 12.3 of the Agreement on Safeguards, continued on 14 July 1999.

3.7 On 16 July 1999, New Zealand requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and pursuant to Article XXII:1 of the GATT and Article 14 of the Agreement on Safeguards.[7] Such consultations were held in Geneva on 26 August 1999.

3.8 On 14 October 1999, New Zealand requested the establishment of a panel.[8] On the same date, Australia also requested the establishment of a panel in respect of the same United States measure.[9] A single panel to hear the complaints of both New Zealand and Australia was established on 19 November 1999. New Zealand reserved its third party rights in respect of the Australian complaint. Australia, Canada, Iceland, Japan and the European Communities reserved their third party rights in respect of New Zealand's complaint.

3.9 The panel was constituted on 21 March 2000.[10]

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[2] G/SG/N/6/USA/5.

[3] USITC Report "Lamb Meat", Investigation No. TA-201-68, Publication 3176, April 1999 (attached as Annex 1). Referred to in this submission as "USITC Report".

[4] G/SG/N/8/USA/3/Rev.1 (attached as Annex 2). The USITC determination on injury had previously been notified to the WTO Committee on Safeguards in February 1999 (G/SG/N/8/USA/3 and G/SG/N/8/USA/3/Corr.1).

[5] The measure was amended on 30 July 1999, but not in any respect material to the legal arguments set out in this submission: "Proclamation 7214 of 30 July 1999 - To provide for the Efiicient and Fair Administration of Action Taken With regard to Imports of Lamb Meat and for Other Purposes" by the President of the United States of America published in the Federal Register Vol 64, No 149, pp 42265-42267 on 4 August 1999.

[6] G/SG/N/10/USA/3 and G/SG/N/11/USA/3 (attached as Annex 3). This notification was later supplemented on 13 August 1999 by G/SG/N/10/USA/3/Suppl.1 and G/SG/N/11/USA/3/Suppl.1.

[7] Circulated to WTO Members on 22 July 1999 as WT/DS177/1 (attached as Annex 4).

[8] Circulated to WTO Members on 15 October 1999 as WT/DS177/4 (attached as Annex 5).

[9] Circulated to WTO Members on 15 October 1999 as WT/DS178/5.

[10] Notified to WTO Members on 23 March 2000 as WT/DS177/5 and WT/DS178/6.

IV. FACTUAL BACKGROUND

4.1 In this section, New Zealand will describe the two industries which the United States claims are threatened with serious injury, that is the live lamb and the lamb meat industries. New Zealand will also provide relevant information on the lamb meat market in the United States, consumption of lamb meat, lamb meat imports, and product marketing. The information in this section is derived either from information in the USITC Report or uncontested information placed before the USITC.

A. THE LIVE LAMB AND LAMB MEAT INDUSTRIES IN THE UNITED STATES

1. The Participants in the Live Lamb and Lamb Meat Industries

4.2 The "domestic industry" in the United States, which the USITC found threatened with serious injury by increased imports, is composed of two distinct categories: those who produce live lambs (growers and feeders) and those who slaughter lambs and prepare carcasses for sale as lamb meat (packers and breakers).

4.3 The live lamb industry is involved in the breeding, growing, and feeding of lambs. Growers have sheep-breeding flocks which produce lambs. They produce two products: live lambs and shorn wool. The annual live lamb crop is retained for breeding purposes and wool production, sold to feeders, or sold directly to packing operations. Feeders fatten lambs on grain in feedlots until they reach the desired weight.[11] The feeders then sell the live lambs which are slaughtered for lamb meat. Feeders also receive income from the lamb's wool pelt.

4.4 The live lamb industry consists of a large number of growers, numbering some 74,710 establishments in 1997.[12] Many of these operations consist of only a few animals that are raised by part-time or hobby farmers.[13] While there was a decline in the number of growing establishments from 1993 to 1997, 94 per cent of the exits were of growers with fewer than 100 sheep.[14] The live lamb industry also consists of a small number of feeders and a number of feeders who are also growers.[15]

4.5 The lamb meat industry is comprised of packers, who slaughter lambs, and breakers, who process carcasses for wholesale or retail sale.[16] The United States packing and breaking industry is highly concentrated with relatively few companies accounting for most of the production. In the lamb meat packer industry 5 firms accounted for 76 per cent of the total lamb slaughter in 1997.[17] The breaker industry is similarly concentrated with less than 10 firms engaged in processing lamb.[18] An estimated 75 per cent of lamb carcasses are processed by breakers, with the remaining 25 per cent

[11] An estimated 70 to 80 per cent of live lambs slaughtered are fed in feed lots: USITC Report: II-24.

[12] USITC Report: II-11.

[13] USITC Report: II-12.

[14] Meat New Zealand Pre-Hearing Submission, Exhibit 7, "Number of US Lamb Growers and Size of Operations 1994-1997" (attached as Annex 6).

[15] It is difficult to quantify this figure. In 1995 officials of the National Lamb Feeder Association reported that there were probably 100 large-volume lamb feedlots in the US (Meat New Zealand Pre-Hearing Submission, Exhibit 1, "USITC, Lamb Meat: *Competitive Conditions Affecting the US and Foreign Lamb Industries*, Inv. No. 332-357, August 1995", pp 2-4). Nine feeders were identified in the petition. Eleven feeders provided responses to the USITC's questionnaires. Some growers may be feeders and grain feed their own lambs.

[16] The main output from packers is lamb meat in carcass form, although some operations, including two of the five firms providing responses to the USITC's questionnaires, both slaughter and divide carcasses.

[17] USITC Report, II-14.

[18] USITC Report, II-15.

processed by packers at the slaughter plants.[19] As with packers, many of the breakers devote only a portion of their overall operations to the processing of lamb.[20]

2. The State of the Live Lamb and Lamb Meat Industries

(a) The Sources of Information

4.6 The USITC used responses to questionnaires to assist in determining the production levels and financial condition of the live lamb growers and feeders and the lamb meat packers and breakers.[21] However, in most cases the questionnaire responses failed to provide a valid representative sample. In other cases the statistical significance of the sample cannot be determined from the USITC Report.

4.7 With regard to the live lamb industry, usable data on domestic production and shipments from 1993 to 1997 was received from 57 growers and 18 feeder operations in response to questionnaires, including several growers which also maintained feeder operations.[22] However, only 49 growers, three grower/feeders, and nine feeders provided data on the financial condition of the live lamb industry.[23] These reporting growers represented merely 5 per cent of the US lamb crop in 1997. Furthermore, information on the size of the operations of these growers was not provided in the USITC report. The feeders reporting financial data represented approximately one-third of the slaughtered lambs fed in feedlots in 1997.[24]

4.8 In the case of the lamb meat industry, data on domestic shipments and inventories was provided in response to questionnaires from five packers. The USITC estimated that these five packers responding accounted for 76 per cent of the sheep and lambs slaughtered in the US in 1997.[25] However, information on the *financial condition* of the packers was provided by only four packers, two of whom were also packer/breakers.[26] It is not made clear in the USITC report which of these firms were included in the five packing firms estimated to account for 76 per cent of the sheep and lambs slaughtered in the United States in 1997.

4.9 There is a similar pattern with regard to responses from breakers. Responses to the USITC questionnaires were received from five firms involved in breaking lamb, four of whom provided usable data on their operations,[27] yet only three firms, (including two who were also packers) provided data on their financial condition.[28] Only one responding firm undertook solely breaking operations. While it is estimated that breakers process 75 per cent of lamb carcasses (with the remaining 25 per cent being processed by packers at slaughter plants),[29] no information is provided by the USITC on the proportion of that total breaker output represented by the one breaker response.

4.10 As a result, the USITC made findings on the financial condition of lamb meat packers and breakers on the basis of financial data provided by five firms - two were packers, two were

[19] USITC Report, II-15, n 63.
[20] USITC Report, II-15.
[21] USDA national data on the numbers of lamb-growing establishments and annual domestic lamb slaughter was also relied on by the USITC: USITC Report, I-16.
[22] USITC Report, II-11 and II-13. Of the 18 feeder responses, seven claimed to be feeders, but in fact were growers who fed their own live lambs and were reclassified as growers: II-29, n 89.
[23] USITC Report, II-24.
[24] USITC Report, II-24.
[25] USITC Report, II-14.
[26] USITC Report, II-14.
[27] USITC Report, II-15.
[28] USITC Report, II-24.
[29] USITC Report, II-15, n 63.

packer/breakers, and only one was a breaker.[30] It is impossible to determine from the information in the USITC report whether these firms represent a valid sample of packers, and what proportion of the total lamb meat processed by firms solely undertaking breaking operations was represented by the only responding breaker.

4.11 Accordingly, the information provided by the USITC on the financial condition of the live lamb and lamb meat industries was not shown to be a valid representative sample. In addition, the statistical significance of the sample cannot be determined in some cases because the United States has not disclosed the information on which the USITC based its determination. As New Zealand will point out later in the submission, the failure of the United States to disclose this information disallows the United States from invoking it in support of its measure.

(b) The Live Lamb Industry

4.12 Both the USITC and the participants in the live lamb and lamb meat industries recognise that the lamb industry in the United States has been in a long state of decline.[31] For some 50 years there has been a long-term downward trend in both the annual lamb crop and the sheep-breeding inventory. The number of breeding ewes has fallen from 22.4 million head in 1960 to 4.5 million head in 1998.[32] Live lamb production (or lamb crop) in 1960 was 21 million.[33] By 1993, the start of the USITC's period of investigation, live lamb production had fallen to 6.37 million. This downward trend continued and by 1998 live lamb production was at 4.87 million.[34]

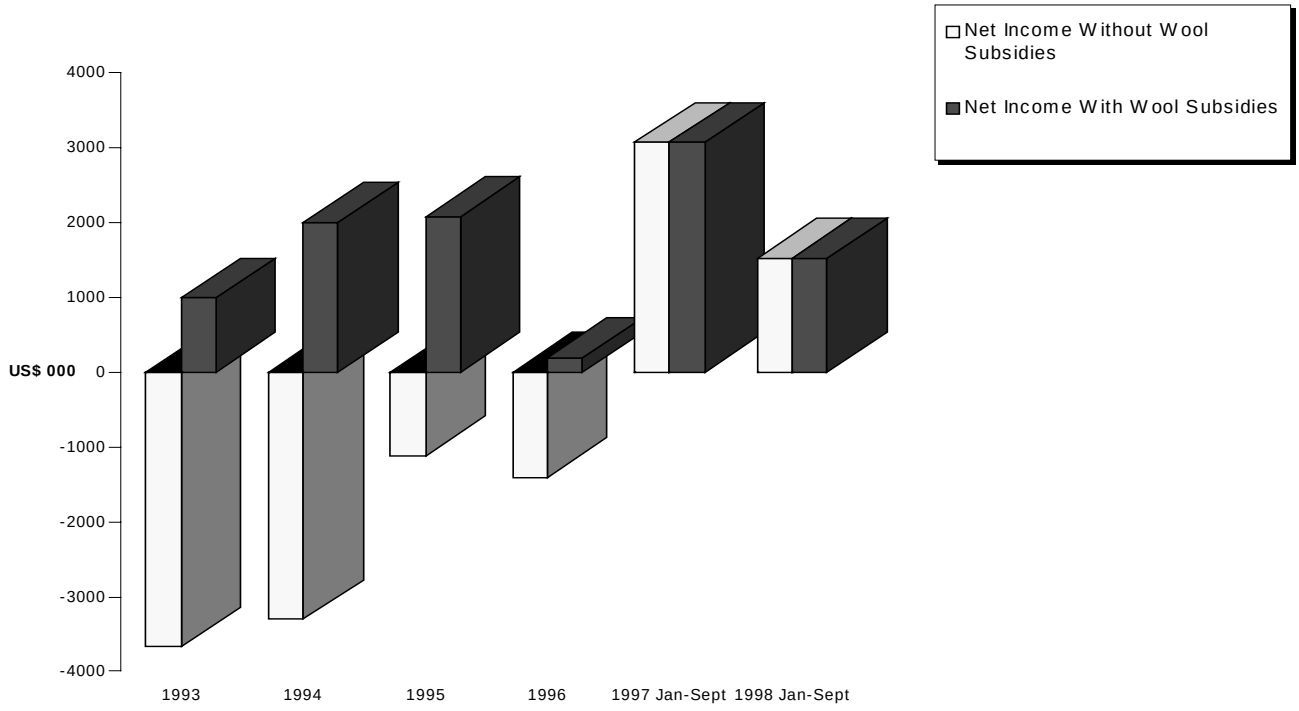
4.13 Aside from live lamb production, the profitability of the live lamb industry is also affected by the other main output - wool.[35] The National Wool Act was introduced in 1954 to provide support payments for shorn wool, mohair, and pulled wool.[36] Government support payments for wool increased substantially from the late 1980's as market prices for wool fell.[37] The support price continued to increase until 1993, when payments under the Wool Act totalled $125 million, with an average payment per wool producer of US$2,320.[38] During the period of investigation revenues to the live lamb industry were adversely affected by the decision of the United States Government in 1993 progressively to eliminate subsidies under the Wool Act to growers of lambs. Subsidies were cut to 75 per cent of previous levels in 1994, to 50 per cent in 1995 and eliminated completely in 1996.

4.14 Government wool subsides in 1994 accounted for 19.3 per cent of the total net sales revenue that growers responding to the USITC questionnaire received from live lambs, wool, and cull ewes.[39] The impact of the wool subsidy can be illustrated by making adjustment to incomes to account for the

[30] USITC Report, II-29 to II-34.
[31] USITC Report, I-17.
[32] USITC Report, II-53; Meat and Livestock Australia Pre-Hearing Submission, Vol 1, Exhibit 15, "US Live Lamb Statistics 1960 to 1998" (attached as Annex 7).
[33] Meat and Livestock Australia Pre-Hearing Submission, Vol 1, Exhibit 15, "US Live Lamb Statistics 1960 to 1998" (attached as Annex 7).
[34] USITC Report, II-53, Table 33. The figure for 1998 of 4.87 million is a January-October figure. The year-end figure is likely to be somewhat higher.
[35] Responses to questionnaires from growers and feeders also indicate that a share of their income is derived from operations other than sheep and lambs: USITC Report, II-51.
[36] USITC Report, II-77.
[37] Meat and Livestock Australia Pre-Hearing Submission, Vol 1, Exhibit 6, "Government Wool Subsidy Payments, Value of Wool Production and Total US Income from Wool" (attached as Annex 8).
[38] USITC Report, II-78, Table 45.
[39] USITC Report, II-25 to II-28, Table 12.

removal of wool subsidies. When such an adjustment is made, net incomes of responding lamb growers actually increased over the period of investigation (Figure 1).[40]

Figure 1 : United States lamb grower income survey



Source: USITC Report, II-25, Table 12

Curiously, this is the one occasion on which the USITC admits that it may not be faced with a representative sample.[41] However, it was the only financial information on lamb growers in front of the USITC.

4.15 Information obtained from grower and feeder responses to the USITC questionnaires indicates that supply and profitability in the live lamb industry is also affected by other factors. These include input costs, including wages and depreciation, predator losses, and more restricted access to public land for grazing.[42]

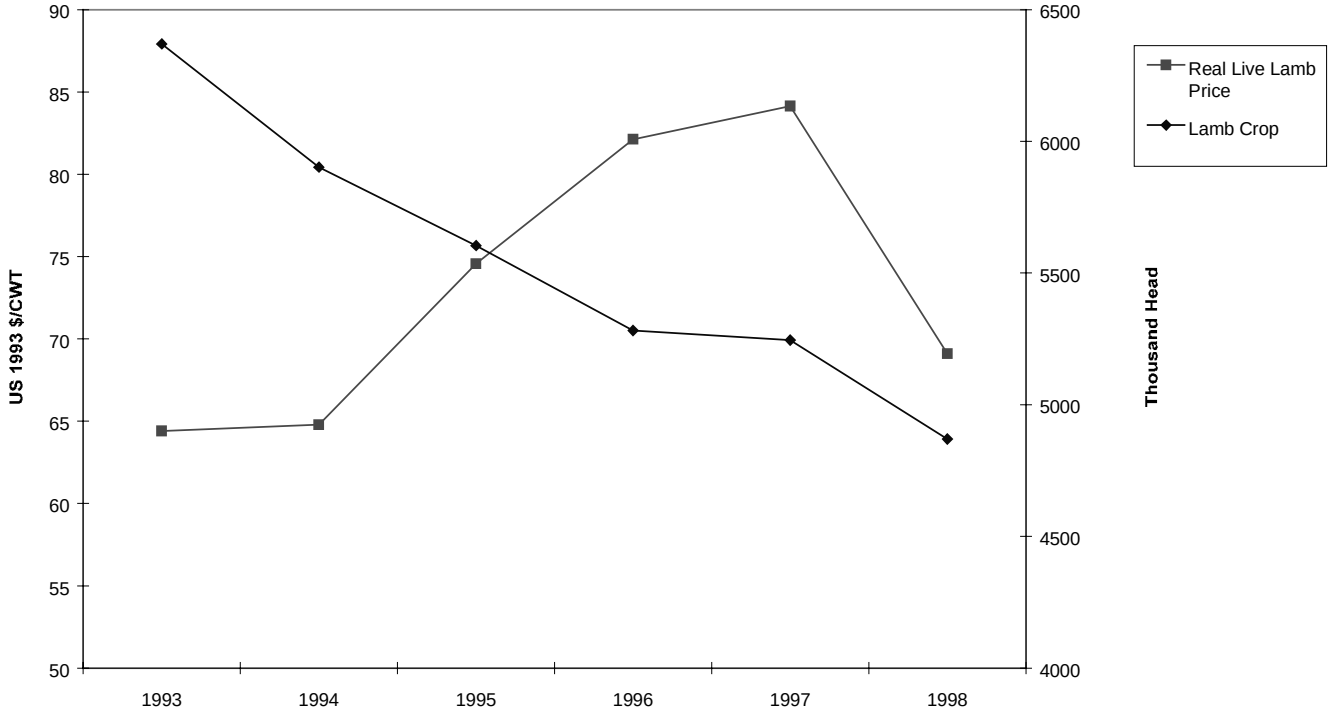
4.16 The decline in the number of breeding ewes and the lamb crop from 1993 to 1998 occurred at the same time as an upward trend in the price of live lambs for slaughter (Figure 2).

[40] The 1997 and 1998 columns - by showing no differential between net income without and with wool subsidies - reflect that in 1997 and 1998 no wool subsidies were paid.

[41] USITC Report, II-51, n 150.

[42] USITC Report, II-25 to II-28, Table 12, and II-30 to II-32, Table 15, and II-52 to II-54.

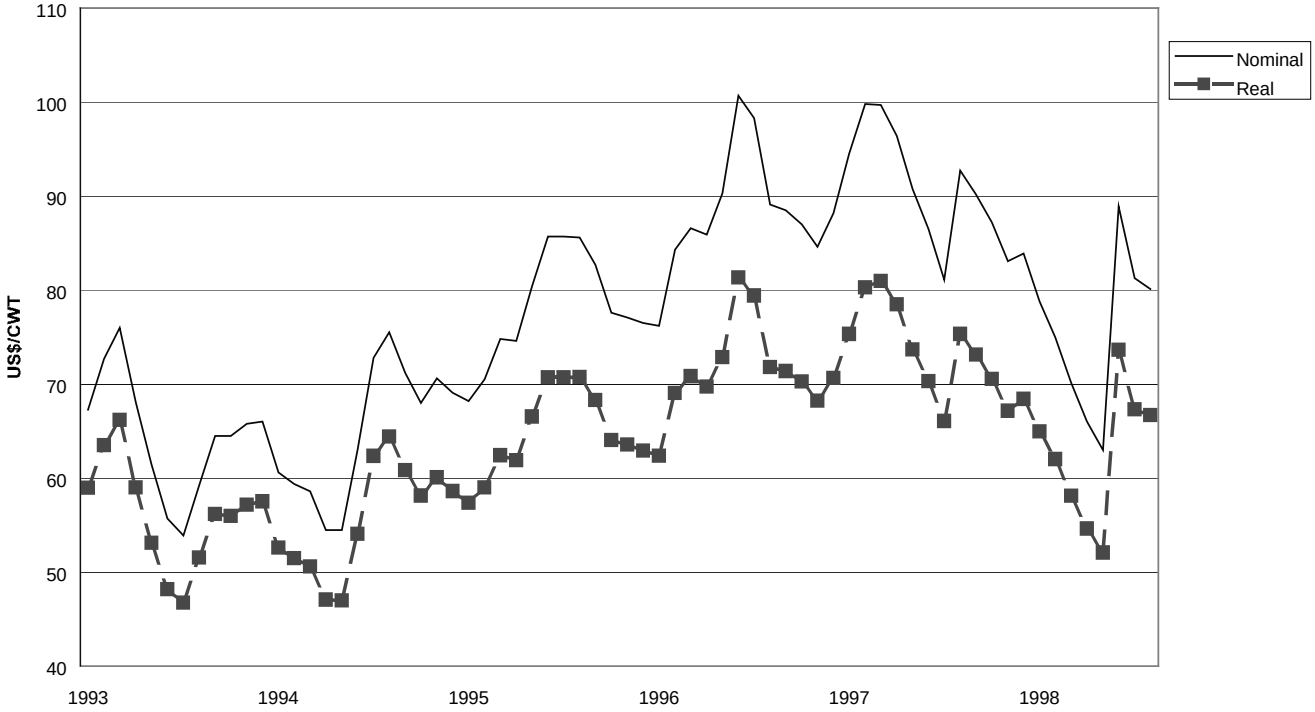
Figure 2 : United States live lamb market



Source: USDA/NASS Annual Price Summary; Bureau of Labour Statistics (PPI Index); & USITC Report, II-53,Table 33

The monthly price of live lambs for slaughter fluctuated considerably over the period of investigation but trended upwards over the period as a whole in both nominal and real terms (Figure 3).

Figure 3: Real and nominal live lamb prices at time of slaughter



Source: USITC Report, II-55, Figure 3

Prices at the end of the period though lower than in 1996 and 1997 were significantly higher than through much of 1993 and 1994 in both nominal and real terms. Furthermore, although prices declined from mid-1997, they improved over the last three months of the period of investigation.

4.17 Decisions taken by the live lamb industry on retention of live lambs for breeding or on the culling of ewes are made on the basis of expected future prices.[43] Accordingly, based on the returns from live lambs alone, producers would have had no reason to reduce their breeding ewes. The decline in lamb flocks must, therefore, have been in response to other factors affecting supply. The loss of revenue resulting from the removal of the Wool Act subsidies is the most likely factor leading to the continued decline in the US lamb crop.

(c) The Lamb Meat Industry

4.18 The main source of supply for lamb packers is the domestic supply of live lambs. As the domestic supply of live lambs contracted over the period of investigation, the throughput of packers, and correspondingly of breakers, has fallen. The decline in lamb meat production is a direct result of the decline in the production of live lambs. Lamb meat production declined from 327 million pounds in 1993 to 251 million pounds in 1997 -- a decline of some 76 million pounds.[44] This constituted an average annual decline of 6.3 per cent between 1993 and 1997. Production is estimated to have declined by 3.4 per cent between January-September 1997 and January-September 1998.[45]

[43] USITC Report, II-51.
[44] USITC Report, II-21, Table 7.
[45] USITC Report, II-21, Table 7.

4.19 The wholesale price of lamb carcasses tended to fluctuate between January 1993 and September 1998 with clear cyclical trends.[46] Wholesale prices exhibited a decline from mid-1997 to mid-1998, but thereafter showed a sharp improvement. However, over the period 1993 to September 1998 as a whole, real wholesale prices of domestic lamb carcasses increased by 12 per cent.[47]

4.20 Information was provided by the USITC for only part of the period on packers' production, capacity, and capacity utilisation. Information on inventories was withheld by the USITC as confidential.[48] No information on any of these factors was provided in relation to breakers. The relevance of this information cannot, therefore, be assessed.

4.21 Available information on the input costs of packers and breakers indicate that labour costs increased over the period of investigation and processing costs in general were relatively flat to slightly increasing from 1993 to 1997.[49] Other data relating to the financial condition of packers and breakers over the period 1993 to interim 1998 and relied upon by the USITC was said by the USITC to be confidential. Once again, the relevance of this information cannot, therefore, be assessed.

4.22 From the little information available, it seems apparent that there has been a decline in the lamb meat industry which has paralleled the long-term decline in the production of live lambs. However, the financial condition of the lamb meat industry cannot be assessed on the basis of the information provided by the United States.

B. THE UNITED STATES LAMB MEAT MARKET

1. Lamb Meat Consumption in the United States

4.23 Lamb meat consumption in the United States has fallen steadily since World War II.[50] In 1950 consumption per capita was 4 pounds. By the mid-1970's it had fallen to just over half that level.[51] It has further declined in recent years to around 1 pound per capita.[52] From 1993 to 1997, total consumption decreased from 365 million pounds to 307 million pounds, although consumption appeared to increase in 1998.[53]

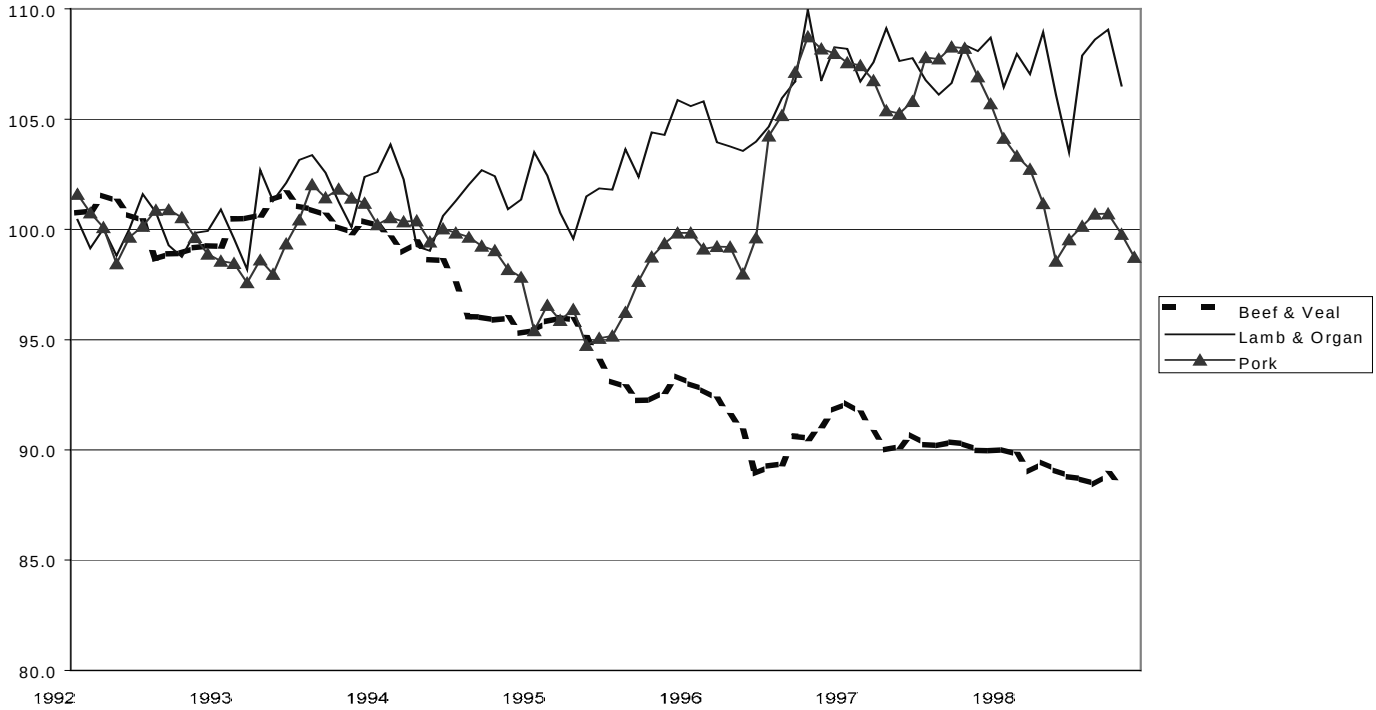
4.24 A shift in consumer preferences away from red meat and loss of price competitiveness with other meats have been important factors in the decline in lamb meat consumption. In general, United States consumer preferences since the mid-1970's have shifted away from red meat consumption, towards poultry and other protein sources. Even in comparison with other red meat sources, however, lamb meat has been relatively uncompetitive.

4.25 Lamb meat has consistently been priced higher than competing meats. Furthermore, there has been an increasing loss of price competitiveness (Figure 4).[54] For example, between 1992 and 1998 the real consumer price for beef decreased by 12.3 per cent and the price for pork decreased by 1.8 per cent. By contrast, the real consumer price for lamb meat rose by 6.1 per cent.[55]

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[46] USITC Report, II-58, Figure 5.
[47] USITC Report, II-57.
[48] USITC Report, II-21 and II-22.
[49] USITC Report, II-56.
[50] USITC Report, I-22.
[51] USITC Report, I-30 and II-66.
[52] USITC Report, II-69.
[53] Based on interim data: USITC Report, II-17, Table 5.
[54] USITC Report, I-31. Figure 4 is adapted from II-70, Figure 17.
[55] Poultry also rose, but by only 2.5 per cent: USITC Report, II-69.

Figure 4: Real consumer price indexes of beef,pork,lamb and organ meats(1992=100)



Source: USITC Report, II-70, Figure 17

4.26 Figure 4 shows that the price of the main red meat substitutes for lamb meat has decreased while lamb meat prices have increased. This can be expected to have contributed to the decline in lamb meat consumption in the United States.

2. Lamb Meat Imports into the United States

4.27 During the period of investigation imports of lamb meat rose from 41 million pounds (carcass weight equivalent) in 1993[56] to 77.8 million pounds for the full 1998 calendar year.[57] During 1993 to 1997 the quantity of lamb meat imports increased by 47 per cent while the value of the imports increased by 131 per cent. The quantity and value of imports from January-September 1997 to January-September 1998 increased by 19 and 8 per cent respectively.[58] Imports for the period January to September 1998 totalled 55 million pounds, and $114 million.[59]

4.28 The average unit CIF import price of lamb meat increased from US$1.45 per pound in 1993 to US$2.06 in 1998 after having peaked at US$2.28 in 1997.[60] The rise in imports of the period since 1993 has in this way been associated with an increase in the average import price. The average

[56] USITC Report, II-19, Table 6.
[57] Table of Lamb Import Quantities received from the United States in response to questions during consultations under the DSU on 26 August 1999 (attached as Annex 9).
[58] USITC Report, II-18.
[59] USITC Report, II-19, Table 6.
[60] USITC Report, II-19, Table 6.

import price in 1993 was higher than that prevailing during the period 1990 to 1992.[61] In the January-September 1998 period, the average import price was significantly higher than in 1993 and 1994.[62]

4.29 It can be concluded, therefore, that while imports of lamb meat increased over the period of investigation, so too did their average unit price.

3. Lamb Meat Product and Marketing

4.30 Domestic United States lamb meat carcasses and cuts are usually large compared to imported lamb meat. The average carcass weight for lambs slaughtered under Federal Inspection in the United States in 1997 was 67 pounds, whereas the average carcass weight in Australia is about 42 pounds and in New Zealand about 35 pounds.[63] Domestic meat is generally sold fresh or chilled and is mostly (70 to 80 per cent) derived from lambs that have been grain fed.[64] The bulk of imported product comes from grass-fed lambs and is often sold in frozen form.[65]

4.31 The highest priced cuts from domestic lambs are racks, and the largest production cut is double legs.[66] There is some specialisation of specific cuts of imported lamb meat and a number of imported products which the domestic industry does not produce.[67] For example, New Zealand produces small racks, and consumer-ready cuts which the domestic industry does not.

4.32 Both New Zealand and Australia have promoted increased consumption of lamb meat in the United States.[68] Factors influencing the purchase of imported lamb meat include its smaller size, leanness, better packaging and greater price stability than domestic lamb meat.[69] As a result of the promotional efforts and product marketing, many imports have gone to create new demand supplied through, for example, large retail chains.[70]

4.33 Domestic and imported lamb meat is generally sold through the same channel of distribution. Lamb meat in the United States is distributed to the food services sector (hotels, restaurants and institutions) and retailers (mostly grocery stores).[71] The majority of New Zealand lamb meat is supplied to the food services sector.[72] More detailed information on the distribution of domestic lamb meat has not been made public by the USITC.[73]

4.34 While domestic and imported lamb meat have similar (but not identical) physical characteristics and comparable distribution channels, they are by no means equivalent in their product differentiation and marketing. The consistency of supply, greater price stability and vigorous promotional efforts have all impacted positively on the demand for imported product.

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[61] Meat New Zealand Pre-Hearing Submission, Exhibit 1, "USITC, Lamb Meat: *Competitive Consitions Affecting the US and Foreign Lamb Industries*, Inv. No. 332-357, August 1995", pp 2-46 and 2-47, Tables 2-12 and 2-13 (attached as Annex 10). The 1990 average import price was $1.26.

[62] USITC Report, II-19, Table 6.

[63] USITC Report, II-8.

[64] USITC Report, II-8 and II-24.

[65] USITC Report, II-8.

[66] USITC Report, II-58.

[67] USITC Report, II-74 to II-76.

[68] USITC Report, II-63.

[69] USITC Report, II-65.

[70] USITC Report, I-32. These were also referred to by the USITC as "food warehouses".

[71] USITC Report, II-16.

[72] USITC Report, II-18.

[73] USITC Report, II-18.

C. CONCLUSION

4.35 The factual evidence clearly shows that both the United States live lamb industry and the United States lamb meat industry have been in a long term decline. The most severe adjustment occurred in the early part of the period of investigation with the progressive elimination of the Wool Act subsidies, which accounted for a significant portion of lamb growers' income. The inevitable effect was a decline in the domestic production of live lambs.

4.36 In response to the reduced domestic supply, imports were drawn into the United States market to meet the unfilled consumer demand for lamb meat. As a result of promotional efforts and differentiated marketing, importers have also created new demand for lamb in markets which the domestic industry had previously not supplied or had under-supplied.

4.37 The factual evidence also shows that while domestic prices trended upwards during the period of investigation, the increase was greater over the 1993 to mid-1997 period. Prices improved again over the last three months of the period of investigation. Although faced with a downward trend in the prices of competing meats, lamb meat prices held up relatively well over the period of investigation.

4.38 There was nevertheless an inevitable lamb meat price correction in 1997 as lamb meat lost its price competitiveness. Despite this, the live lamb and lamb meat industries that claim to be suffering injury were better off in 1998 than they were in the early years of the period of investigation.

V. THE UNITED STATES DETERMINATION

5.1 In its determination of April 1999, the USITC recommended that a tariff-rate quota be imposed on imports of lamb meat for a four year period as follows:

Year One:	20 per cent *ad valorem* on imports over 78 million pounds.[74]
Year Two:	17.5 per cent *ad valorem* on imports over 81.5 million pounds.
Year Three:	15 per cent *ad valorem* on imports over 81.5 million pounds.
Year Four:	10 per cent *ad valorem* on imports over 81.5 million pounds.

Under the USITC's recommendation the in-quota tariff would remain at the current bound value of 0.8c per kg.[75]

5.2 This recommendation was not adopted by the United States Administration. Instead, on 7 July 1999, the United States imposed a definitive safeguard measure in the form of a tariff-rate quota on imports of lamb meat for a period of three years and one day on the following basis:

Year One: 9 per cent *ad valorem* in-quota tariff; 40 per cent *ad valorem* out-of-quota tariff on imports over 31,851,151 kg.[76]

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[74] The weights recommended by the USITC are in terms of carcass-weight equivalents: USITC Report, I-29.

[75] The bound value is scheduled to drop to 0.7c per kg in 2001. The average ad valorem tariff rate equivalent of 0.8c per kg is approximately 0.2%.

[76] In contrast to those used by the USITC, the weights used in the measure adopted by the United States Administration are in product weight equivalent. The weight specified for Year One of the measure is approximately 78 million pounds in carcass weight equivalent. The country allocations (in product weight equivalent) are: Australia 17,139,582 kg; New Zealand 14,481,603 kg; other countries 229,966 kg: US notification to the WTO Committee on Safeguards of its safeguard measure under Article 12.1(c) of the Safeguards Agreement (attached as Annex 3.)

Year Two: 6 per cent *ad valorem* in-quota tariff; 32 per cent *ad valorem* out-of-quota tariff on imports over 32,708,493 kg.[77]

Year Three: 3 per cent *ad valorem* in-quota tariff; 24 per cent *ad valorem* out-of-quota tariff on imports over 33,565,835 kg.[78]

The import level for the year one over-quota rate under both the USITC recommendation and the actual United States safeguard measure was set at the import level for lamb meat for 1998.

5.3 The measure does not apply to imports from Canada, Mexico, Israel, beneficiary countries under the Caribbean Basin Economic Recovery Act or the Andean Trade Preference Act, or developing countries exempted in accordance with Article 9.1 of the Agreement on Safeguards.

VI. NEW ZEALAND'S CLAIM

6.1 The United States safeguard measure imposed on imports of lamb meat from New Zealand is not in conformity with the United States obligations under the Safeguards Agreement and under GATT 1994 in the following respects:

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

(ii) The United States has failed to demonstrate that its "domestic industry that produces like or directly competitive products" has been threatened with "serious injury" as required by Article 2.1 of the Safeguards Agreement.

(iii) The United States has failed to demonstrate that any threat of serious injury to its domestic industry has been caused by increased imports as required by Article 2.1 of the Safeguards Agreement.

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

(v) The United States has failed to apply a safeguard measure to all imports irrespective of source as required by Article 2.2 of the Safeguards Agreement and Article I of GATT 1994.

(vi) The United States has applied a safeguard measure that places it in violation of its obligations under Article II of GATT 1994.

[77] ie approximately 80 million pounds in carcass weight equivalent. The country allocations (in product weight equivalent) are: Australia 17,600,931 kg; New Zealand 14,871,407 kg; other countries 236,155 kg: Annex 3.

[78] ie approximately 82 million pounds in carcass weight equivalent. The country allocations (in product weight equivalent) are: Australia 18,062,279 kg; New Zealand 15,261,210 kg; other countries 242,346 kg: Annex 3.

VII. LEGAL ARGUMENT

A. INTRODUCTION

7.1 The Safeguards Agreement and GATT 1994 set out certain obligations that must be met by Members seeking to derogate from their WTO obligations through the use of a safeguard measure. Those obligations are clear and precise and, in order to uphold the integrity of the WTO system, Members must adhere to those obligations strictly. New Zealand will establish that the United States has failed to meet those obligations and that as a result its safeguard measure in this case places the United States in violation of both the Safeguards Agreement and GATT 1994.

B. THE UNITED STATES OBLIGATIONS UNDER THE SAFEGUARDS AGREEMENT

7.2 The Agreement on Safeguards, which clarifies and reinforces Article XIX of GATT 1994,[79] sets out the conditions under which Members may take safeguard measures. The basic conditions are set out in Article 2 which provides:

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

7.3 A "safeguard measure" is stated in Article 1 to "be understood to mean those measures provided for in Article XIX of GATT 1994." Accordingly, to be justified as a safeguard measure under the Safeguards Agreement, a measure must meet the requirements of GATT Article XIX. This is reinforced by Article 11 of the Safeguards Agreement which provides that emergency action can be taken only if it conforms with both GATT Article XIX and the provisions of the Safeguards Agreement. In particular, under GATT Article XIX a safeguard measure can respond only to "unforeseen developments". As the Appellate Body pointed out in *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*,[80] and in *Argentina - Safeguard Measures on Imports of Footwear*,[81] emergency action within the meaning of Article XIX can be invoked only when an importing Member "finds itself confronted with developments it had not 'foreseen' or 'expected'...".[82]

7.4 Article 2 provides that a determination of serious injury or of threat of serious injury can only be made in respect of an industry that "produces like or directly competitive products."

7.5 In the present case, the United States has not made a determination of serious injury; it has determined that there is a "threat of serious injury." Article 4.1(b) of the Safeguards Agreement defines "threat of serious injury" as "serious injury that is clearly imminent". "Serious" injury is defined in Article 4.1(a) as "a significant overall impairment in the position of a domestic industry." Thus, any determination by the United States that there is a threat of serious injury must establish that a "significant overall impairment in the domestic industry" is "clearly imminent".

7.6 Article 4.2(a) requires that in an investigation to determine whether increased imports are causing or threatening to cause serious injury to a domestic industry, the competent authorities of a Member shall:

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[79] Safeguards Agreement, Preamble.
[80] WT/DS98/AB/R, 14 December 1999.
[81] WT/DS121/AB/R, 14 December 1999.
[82] *Argentina - Footwear*, para 93 and *Korea - Dairy*, para 86.

> "evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses and employment."

7.7 Article 4.2(b) requires that a determination that increased imports are causing or threatening to cause serious injury to a domestic industry shall not be made unless the 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." Article 4.2(b) goes on to provide that "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." Thus, any threat of serious injury on which a safeguard measure is based must be caused by increased imports. It is not sufficient to show that increased imports in part cause a threat of serious injury. Serious injury caused by other factors does not constitute serious injury on which a safeguards measure can be based.

7.8 Having made the relevant determinations on injury and causation, a Member has specific obligations under Article 5 of the Safeguards Agreement in respect of the remedy imposed. Article 5.1 provides that a safeguard measure can be applied "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment." Moreover, in accordance with Article 5.1, Members are to "choose measures most suitable" for the achievement of this objective.

7.9 In making the determinations on injury and causation required in Article 2 and Article 4, and on the necessity of the remedy under Article 5, a Member is required by Article 3 to publish a report setting out the findings of its competent authorities and its "reasoned conclusions on all pertinent issues of law and fact." In short, in order to justify the imposition of a safeguard measure, a Member must base its determinations both on injury and remedy on reasoned conclusions.

7.10 Article 2.2 requires a Member applying a safeguard measure to ensure that the measure is applied to all imports irrespective of source. Thus a measure must be applied on a "Most Favoured Nation" basis, in accordance with Article I of GATT 1994.

7.11 As a result of these provisions, the United States has specific obligations under the Safeguards Agreement and GATT 1994 in respect of its imposition of a definitive safeguard measure on imports of lamb meat.

(i) It must demonstrate that "unforeseen developments" have resulted in the situation to which the safeguard measure responds.

(ii) It must determine, on the basis of reasoned conclusions, that there is a clearly imminent threat of serious injury to a domestic industry that produces a like or directly competitive product.

(iii) It must determine on the basis of reasoned conclusions that the threat of serious injury has been caused by increased imports, and must not attribute injury from other factors to imports.

(iv) It must demonstrate, on the basis of reasoned conclusions, that the remedy it has adopted is necessary to prevent the serious injury that is threatened and is necessary to facilitate adjustment.

(v) It must also apply its safeguard measure to all imports irrespective of source and in such a way that it does not violate its other obligations under GATT 1994.

7.12 In this Submission, New Zealand will show that the United States has failed to meet each of the above obligations and as a consequence the United States is not in conformity with its obligations under the Agreement on Safeguards or its obligations under GATT 1994.

C. APPROACH TO INTERPRETATION

7.13 The correct approach to the interpretation of WTO Agreements, including the Safeguards Agreement, is well-established in the jurisprudence of the WTO. Agreements are to be interpreted in accordance with the rules of interpretation set out in the Vienna Convention on the Law of Treaties. Article 31 of the Vienna Convention provides that a treaty is to be interpreted in accordance with "the ordinary meaning to be given to the terms of a treaty in their context and in the light of its object and purpose." Article 32 of the Vienna Convention provides that the preparatory work and the circumstances of the conclusion of a treaty can be referred to as a supplementary means of interpretation "to confirm a meaning derived from the application of Article 31, or where the application of the approach set out in Article 31 produces a result that is ambiguous or obscure or is manifestly absurd or unreasonable."

7.14 Thus, the approach to interpretation in this case involves looking at the meaning of the words used in the Safeguards Agreement and in GATT 1994 in their context and in the light of the object and purpose of the agreement in question. The *travaux préparatoires* play a supplementary role.

7.15 In looking at the meaning of the words, it must be recalled, as the Appellate Body pointed out in *Korea - Dairy*, that "Article XIX is clearly an extraordinary remedy."[83] In *Argentina - Footwear* the Appellate Body added further emphasis: "Article XIX is clearly, *and in every way*, an extraordinary remedy."[84] The reason for this extraordinary nature of the safeguard remedy is made clear in both cases. It is because it allows Members temporarily to suspend obligations undertaken under the WTO Agreements in whole or in part or to withdraw or modify a concession made under those Agreements.[85] It allows Members to derogate from obligations undertaken under the WTO Agreements.

7.16 This derogation from obligations is explicitly exceptional. GATT Article XIX is entitled "Emergency Action on Imports of Particular Products." The reference to "emergency action" is repeated in Article 11.1(a) of the Safeguards Agreement. It follows that a safeguard measure is to be taken in "emergencies", not routinely. It is action that can be taken in respect of trade that has occurred in full compliance with WTO obligations, and as such, is action that can be taken only in exceptional circumstances. As the Appellate Body said in *Argentina - Footwear*:[86]

> "it is essential to keep in mind that a safeguard action is a 'fair' trade remedy. The application of a safeguard measure does not depend upon 'unfair' trade actions, as is the case with anti-dumping or countervailing measures."

7.17 Such an interference with the legitimate trading activities of WTO Members can be permitted only in limited and defined circumstances. Members can impose safeguard measures only to the extent that they comply strictly with the provisions of GATT Article XIX and the Safeguards Agreement. As the Appellate Body said in *Korea - Dairy* and *Argentina - Footwear*:

> "it must always be remembered that safeguard measures result in the temporary suspension of treaty concessions or the temporary withdrawal of treaty obligations,

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[83] Para 86.
[84] Para 93 (emphasis added).
[85] *Korea - Dairy*, para 86 and *Argentina - Footwear*, para 93.
[86] Para 94.

> which are fundamental to the *WTO Agreement*, such as those in Article II and Article XI of the GATT 1994."[87]

7.18 That the extraordinary nature of the safeguard remedy must be taken into account in the interpretation of the Safeguards Agreement, was mandated specifically by the Appellate Body in *Argentina - Footwear*. It said:

> "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*."[88]

7.19 Accordingly, in the present context the provisions of the Safeguards Agreement and of GATT 1994 are to be interpreted in accordance with the fundamental rule of interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties, taking account of the extraordinary nature of the safeguard remedy which requires that safeguard provisions be interpreted strictly.

D. BURDEN OF PROOF

7.20 The basic rule regarding burden of proof was set out by the Appellate Body in *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*: "the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof."[89] Such a rule applies equally to cases brought under the Safeguards Agreement. As the Panel pointed out in *Korea - Dairy*, it is for the claimant to establish a *prima facie* case of violation of the Safeguards Agreement and then it is for the respondent to refute that case.[90]

7.21 Accordingly, New Zealand will demonstrate in this submission that, in adopting the safeguard measure against imports of lamb meat, the United States has failed to discharge its obligations under the Safeguards Agreement and under GATT 1994.

E. USE OF CONFIDENTIAL INFORMATION

7.22 In seeking to demonstrate that it has met its obligations under the Safeguards Agreement and under GATT 1994, the United States must show that the determination of the USITC, as well as any determination made by the United States Administration, in respect of the safeguard measure imposed on New Zealand, was based on reasoned conclusions.[91] In order to accept that conclusions were reasoned, a Panel must have access to the information on which those conclusions were based.

7.23 In its report, the USITC relied on information that it regarded as confidential and which has never been disclosed to New Zealand. Article 3.2 of the Safeguards Agreement recognises that in the course of its investigation a Member's competent authorities will have access to confidential information and that that confidentiality must be respected. But Article 3.2 does not absolve a Member from disclosing information in the course of proceedings under the DSU when a safeguard measure that it has imposed is challenged by another Member. Article 13.1 of the DSU expressly contemplates that the Panel and the parties in any dispute settlement proceedings will be provided with any confidential information on which the Member seeks to rely to justify a measure, and sets out specific procedures to protect the confidentiality of that information.

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[87] *Korea - Dairy*, para 88, *Argentina - Footwear*, para 95.
[88] Para 94 (emphasis added).
[89] WT/DS33/AB/R, 25 April 1997, p 14.
[90] WT/DS98/R, 21 June 1999, para 7.24.
[91] Safeguards Agreement, Article 3.1 and *Argentina - Footwear* (Appellate Body Report), para 121.

7.24 It follows from this that a Member cannot rely on undisclosed information to show that it is complying with its obligations under the Safeguards Agreement or under GATT 1994. For a Member to argue that it had complied with its obligations under the Safeguards Agreement and GATT 1994 simply by affirming, without proof, that it has done so would undermine the rules-based system on which the WTO and the DSU rest.

7.25 Accordingly, in the absence of disclosure of the information on which its competent authorities relied, the United States cannot rely on that information to support the conclusions reached by the USITC or the US Administration to demonstrate its compliance with its obligations under the Safeguards Agreement or GATT 1994.

F. STANDARD OF REVIEW

7.26 In *Argentina - Footwear* the Appellate Body noted that the Agreement on Safeguards "is silent as to the appropriate standard of review."[92] Accordingly, the Appellate Body pointed out, it is the requirements of DSU Article 11 that apply here. That is, "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".[93]

7.27 Under Article 4 of the Safeguards Agreement, before making their determinations, the competent authorities of a Member are required, in the course of their investigation, to evaluate certain factors. In this context, the responsibility of the Panel is to examine whether the competent authorities "had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination."[94] This does not constitute conducting a *de novo* investigation or substituting the Panel's judgment for that of the national authorities.

7.28 As required by Article 11 of the DSU, a panel is also to make an assessment of the applicability of the covered agreement and the conformity of a measure with it. In order to be consistent with Article 3.1 of the Safeguards Agreement, reasoned conclusions must be reached on all pertinent issues. A Panel has therefore to determine whether the Member has based its decision on reasoned conclusions. Also, under Article 5.1 of the Safeguards Agreement a Member is entitled to apply a safeguard measure only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. A Panel must therefore decide both whether, in accordance with Article 3.1, reasoned conclusions have been provided for the application of a measure, and whether, in accordance with Article 5.1, the measure is, in fact, "necessary."

G. THE UNITED STATES VIOLATION OF ITS OBLIGATIONS UNDER THE SAFEGUARDS AGREEMENT

1. The United States Safeguard Measure is Not a Response to "Unforeseen Developments" as Required by GATT Article XIX

7.29 Article 1 of the Safeguards Agreement provides that safeguard measures "shall be understood to mean measures provided for in Article XIX of GATT 1994." Article 11 of the Safeguards Agreement provides that a Member shall not take or seek emergency action on imports of products unless its action conforms with both the provisions of Article XIX of GATT 1994 and the provisions of the Safeguards Agreement. GATT Article XIX provides that the circumstances that give rise to a need for emergency action must be "a result of unforeseen developments." In both *Korea - Dairy* and *Argentina - Footwear* the Appellate Body affirmed that the requirement of "unforeseen

[92] Para 120.
[93] Para 120.
[94] *Argentina - Footwear* (Appellate Body Report), para 121.

developments" was a circumstance that "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."[95] Accordingly, the United States cannot take the measures it has imposed on imports of lamb meat unless those measures are a response to "unforeseen developments."

7.30 The meaning of the term "unforeseen developments" was examined by the Appellate Body in both *Korea - Dairy* and *Argentina - Footwear*. It refers, the Appellate Body said, to circumstances that were "unexpected" when the obligation sought to be suspended temporarily was undertaken.[96] Safeguard measures may be imposed in respect of matters that are "out of the ordinary," or matters of urgency.[97] The language of GATT Article XIX:1(a), the Appellate Body said, was "not the language of ordinary events in routine commerce".[98] Where at the time an obligation was undertaken or a concession was made the developments that subsequently occurred could have been expected or foreseen, then there would be no basis for the imposition of a safeguard measure, as there would be nothing "out of the ordinary" in such circumstances. This means that, in order to meet the requirements of GATT Article XIX for the imposition of a safeguard measure against imports, the developments that result in an increase in those imports must have been unforeseen.

7.31 In the present case, the United States has made no determination that the circumstances that led to the imposition of a safeguard measure on imports of lamb meat were the result of "unforeseen developments". The matter was simply not addressed in the USITC's report. And nor is it surprising that it was not. The circumstances affecting the domestic industry in the United States in the present case did not result in fact from "unforeseen developments". As the facts set out above show, the decline in domestic lamb production was long-term, foreseen and known. Moreover, it was in part the consequence of acts deliberately taken by the United States affecting its own domestic market and of factors within that market itself. This could not have met any standard of "unexpected" or "unforeseen".

7.32 As the Appellate Body pointed out in *Korea - Dairy* and *Argentina - Footwear*, the words "unforeseen developments" are part of a broader clause and must take their meaning from this context. Article XIX states, "if, as a result of unforeseen developments *and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions...*". The Appellate Body pointed out in *Argentina - Footwear* that this phrase means that "it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions."[99] The Appellate Body also made clear that it is at the time of incurring those obligations including concessions that the developments leading to the increase in imports causing injury must have been unforeseen. The question to be determined in this case, therefore, is whether the alleged threat to the United States domestic industry from increased lamb meat imports results from developments since the binding of the United States tariff on imports of lamb meat on the coming into force of the WTO which were unforeseen at the time of that binding. That is, at 1 January 1995.

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[95] *Korea - Dairy*, para 85, *Argentina - Footwear*, para 92.

[96] *Argentina - Footwear*, paras 91 and 93 and *Korea - Dairy*, paras 84 and 86.

[97] *Argentina - Footwear*, para 93 and *Korea - Dairy*, para 86 . This formulation, the Appellate Body noted at para 96 of *Argentina - Footwear* and 89 of *Korea - Dairy*, is consistent with the formulation of the GATT Working Party in the *Hatters Fur* case (GATT/CP/106, adopted 22 October 1951), where it was stated at para 9:

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

[98] *Argentina - Footwear*, para 93.

[99] *Argentina - Footwear*, para 91 and *Korea - Dairy*, para 84.

7.33 On the basis of the period of investigation (1993-September 1998) and the definition of domestic industry adopted by the USITC,[100] it was clear by the beginning of 1995 that live lamb production in the United States was declining. In 1993 the lamb crop in the United States was 6,370,000 lambs; in 1994 it was 5,897,000. There was a parallel decline in lamb meat production from 327 million pounds in 1993, to 299 million pounds in 1994. The decline in production simply continued from 1995 on a trend that was well-established. There was nothing unexpected, or unforeseen about production declines from 1995 on. Indeed, the USITC itself noted that it had been "generally agreed" by all of the parties before it that the US lamb industry has been in a long state of decline."[101]

7.34 One of the reasons for the continuation of this decline during the period of investigation was well-known to the United States and acknowledged by the USITC. That is, from 1993, subsidies under the Wool Act to growers and feeders of lambs were progressively reduced, and were eliminated by 1996. In an industry -- that of growers and feeders -- whose source of income came from both the sale of wool and the sale of lambs for the production of lamb meat, the removal of the Wool Act subsidy would have had a predictable effect. Incomes of the recipients of that subsidy - growers and feeders - would fall and production would decline. And that is precisely what occurred. There was nothing unexpected or unforeseen about that. It also would not have been unexpected that if domestic production of live lambs fell, there would be a flow-through effect on packers and breakers. That is, there would be a decline in their source of supply. That, too, is what occurred. Nor would it have been unexpected that a decline in domestic supply would lead to an increase in imports as those imports would be drawn into the United States market to meet the demand for lamb meat that the domestic industry was unable to fulfil. It was not unexpected, and, in fact, that also is what occurred.

7.35 This is a classic situation of supply and demand, where a contraction of supply leads to unfulfilled demand which is met by increased imports. Therefore, not only were the circumstances that allegedly have caused a threat to the domestic industry foreseen, but the circumstances that led to the increase in imports were also foreseen. As pointed out earlier, the decline in the production of live lambs, resulting from the elimination of the wool subsidy led to a loss of production by packers and breakers. This in turn led to the drawing of imports of lamb meat into the United States market to meet the demand that the domestic industry was unable to fulfil. None of this could be regarded as unforeseen or unexpected.

7.36 Accordingly, the safeguard measure applied by the United States in the present case does not comply with the requirement of Article XIX of GATT 1994 that it be a response to "unforeseen developments".

2. The United States has Failed to Demonstrate that its "Domestic Industry that Produces Like or Directly Competitive Products" has been Threatened by "Serious Injury" as it is Required to do Under Article 2.1 of the Safeguards Agreement

(a) The United States has failed to define correctly its "domestic industry that produces like or directly competitive products"

7.37 Under Article 2.1 of the Safeguards Agreement, a condition to be fulfilled before the application of a safeguard measure is that serious injury must be caused or threatened to be caused to "the domestic industry that produces like or directly competitive products." An examination of

[100] However, as New Zealand will point out later in this Submission, the United States' determination of its "domestic industry" for the purposes of the investigation is not in conformity with the provisions of the Safeguards Agreement.

[101] USITC Report, I-17.

whether the requirements of this provision have been met necessitates a determination of what constitutes "the domestic industry that produces a like or directly competitive product".

7.38 Article 4.1(c) defines "domestic industry" as "the producers as a whole of the like or directly competitive product 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." This definition has both a quantitative and a qualitative aspect. The quantitative aspect refers to the numbers of producers who must be included; either "producers as a whole" or "those whose collective output ...constitutes a major proportion of domestic production."

7.39 The qualitative aspect of Article 4.1(c) relates to who constitutes a producer for the purposes of defining the domestic industry. Both Article 2.1 and Article 4.1(c) make clear that membership in the category of "producers" is determined by production of "like or directly competitive products." Accordingly, the determination of what constitutes the domestic industry for the purposes of a safeguards investigation has to be based on a determination of whether the industry produces a "product" that is "like or directly competitive" with imported lamb meat.

7.40 The United States has made no such determinations. In its report, the USITC bifurcates its analysis into a determination of whether imported lamb meat is "like or directly competitive" with domestically produced lamb meat and then makes a separate determination of what constitutes the "domestic industry." The USITC acknowledges that most safeguard investigations "involve firms and workers producing a product at the same stage of production as the imported article."[102] However, it asserts that it is appropriate to include the producers of a raw product in the industry producing a processed product if "there is a continuous line of production from the raw to the processed product" and there is a "substantial coincidence of economic interest between the growers and the processors."[103] On this basis, the USITC concludes that "the domestic lamb meat industry includes the growers and feeders of live lambs as well as packers and breakers of lamb meat."[104]

7.41 The approach of the USITC finds no justification in the Safeguards Agreement or in GATT Article XIX. Under Articles 2.1 and 4.1(c) of the Safeguards Agreement, the domestic industry for the purposes of a safeguards investigation is the industry that "produces like or directly competitive products." The only basis on which the USITC could, consistently with the Safeguards Agreement, have included growers and feeders of live lambs in its investigation would have been if the live lambs produced by growers and feeders were a product that is "like or directly competitive" with lamb meat. The USITC made no such determination. It found only that imported lamb meat was "like" domestically produced lamb meat and that there was a continuous line of production from the raw product of growers and feeders (live lambs) to the processed product of packers and breakers (lamb meat), along with a substantial coincidence of economic interest between the two types of producers. Furthermore, the USITC could not have made a determination that live lambs were a product "like or directly competitive" with lamb meat consistently with the well-established law in GATT and the WTO on the meaning of "like or directly competitive" products.

7.42 In *Japan - Taxes on Alcoholic Beverages*[105] the Appellate Body endorsed the "Report of the Working Party on *Border Tax Adjustments*"[106] under the GATT on the criteria to be taken into

[102] USITC Report, I-12.
[103] USITC Report, I-12.
[104] USITC Report, I-13.
[105] WT/DS8/AB/R, 4 October 1996.
[106] BISD 18S/97.

account in determining whether products are "like".[107] The Appellate Body also accepted that a determination of what constitutes a "like" product must be made on a case-by-case basis.

7.43 In the present case, no claim has been made by the United States that live lambs and lamb meat are "like" products. Those Commissioners of the USITC who addressed the question whether the producers of live lambs were producing a product that was a "like or directly competitive" product, concluded only that live lambs were "directly competitive" with lamb meat.[108] Accordingly, the only claim made by the United States, albeit indirectly, is that live lambs are "directly competitive" with lamb meat.

7.44 In *Japan - Alcohol* the Appellate Body considered the term "directly competitive or substitutable" in the context of Article III:2 of GATT. The Appellate Body endorsed the Panel's view that, in interpreting that term, it was appropriate to look at "the market place" as well as at physical characteristics, common end uses and tariff classifications.[109] It agreed that the "decisive criterion" is whether the products "have common end-uses, *inter alia* as shown by elasticity of substitution."[110] In the subsequent case of *Korea - Taxes on Alcoholic Beverages*[111] the Appellate Body and the Panel emphasised that for products to be directly competitive or substitutable there has to be evidence of a "direct" competitive relationship.[112] The Appellate Body also stated that products are directly competitive or substitutable if they are "interchangeable", and accepted the Panel's formulation that directly competitive or substitutable products must provide "alternative ways of satisfying a particular need or taste."[113]

7.45 Live lambs and lamb meat are not "interchangeable". A live lamb can be sold for breeding purposes, kept for wool production, or it can be sold for slaughter. The product of a slaughtered lamb is both its wool pelt and lamb meat.[114] A buyer of breeding stock would not purchase lamb meat as a substitute for live lambs. Equally, the typical consumer of lamb meat would not satisfy a "need or taste" for lamb meat by the purchase of a live lamb. In *Japan - Alcohol*, in *Korea - Alcohol* and in *Canada - Certain Measures Concerning Periodicals*,[115] the products in question could be purchased by consumers and used in fundamentally the same way, although they might appeal to different tastes. The same cannot be said for live lambs and lamb meat.

7.46 The approach of the USITC Commissioners to the identification of the relevant domestic industry in this case was based on a legislative test set out in the United States Trade Act.[116] Under this test a domestic article can be regarded as directly competitive with an imported article at an earlier or later stage of processing if the importation can have an economic effect on the domestic producer "comparable to" the importation of an article in the same stage of processing. Such a test, however, has been rejected in GATT law, both in respect of "like product" determinations and in respect of whether products are "directly competitive".

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[107] Those criteria were said to include the product's end-uses in a given market, consumers' tastes and habits, and the product's properties, nature and quality: *Border Tax Adjustments*, para 18 and *Japan - Alcohol*, p 20.

[108] Commissioner Askey, USITC Report, I-8, fn 7 and Commissioner Crawford, USITC Report, I-9, fn 8.

[109] *Japan - Alcohol*, p 25. See also *Canada - Certain Measures Concerning Periodicals*, WT/DS31/AB/R, 30 June 1997, p 25.

[110] *Japan - Alcohol*, p 25, quoting from the Panel Report (WT/DS8/R, 11 July 1996), para 6.22.

[111] WT/DS75/AB/R, 18 January 1999 (Appellate Body Report) and WT/DS75/R, 17 September 1998 (Panel Report).

[112] Panel Report, para 10.43 and Appellate Body Report, paras 109, 113, and 124.

[113] Appellate Body Report, para 115.

[114] The product of a lamb pelt is both the hide and the wool.

[115] WT/DS31/AB/R, 30 June 1997.

[116] 19 USC sec 601(5).

7.47 GATT panels have never accepted that products that were not "like" could have that defect cured by reference to some idea of a continuous line of production. In *Panel on United States Definition of Industry Concerning Wine and Grape Products*[117] the Panel took the view that the "economic interdependence between industries producing raw material or components and industries producing the final product" was not relevant for a "like product" determination under the Anti-Dumping Code.[118] Similarly, in *Canada - Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC*[119] the Panel rejected Canada's argument that because of the economic linkages between the producers of live cattle and the producers of manufacturing beef, the former could also be considered "producers" of manufacturing beef within the meaning of Article 6.5 of the Subsidies Code.[120] These cases clearly show that the inclusion of products within earlier stages of processing as "directly competitive" with those at a later stage of processing purely on the basis of linked economic interests is not consistent with GATT law.

7.48 Equally, that argument has not been accepted where the issue is one of direct competition. In *Canada - Import Restrictions on Ice Cream and Yoghurt*[121] the Panel did not accept Canada's argument that ice cream and yoghurt "competed directly" with raw milk. The Panel took the view that "The essence of direct competition was that a buyer was basically indifferent if faced with the choice between one product or the other and viewed them as substitutable in terms of their use."[122] Canada's arguments that because imported ice cream and yoghurt competed directly with domestically produced ice cream and yoghurt, it "displaced" raw milk that would otherwise be processed into ice cream and yoghurt was rejected by the panel as indirect competition.[123]

7.49 In the present case, a proper application of the test for determining whether products are directly competitive indicates clearly that live lambs and lamb meat are not "directly competitive." There are separate market places for live lambs and lamb meat. The former is purchased by sheep breeders, by feeders, and by packers for slaughtering. The latter is purchased by consumers of lamb meat. The marketing of live lambs and of lamb meat is different. They are advertised differently. Typical consumers are not indifferent if faced with a choice between live lambs and lamb meat. They do not find live lambs and lamb meat substitutable or interchangeable. The fact that live lambs can be processed to lamb meat does not mean that they have common end-uses. To argue that live lambs and lamb meat are directly competitive on the basis of economic interdependence is something that has been rejected consistently in GATT jurisprudence. Indeed, in seeking to treat live lambs and lamb meat as "directly competitive", the United States is seeking to resurrect Canada's "displacement" or "indirect competition" theory which the United States itself opposed and which was rejected by the Panel in *Canada - Ice Cream and Yoghurt*.

7.50 The United States incorrect determination of its "domestic industry" is of itself a violation of the United States obligations under the Safeguards Agreement. However, the erroneous identification of the "domestic industry" also has a direct impact on the determination of whether serious injury has been caused or threatened to that domestic industry. The incorrect determination by the United States of the relevant domestic industry in this case has resulted in errors in the determination of whether a threat of serious injury had occurred. This is because in making that determination, the United States

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[117] Report of the Panel adopted by the Committee on Subsidies and Countervailing Measures on 28 April 1992, SCM/71, BISD 39/436.

[118] Para 4.5. Both parties, including the United States, had agreed that grapes and wine could not be considered "like" products.

[119] SCM/85, 13 October 1987.

[120] Paras 5.8, 5.12 and 5.13. In that case the parties and the Panel all agreed that live cattle was not a "like product" with fresh and frozen manufacturing beef: para 5.1.

[121] Report of the Panel adopted 5 December 1989, BISD 36S/68.

[122] Para 73. The Panel also rejected the view that raw milk and yoghurt and ice cream could be regarded as "like products" for the purposes of GATT Article XI:2(c).

[123] Para 73.

has taken into account the situation of growers and feeders - segments of an industry which produces live lambs and which is different from the industry that produces products that are like or directly competitive with imported lamb meat.

7.51 The arguments set out above clearly establish that in order to meet the requirements of Article 2.1 of the Safeguards Agreement, the correct domestic industry must be identified in a safeguard investigation, as the industry which produces a like or directly competitive product to the imported product. In its investigation on safeguards against lamb meat imports, the United States was required by Article 2.1 to determine the industry that produces a product that is like or directly competitive with imported lamb meat. The United States has failed to do this. Instead, it made a determination for the purposes of its safeguard investigation that the domestic industry was made up of producers of products that were not "like or directly competitive". It did this on the basis of a coincidence of economic interests between the producers of live lambs, a product that is not like or directly competitive with imported lamb meat, and the producers of lamb meat, a product that is directly competitive with imported lamb meat. This approach has no foundation in the Safeguards Agreement. The economic effects of lamb meat imports on each of these producers is irrelevant to the issue of which industry produces a like or directly competitive product to those imports. The question is simply whether growers and feeders, as producers of live lambs, are part of the domestic industry producing a product like or directly competitive with lamb meat imports.

7.52 As no claim was made by the United States that live lambs produced by growers and feeders of lamb are "like" imported lamb meat, the relevant question in this case is whether those live lambs are "directly competitive" with lamb meat. The arguments set out above clearly establish that they are not. It follows that the United States has failed to define its domestic industry correctly for the purposes of the lamb safeguard investigation as required by Article 2.1 of the Safeguards Agreement. In addition, the erroneous identification by the United States of the relevant domestic industry has resulted an erroneous determination by the United States of a threat of serious injury based on the economic situation of growers and feeders.

(b) The United States has failed to demonstrate that there is any "serious injury" to its domestic industry that is "clearly imminent"

7.53 The United States determination in the present case is that its domestic industry is faced with a "threat of serious injury". Article 4.1(b) of the Safeguards Agreement provides that a " 'threat of serious injury' shall be understood to mean serious injury that is clearly imminent...". Moreover, a determination of a threat of serious injury is to be "based on facts and not merely on allegation, conjecture or remote possibility".[124] Paragraph (a) of Article 4.1 requires that "serious injury" shall be understood to mean a significant overall impairment in the position of a domestic industry. Thus, in order to comply with its obligations under the Safeguards Agreement, the United States must demonstrate that its domestic industry is threatened with a significant overall impairment that is clearly imminent.

7.54 In an investigation to determine whether a threat of serious injury has occurred, Article 4.2(a) requires that the competent authorities "evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry." This obligation to evaluate relevant factors entails an obligation to consider those factors and to demonstrate their relevance or otherwise. Such a standard was recognised by the Panel in *United States - Wool Shirts*,[125] in respect of safeguard measures under the Agreement on Textiles and Clothing and has been applied by panels to measures under the Safeguards Agreement as well.[126] In addition, in *Korea - Dairy* the Panel indicated that a Member must examine "all relevant facts in its possession or which it should have obtained in

[124] Safeguards Agreement, Article 4.1(b).
[125] Paras 7.25-7.27.
[126] *Korea - Dairy*, para 7.55 and *Argentina - Footwear*, para 8.167.

accordance with Article 4.2 of the Agreement on Safeguards at the time of the investigation" and it must "provide an adequate explanation of how those facts as a whole supported the determination made."[127] Article 4.2(c) requires that a detailed analysis of the case investigated be published, along with a demonstration of the relevance of the factors examined.[128]

7.55 A determination that an industry has suffered or is threatened with serious injury is a comparative determination. That is, the position that the industry is in or is expected to be in at the time of the determination must be significantly impaired overall in comparison with the position it was in at some other point in time. Thus, there must be some indication over the period of a safeguard investigation that the position of the industry is or will be significantly impaired overall compared with the position it was in at the beginning of the period.

7.56 The report prepared by the USITC, on which the United States safeguard measure is based, does not make any such determination. Nor does it demonstrate a "clearly imminent significant overall impairment" within the meaning of Article 4.1(a) and Article 4.1(b). Instead, the report simply lists a variety of factors purporting to show that the domestic industry, as defined by the USITC, was threatened with serious injury. These factors include declines in domestic lamb meat market share in terms of both volume and value; declines in domestic lamb meat production volume and value; declining lamb meat prices; a decrease in lamb-growing establishments; declines in sales by packers and breakers; revenue declines for packers, breakers and feeders; revenue fluctuations affecting growers; declining capacity utilisation of breakers; and constant productivity across all segments throughout the period.[129] The USITC makes no attempt to "evaluate" these factors as Article 4.2(a) requires nor to show *how* these factors show a threat to the condition of the industry. It simply says that these factors "show" that the domestic industry is threatened with serious injury.[130] No attempt is made to show how those factors support the determination made. Thus, there is no "demonstration of the relevance of the factors examined" as required by Article 4.2(c) of the Safeguards Agreement.

7.57 The failure of the USITC to evaluate the relevant factors as required by Article 4.2(a) is demonstrated by its reference to the decline in the number of lamb growing establishments from 1993 to 1997. From this decline the USITC postulates that employment indicators fell over the period. However, the USITC does not explain how employment and profitability levels are affected when there was evidence before it that 94 per cent of those exiting the market were operations of less than 100 sheep.[131] Those who exited were probably part-time or hobby farmers or those with other income sources. These facts are simply ignored by the USITC which fails to assess the relevance of the indicator it cites. Furthermore, the USITC does not even attempt to explain how establishments that have already left the market can be considered as being threatened with significant overall impairment that is clearly imminent.

7.58 The USITC is selective in its use of data. It notes that because USDA data provides a more comprehensive industry coverage than the USITC's questionnaire data, it would rely on USDA data

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[127] Para 7.55.

[128] Article 3.1 also requires the publication of a report setting forth the findings and reasoned conclusions of the competent authorities on all pertinent issues of fact and law.

[129] USITC Report, I-18 to I-20.

[130] USITC Report, I-21. In addition, factors such as the decrease in lamb-growing establishments, revenue declines for feeders, revenue fluctuations affecting growers, and productivity of growers and feeders, should not have been considered by the USITC in determining serious injury or threat thereof at all. This is because those factors relate to the position of the live lamb industry, which is not a part of the domestic industry producing a like or directly competitive product with lamb meat imports within the meaning of Article 4.1(c) of the Safeguards Agreement.

[131] Meat New Zealand Pre-Hearing Submission, Exhibit 7, "Number of US Lamb Growers and Size of Operations 1994-1997" (attached as Annex 6).

"where possible".[132] This turns out to be a licence for the USITC to use either data depending on which supports its view of threat of serious injury. Questionnaire data on indicators such as production, shipments, profitability and employment show more positive trends than those of USDA data. As a result, the USITC rejects the questionnaire data, even though all it can find by way of substitution is conjecture about employment based on USDA figures of declines in establishments of only growers.

7.59 The USITC is also selective in the way it draws conclusions from the data on which it relies. This is apparent in the USITC's discussion of profitability, where it states, on the basis of the questionnaire data, that "a significant portion of individual growers reported that they had operated at a loss."[133] This statement is misleading. It could equally be said that on the basis of the questionnaire data "a significant portion of individual growers reported that they had operated at a profit." What the data in fact shows is that while 51 per cent of the reporting growers operated at a profit in 1993, 67 per cent of the reporting growers operated at a profit in January-September 1998. Even if the growers responding to the USITC questionnaires were those who were more profitable, the data they provided indicated that their profitability was higher in the latter part of the period of investigation than in the earlier. The data also shows that the proportion of growers reporting operating at a profit remained relatively constant between 1994 and 1998.[134] This is not consistent with the USITC's image of growers operating at a loss.

7.60 Similarly, when dealing with the profitability of feeders, the USITC again seeks to draw conclusions that the data will not support. For example, on the basis of the questionnaire data, the USITC identifies the first nine months of 1998 as the period when feeders experienced their greatest loss during the period of investigation.[135] It supports this finding by comparing the responses of 9 feeders who provided responses to the questionnaires for the period 1993-1997, 7 feeders who provided responses for the period January-September 1997 and 6 feeders who provided responses for the period January-September 1998.[136] In short, the USITC seeks to draw conclusions by comparing what is simply not comparable.

7.61 In contrast, questionnaire data on matters such as capacity, capacity utilisation, inventories and productivity that would have presented a picture of the financial condition of the industry different to the way it was perceived by the USITC was dismissed as "mixed".[137] The USITC also discounted the relevance of inventories,[138] thereby failing to take into account the fact that inventories of packers actually decreased in January-September 1998 by comparison with the previous year.[139] Similarly, on the basis of anecdotal evidence the USITC concluded that financing of capital and repaying of loans showed "difficulties consistent with the worsening financial condition of the domestic lamb meat industry."[140] However, if anecdotal evidence has probity, there was also anecdotal evidence that some packers and breakers had undertaken financial commitments for new equipment and modernisation of plant.[141] Such commitments are normally undertaken on the basis of an expectation of increasing financial returns. The existence of such expectations is not the hallmark of an industry that is threatened with significant overall impairment.

[132] USITC Report, I-16.
[133] USITC Report, I-20.
[134] USITC Report, II-28, Table 12.
[135] USITC Report, I-19.
[136] USITC Report, II-32, Table 15.
[137] USITC Report, I-20.
[138] USITC Report, I-20.
[139] USITC Report, II-22.
[140] USITC Report, I-21.
[141] USITC Report, II-15, n 61 and n 64.

7.62 In another example, the decline in lamb prices that occurred towards the end of the period of investigation is relied on by the USITC as a key indicator of the poor health of the domestic industry. Falling prices allegedly affected financial performance across all industry segments.[142] However in reaching this conclusion the USITC fails to take account of the fact that live lamb slaughter prices through 1997 and 1998 were higher than during most of the 1993 and 1994 period. Similarly, real wholesale lamb meat prices in September 1998 were 12 per cent higher than in January 1993. The USITC also fails to take into account that when Wool Act subsidies that were in place at the beginning of the period of investigation are deducted, grower income is shown actually to be higher at the end of the period of investigation than it was at the beginning.[143]

7.63 In terms of the USITC's finding of threat of serious injury, notwithstanding what it perceived to be "declines during the period of investigation in the domestic industry's market share, production, shipments, profitability and prices" the USITC did not conclude that these factors resulted in "a significant overall impairment" in the position of the domestic industry. If it had done so, it would have concluded that there was actual serious injury. Instead, it concluded that "a significant overall impairment" was clearly imminent. What the USITC failed to do was identify any basis for that conclusion. In short, the USITC asserts, as if it were a truism, that factors that did not constitute serious injury must constitute a threat of serious injury.

7.64 The conclusion that a threat exists requires more than affirmation. The Panel in *Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*[144] stated that determining whether a threat exists necessitates "a prospective analysis of a present situation with a view to determining whether a 'change in circumstances' was 'clearly foreseen and imminent'." In the Panel's view, it required an analysis of relevant future developments with regard to the volume and price effects of imports and their consequent impact on the domestic industry.[145]

7.65 Similarly, in *United States - Measures Affecting Imports of Softwood Lumber from Canada*[146] the Panel said that in the practice of GATT signatories the concept of threat of material injury "had been interpreted as requiring factual evidence of a clearly foreseen and imminent change in circumstances".[147] In *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*,[148] the Panel stated that a finding on "threat" requires a party "to demonstrate that, unless action is taken, damage will most likely occur in the near future."[149]

7.66 Such requirements are implicit in Article 4.1(b) of the Safeguards Agreement according to which in order to establish a threat of serious injury it must be shown that serious injury is "clearly imminent". The dictionary definition of "imminent" is "impending, soon to happen".[150] To determine whether something is "soon to happen" requires a prospective analysis; it requires an assessment of what is likely to happen in the future. The USITC did not make such an assessment. Rather, it looked at the past - a past that it found did not constitute a "significant overall impairment" in the position of the domestic industry. The USITC rejected information that might give some idea about the future. It rejected questionnaire data that showed an increase in net shipments, employment

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[142] USITC Report, I-20.

[143] See Figure 1 at para 4.14 of this Submission.

[144] Report of the Panel adopted by the Committee on Anti-Dumping Practices on 27 April 1993 (ADP/92 and Corr.1), BISD 40S/205.

[145] Para 271.

[146] Report of the Panel adopted by the Committee on Subsidies and Countervailing Measures on 27-28 October 1993 (SCM/162), BISD 40S/358.

[147] Para 402. See also *New Zealand - Imports of Electrical Transformers from Finland*, Report of the Panel adopted on 18 July 1985 (L/5814), BISD 32S/55, para 4.8.

[148] WT/DS24/R, 8 November 1996.

[149] Para 7.55.

[150] *The New Shorter Oxford English Dictionary* (1993).

and net sales over the period of investigation, on the ground that such data had a "survivorship bias." However, surely information about the competitiveness of "survivors" is a better prediction of the future than information about those who have exited the industry?

7.67 The factors examined by the USITC show exactly what the USITC and the parties before it all accepted. That is, the live lamb and lamb meat industries in the United States continued throughout the period of investigation a decline that they had been experiencing since the early 1940's. The continuation of that decline in 1993, at the beginning of the period of investigation, clearly did not constitute an imminent significant overall impairment in the position of the industry. If it had, the USITC would have been obliged to find that serious injury had occurred during the period of investigation, that is, that the clearly imminent threat of 1993 had become actual serious injury in 1998. But it did not do so. On what basis, then, does a continuation of a decline that existed in 1993 without being a threat of serious injury suddenly constitute in 1998 a clearly imminent significant overall impairment of the industry? That is what the USITC was obliged to explain, and that is what it has not done.

7.68 Instead, what the USITC does is rely on a decline that has occurred in the past to explain a threat of significant overall impairment in the future. In support of its conclusion, it cites USDA figures to show a 23.2 per cent decline in production between 1993 and 1997. However, most of this decline occurred in the period between 1993 and 1996, when production fell by 21.7 per cent.[151] In other words, most of the decline in production occurred prior to 1997. The fact that production in January-September 1998 was 3.4 per cent below the comparable figure for 1997 is within the bounds of normal production fluctuation, especially in an industry that has been in a general state of decline for many years. Accordingly, the figures relating to past production declines relied on by the USITC to support its finding of threat of serious injury do not in fact constitute any indication that future significant overall impairment to the position of the domestic industry is clearly imminent.

7.69 Thus, the United States has not met its obligations under Article 4.1(b) of the Safeguards Agreement to base its determination that serious injury is clearly imminent on facts and not on allegation, conjecture or remote possibility. Instead, what the USITC has done is to base its determination on threat of serious injury on the presentation of facts showing that actual serious injury has not occurred. It has not undertaken any prospective analysis of the clear imminence of a significant overall impairment in the position of the domestic industry in future. It has made its findings through selective use of data available to it, and has drawn conclusions inconsistently from that data on which it has chosen to rely.

In fact, what the available data shows is that there has been a continuation of a long-term decline in the domestic industry. That decline was not considered by the USITC to constitute clearly imminent significant overall impairment of the domestic industry at the beginning of the period of investigation. No reason has been given as to why the continuation of that same long-term decline should be considered now to amount to a threat of serious injury. Accordingly, the United States has not met the requirements of Article 4.1(b) of the Safeguards Agreement to determine on the basis of reasoned conclusions that there is a significant overall impairment to the position of its domestic industry that is clearly imminent.

3. The United States has Failed to Demonstrate that any Threat of Serious Injury to its Domestic Industry has been Caused by Increased Imports as Required by Article 2.1 of the Safeguards Agreement

7.70 Article 2.1 provides that a Member may apply a safeguard measure where a threat of serious injury is caused by products being imported into its territory in increased quantities. Article 4.2 requires that in investigating this matter the competent authorities are to evaluate all relevant factors

[151] USITC Report, II-21, Table 7.

having a bearing on the industry (paragraph (a)) and that the existence of the causal link between increased imports and the threat of serious injury must be demonstrated on the basis of "objective evidence"(paragraph (b)). In addition, injury caused by factors other than increased imports is not to be attributed to increased imports.[152]

7.71 These obligations were summed up by the Panel in *Korea - Dairy* as follows:

> "In its causation assessment, the national authority is obliged to evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry. In addition, if the national authority has identified factors other than increased imports which have caused injury to the domestic industry, it shall ensure that any injury caused by such factors is not considered to have been caused by the increased imports."[153]

7.72 In the present case, the USITC's finding of causation is fundamentally flawed in three important respects:

> First, the USITC applies a test for causation that has no basis in the Safeguards Agreement;
>
> Second, the USITC fails to show "the causal link" between increased imports and threat of serious injury as required by Article 4.2(b); and
>
> Third, the USITC fails to comply with the requirement in Article 4.2(b) that injury from factors other than increased imports not be attributed to increased imports.

(a) The United States wrongfully applies a "substantial cause" test

7.73 The USITC found that increased imports of lamb meat are "both an important cause of the threat of serious injury and a cause that is not less than any other cause."[154] It concludes, therefore, that increased imports of lamb meat are a "substantial cause" of the threat of serious injury to the domestic lamb meat industry. The USITC bases its "substantial cause" test on S.202(b)(1)B of the Trade Act of the United States. However, such a finding does not comply with the standards set out in the Safeguards Agreement. Article 2.1 of the Agreement requires that serious injury or a threat thereof must be "caused" by increased imports. It does not say that it is sufficient if the injury is "substantially" caused by increased imports. In short, the United States has applied a less stringent test, that of "substantial cause", in place of the test set out in Article 2.1 of the Safeguards Agreement which requires that serious injury be "caused" by increased imports.

7.74 That the United States "substantial cause" test is inconsistent with the Safeguards Agreement is readily apparent from the USITC's own explanation of how that test is to be applied. The test is met if increased imports are a cause that is "no less than any other cause" or "a cause that is equal to or greater than any other cause."[155] Thus, the United States "substantial cause" test is met even though increased imports are only one of many causes of serious injury as long as *no single cause* is more important than increased imports.

7.75 Article 4.2(b) of the Safeguards Agreement makes clear that such a weighing of the causes of serious injury is incompatible with the requirements of that Agreement. It provides that injury caused by factors other than increased imports cannot be attributed to those imports. It is not possible under

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[152] Safeguards Agreement, Article 4.2(b).
[153] Para 7.89.
[154] USITC Report, I-21.
[155] USITC Report, I-21.

Article 4.2 to aggregate injury caused by a variety of factors and then determine whether the impact of increased imports is greater than that of any single other cause. Rather, there can be no serious injury attributable to imports at all if that serious injury is in fact attributable to other causes.

7.76 The consequence of the United States applying a causation test that has no basis in the Safeguards Agreement is that it has attributed to imports of lamb meat injury to its domestic industry that is caused by factors that are domestic in nature and that result from government action or from domestic market forces. In doing so, the United States has not complied with Article 2.1 of the Safeguards Agreement which limits the application of safeguard measures to circumstances where *increased imports* threaten to cause serious injury.

(b) The United States fails to demonstrate the causal link between increased imports and the threat of serious injury

7.77 In analysing causation under the Safeguards Agreement, a Member must examine the conditions of competition between imports and domestic product in the market to determine whether, on the basis of objective evidence, the causal link between imports and any threat of serious injury has been demonstrated.[156] In this case, therefore, the USITC was required to examine whether conditions of competition between imported and domestic lamb meat in the United States market were such as to objectively demonstrate the causal link between the imports and the threat of injury found to exist. Furthermore, the Appellate Body has said that the relationship between the movements in imports and the movements in the injury factors must be central to the causation analysis in safeguard investigations.[157] Accordingly, in the present case the USITC's causation analysis should have focussed on the relationship between the increase in imports and the factors found to indicate a threat of injury to the domestic industry.

7.78 In its analysis of causation the USITC speculates that, given the nature of the domestic lamb industry, increases in imports "would likely cause domestic producers to lose some sales, to lower prices to attempt to maintain sales, or both."[158] It refers to conflicting evidence on the likelihood of imports from Australia and New Zealand increasing in future years and suggests that "increases in import volume are likely to have further negative effects on the domestic industry's prices, shipment volumes, and financial conditions in the imminent future." However, the only evidence it cites in support of its assertion that "the increase in imports has caused prices to fall in the short run" is a lowering of the unit value in domestic and imported products in the 1997-1998 period and an increase in the market share of imported lamb meat over the period of investigation, particularly in 1997-98.[159] It asserts, without proof, that the worsening financial condition of the domestic industry was a result of increases in imports and states that increased imports "captured" market share from domestic producers.[160]

7.79 In fact, the factors cited by the USITC cannot reasonably and objectively support such a conclusion. For example, while it is true that the market share held by United States lamb meat declined from 88.8 per cent in 1993 to 80.3 per cent in 1997 and 76.7 per cent in January-September 1998, this was largely due to the decline in United States production over that period. Increasing imports did not match this dramatic decline in domestic supply of lamb meat. Over the period of investigation as a whole domestic production fell by 82 million pounds while imports rose by only 28 million pounds. Accordingly, the increase in imports over the period of investigation did not match the fall in domestic production. Yet the USITC assumes, without any analysis, that domestic

[156] *Argentina - Footwear*, Panel Report, para 8.229.
[157] *Argentina - Footwear*, Appellate Body Report, para 144, quoting from the Panel Report, para 8.237.
[158] USITC Report, I-22.
[159] USITC Report, I-24.
[160] USITC Report, I-24.

market share was *taken* by imported product. This assumption also ignores the USITC's own finding that imported product partly went to meet new demand.[161]

7.80 The USITC's analysis of causation consists of conjecture and speculation. It takes the fact that the domestic industry has been in decline over the period of investigation and the fact that imports have increased over that period and then supposes that the decline in the domestic industry is caused by the increased imports. It assumes that the decline in domestic prices occurring in mid-1997 was caused by increased imports[162] without producing any evidence to support this. The USITC fails completely to distinguish between circumstances where imports increase because they come into a market at reduced prices and displace domestic production, and circumstances where imports increase because domestic production has declined due to domestic supply side factors. However, this distinction is fundamental. The latter circumstance would clearly not constitute causation.

7.81 The factors referred to by the USITC as indicative of causation do not distinguish between circumstances where domestic production declines due to domestic supply side factors and circumstances where domestic production declines because of increased imports. In either instance imports would grow, domestic production would decline and domestic producers would suffer hardship. In either instance, profits and revenues in the domestic industry would deteriorate. Thus, the fact that a domestic production decline and an increase in imports occur does not provide a basis for showing whether the decline in production is caused by domestic factors or by increased imports. The USITC cites hardship for domestic producers and revenue and profit declines, but it provides no basis on which to determine the cause of that hardship and decline, or for distinguishing domestic causes from the effects of increased imports.

7.82 Methods which could have been used to draw such distinctions were simply ignored by the USITC. For example, a key way of determining whether injury results from domestic factors or from increased imports is to analyse information about price. Such an approach is contemplated by the Safeguards Agreement and by the Panel in *Argentina - Footwear*.[163] However, this was not done by the USITC. There is no serious analysis by the USITC of the impact of price on the conditions of competition. There is no real analysis of price trends of imports and of domestic products. Nor is there any theoretical or empirical economic reasoning cited in support of the many assertions and suppositions about causation on which the USITC's conclusions are based.

7.83 In order to comply with the United States obligations under the Safeguards Agreement, the USITC had to demonstrate the link between one variable, increased imports, and other variables, the factors constituting threat of injury to the domestic industry. Econometric analysis would have provided objective, statistical analysis concerning this link. In previous investigations of the domestic lamb meat industry the USITC has used econometric analysis to this end. For example, in 1995,[164] the USITC used a "vector autoregression model" in concluding that imports of lamb meat had only a marginal impact on domestic production. In this case, the USITC had before it updated analysis based on the methodology used in their previous investigation. The USITC even cites the 1995 study as suggesting "that imports do little to displace US produced lamb or to suppress its prices and that imports are imperfect substitutes".[165] However, the USITC did not undertake a further econometric analysis such as it had utilised in 1995.

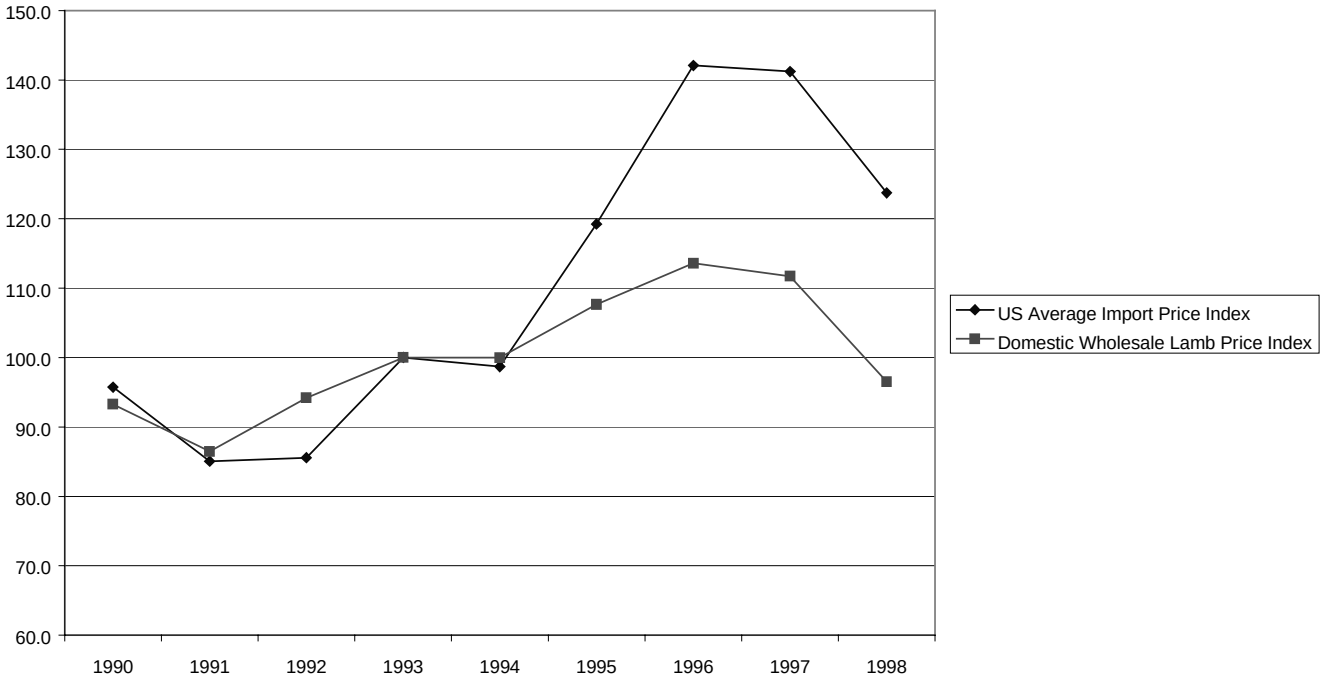
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[161] USITC Report, I-32.
[162] USITC Report, I-24.
[163] Para 8.252.
[164] USITC, Lamb Meat*: Competitive Conditions Affecting the US and Foreign Lamb Industries*, Inv. No. 332-357, August 1995, USITC Publication No 2915.
[165] USITC Report, II-72.

7.84 In addition, in making a determination of *threat* of serious injury, the United States is obliged to demonstrate that increased imports will be the cause of serious injury in the future. It must *demonstrate* causation; it is not sufficient just to say that causation exists. Again, however, the USITC's analysis rests on assertion and not on demonstration. Thus, not only is there a failure by the United States to demonstrate that the decline in domestic production has been caused by increased imports, there is also no substantiation of the USITC's supposition that imports would in the future cause a serious threat of injury.

7.85 A proper analysis by the USITC of the information available about prices would have led to the conclusion that increased imports could not have been the cause of the decline in domestic production over the USITC's period of investigation. Based on indices of real prices for lamb meat on the United States market, the real price for domestic lamb meat steadily increased over much of the period of investigation (Figure 5).

Figure 5: Indexes of real import & domestic wholesale US lamb prices

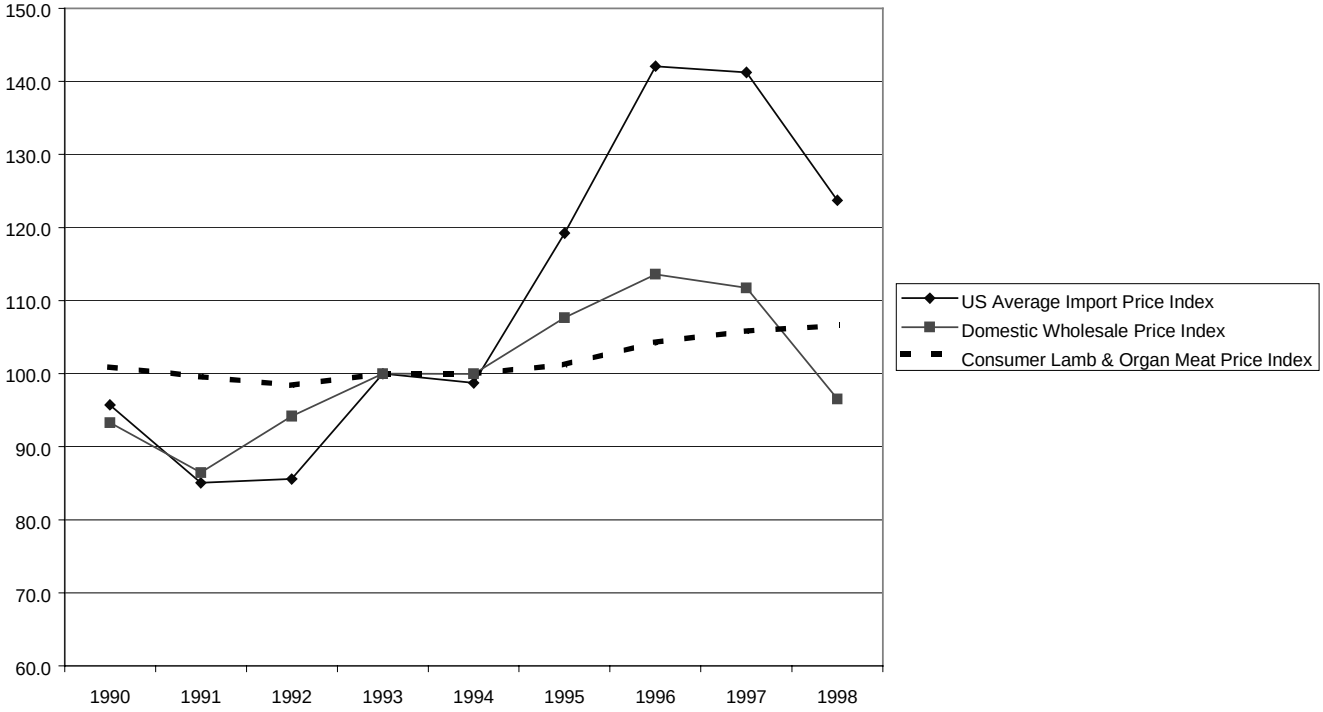


Sources: US Department of Commerce and USITC Publication No 2915, August 1995, pp 2-46 and 2-47 (Unit CIF Import Price); US Bureau of Labour Statistics (CPI); USDA/AMS Red Meat Yearbook 1996 and "Livestock, Dairy and Poultry 1997-1999" (Domestic Wholesale Price)

Figure 5 illustrates that over this period the imported lamb meat price rose more steeply than domestic lamb meat price. In such circumstances the decline in domestic production could not have been attributable to increased imports. In fact, the strong rise in import price would have helped drive up lamb meat prices on the United States domestic market.

7.87 The rise in prices on the supply side between 1993 and 1997 clearly show that there was a shortage of lamb meat on the United States market during that period. This also drove up real consumer prices (Figure 6).

Figure 6 : Indexes of real (CPI deflated) prices for lamb on US market



Sources: Department of Commerce; ITC Publication No 2915, August 1995, pp 2-46 and 2-47; US Bureau of Labour Statistics; USDA/AMS Red Meat Yearbook; "Livestock, Dairy and Poultry" 1997-1999

As Figure 6 shows, the consumer price continued to increase in 1998 although at a smaller rate than in previous years.

7.88 In 1998 both domestic wholesale and import lamb meat prices declined. However, even after a decline from 1997 to 1998 of 12 per cent, the import price in 1998 was still 24 per cent higher than its 1993 level. A price decline in one year, 1997 to 1998, following several years of price increases in a row does not demonstrate that imports have caused a decline in domestic prices. To focus on that particular portion of the period of investigation would be to ignore the reality that agricultural prices fluctuate. For example, real pork prices have exhibited wide fluctuations in recent years and fell by 9 per cent between August 1997 and April 1998.[166] The choice of a period of investigation is designed to look at trends and impacts over a period of time, and not to focus on isolated, single events.

7.89 The conclusion that can be drawn from the relevant price information is that increased imports could not have been a cause of any serious injury to the United States domestic industry. Instead, domestic factors must have been the cause of the industry's decline. This is reinforced if quantities of domestic production during this period are considered. From 1993-1997, notwithstanding the rising real prices for lamb meat, the quantity of domestically-produced lamb meat declined. In circumstances where real prices rise, it cannot be increases in imports that cause domestic production to decline. It has to be factors external to the market that are responsible for the decline in domestic supply. In this case, increased imports were a *response* to this backward shift in the supply schedule, not the *cause* of it.

[166] See Figure 4 at para 4.25 of this Submission.

7.90 The relevant price information during the period of investigation indicates clearly that domestic factors must have been the cause of the decline in the United States domestic industry during that period. In this regard, the single most important factor in the cause of that decline was the removal of the wool subsidy. The wool subsidy contributed 19.3 per cent of the revenue of live lamb producers (growers and feeders). An industry with a dual revenue stream cannot avoid being affected by a substantial reduction in one of those revenue streams. The decline in production by growers and feeders is at the root of the problem faced by the domestic industry properly considered in this case. That is, any deterioration in the economic condition of packers and breakers -- the producers of lamb meat which is the product that is like or directly competitive with imported lamb meat -- results from a decline in production by growers and feeders. It is not the result of competition from increased imports.

7.91 Another important factor in the decline in the domestic industry during the period of investigation is the price competitiveness of lamb meat with other meats. In this context, although domestic prices at the wholesale and producer level at the end of the period of investigation declined, it is not reasonable to conclude that imports were the cause of these declines. As the comparison of real consumer price indices of lamb and other meats shows,[167] prices for lamb meat at the consumer level remained very high throughout 1997 and 1998 while real prices for other meats, particularly pork, declined. This is in sharp contrast to the period between 1995 and 1997. At that time, there were significant increases in the real prices of pork which would have helped to support demand for lamb at higher prices. In its report, the USITC concluded that demand for lamb meat was responsive to price.[168] However, it then ignored relative price changes in analysing the end of the period decline in domestic prices at the wholesale and producer level. Similarly, the USITC concluded that many imports supplied new demand,[169] but then ignored this conclusion in considering the impact of increased imports on the domestic industry. Instead, the USITC simply assumed that the decline in domestic prices on which it placed such reliance was caused by imports.

7.92 The above analysis of the relevance of other factors to the domestic industry's decline shows that the USITC's entire causation analysis was based on an *assumption* that increased imports led to decreased prices, which led to a decline in the financial condition of the domestic industry. Causal factors such as price competition from other meats were not given serious consideration. Similarly, causal factors such as the elimination of the Wool Act subsidies, and the overfeeding of lambs in 1997 which respondents argued had a negative effect on prices at that time, were summarily dismissed on the basis that such factors did not constitute a more important cause of future threat than increased imports. In this way, the USITC's report gives the impression that the USITC had made up its mind that what it saw as a threat of serious injury to the domestic industry was the result of increased imports, and that it was not to be deflected by a proper analysis of other factors relevant to the industry's decline. However, if the USITC had considered those other factors as it should have, it could not have reached the conclusion that it did.

7.93 The above arguments clearly show that the USITC's assertion that increased imports caused the threat of serious injury to the domestic industry is merely speculation and conjecture. The arguments above also establish that the USITC has failed to distinguish between a situation where domestic production declines due to domestic supply side factors, and where it declines because of increased imports. It could have made such a distinction, using econometric analysis previously used by it in investigating the lamb industry, but chose not to do so. Had the USITC undertaken any serious analysis of prices, it could not have reached the conclusion it did reach on causation. Other

[167] See Figure 4 at para 4.25 of this Submission. Real prices of poultry also increased during that period: USITC Report, II-70, Figure 17.

[168] USITC Report, I-22.

[169] USITC Report, I-32.

factors would instead have been found responsible for the domestic industry's decline, for example, the removal of the Wool Act subsidy and the lack of competitiveness with other meats.

7.94 If a decline in the domestic industry which does not constitute serious injury is caused by domestic considerations, and not by increased imports, then there is no basis for any conclusion that a continuation of that decline constitutes a threat of serious injury that is caused by increased imports. The United States' failure to analyse correctly the causes of the decline in its domestic industry means that its conclusions on the cause of an alleged threat to its domestic industry are flawed and cannot stand.

(c) The United States wrongfully attributes to imports injury caused by other factors

7.95 Article 4.2(b) of the Safeguards Agreement expressly requires that in making a determination that increased imports have caused or are threatening to cause serious injury, when factors other than increased imports are causing injury at the same time, that injury must not be attributed to increased imports. However, in direct contradiction to this requirement, the United States' test of "substantial cause" leads it to attribute to increased imports injury that the United States itself acknowledges has been caused by other factors. For example, the USITC acknowledges that the withdrawal of the subsidy under the National Wool Act was a cause of the decline of the domestic industry during 1993-97.[170] However, while it indicates that this factor will not be a significant cause in the future, and thus does not attribute the threat of serious injury to the removal of the subsidy, nevertheless it treats the injury caused by the removal of the wool subsidy as evidence of a threat of serious injury. It then attributes that threat of serious injury to increased imports.[171]

7.96 Equally, the USITC concludes that competition from other meat products, concentration in the packer segment, and failure of the industry to develop and implement an effective marketing program were all causes of injury.[172] However, since none of those factors was individually a more important cause of injury, in the USITC's view, than increased imports, the USITC saw no reason to alter its finding. In doing so, however, the USITC did not deny that part of the threat of serious injury on which its finding of causation was based was attributable to factors other than increased imports.

7.97 The failure of the USITC to attribute injury acknowledged by it to be caused by other factors to those other factors, and not to imports, is a violation of Article 4.2(b) of the Safeguards Agreement. In fact, the USITC's determination of causation in this case has done precisely what that Article enjoins a Member imposing a safeguard from doing. That is, not to attribute to increased imports injury that has been caused by other factors.

4. The United States has Applied a Safeguard Measure that is Neither "Necessary to Prevent Serious Injury" Nor "Necessary to Facilitate Adjustment" Contrary to Article 5.1 of the Safeguards Agreement. Moreover, it has Failed to Publish its Findings and Reasoned Conclusions on the Necessity of its Measure as Required by Article 3.1 of the Safeguards Agreement

7.98 Even if the United States had been justified in imposing a safeguard measure, it must still comply with Articles 5.1 and 3.1 of the Safeguards Agreement. Article 5.1 provides : "A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment." It further provides that Members should choose measures "most suitable" for

[170] USITC Report, I-24.
[171] USITC Report, I-17.
[172] USITC Report, I-25 and I-26. The USITC also considered arguments that increased input costs and overfeeding of lambs were causes of a threat of serious injury. Although the USITC's Report is unclear on this point, it appears to reject both these factors as causes at all: I-25.

the achievement of the objectives of this Article. In *Korea - Dairy* the Appellate Body affirmed that this provision "imposes an *obligation* on a Member applying a safeguard measure to ensure that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment."[173] There is thus a two-fold obligation on the United States in applying its safeguard measure to a threat of serious injury. The United States must ensure that its measure is "necessary" to "prevent" the serious injury that is threatened. Second, the United States must ensure that its measure is "necessary" to "facilitate adjustment." In fact, as New Zealand will show, the United States has failed to meet either obligation. In addition, Article 3.1 requires a Member imposing a safeguard to publish a report setting out its findings and reasoned conclusions on all pertinent issues of fact and law. New Zealand will also show that the United States has failed to meet this obligation with regard to the necessity of its safeguard measure.

(a) The United States measure is not "necessary" to prevent serious injury within the meaning of Article 5.1 of the Safeguards Agreement

7.99 The ordinary meaning of the term "necessary" as defined in *The New Shorter Oxford English Dictionary*[174] is "that cannot be dispensed with or done without," or "requisite, essential, needful." The term "necessary" is used in other provisions of the WTO Agreements and it has a particular meaning in GATT jurisprudence. In *United States - Section 337 of the Tariff Act of 1930*,[175] the Panel, speaking of GATT Article XX(d), said that a contracting party could not justify a measure that was inconsistent with another GATT provision as "necessary" if "an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it."[176] It went on to say that if a GATT consistent measure is not available, then a contracting party "is bound to use, among the measures reasonably available to it, that which entails the *least degree of inconsistency* with other GATT provisions."[177]

7.100 This obligation to choose the "least trade restrictive" measure in order to meet the "necessary" test was applied by GATT panels in *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*,[178] and in *United States - Measures Affecting Alcoholic and Malt Beverages*.[179] Equally it has been endorsed by a WTO Panel and the Appellate Body in *United States – Standards for Reformulated and Conventional Gasoline*.[180]

7.101 The rationale for the "least trade restrictive" test in the context of GATT Article XX is that it serves to minimise the impact of derogations from substantive GATT obligations. In the context of the Safeguards Agreement, which is designed to ameliorate the impact of fair, rather than unfair, trade, similar considerations apply.[181] Article 5.1 is designed to place limits on the ability of Members to take safeguard measures which by definition derogate from their substantive WTO obligations.[182] Members can take such measures "only to the extent necessary" to achieve the

[173] Para 96 (emphasis in original).
[174] (1993).
[175] Report of the Panel adopted on 7 November 1989 (L/6439), BISD 36S/345.
[176] Para 5.26.
[177] Para 5.26 (emphasis added).
[178] Report of the Panel adopted on 7 November 1990 (DS10/R), BISD 37S/200, paras 73-75.
[179] Report of the Panel adopted on 19 June 1992 (DS23/R), BISD 39S/206, paras 5.40-5.43. See also the unadopted reports of the Panels in *United States - Restrictions on Imports of Tuna*, DS21/R, discussed in the Council on 18 February, 18 March, and 30 April 1992, BISD 39S/155, para 5.28 and *United States - Restrictions on Imports of Tuna*, DS29/R, 16 June 1994, para 200.
[180] Panel Report, WT/DS2/9 (as modified by the Appellate body Report on 20 May 1996), para 6.24 and Appellate Body Report WT/DS2/AB/R, 29 April 1996, page 16.
[181] In *United States - Underwear*, safeguard measures under the ATC were treated as exceptions to substantive obligations for the purposes of applying the burden of proof.
[182] To this extent, safeguards provisions are more like the general exceptions provisions of GATT Article XX than some of the provisions of other WTO Agreements where the term "necessary" is used: see Note

objective of preventing serious injury. In the safeguards context, the need to preserve the integrity of Members' substantive obligations under the WTO Agreements is emphasised in the Preamble to the Safeguards Agreement, which refers to the need to "clarify and reinforce the disciplines of GATT 1994". While recognising the need for structural adjustment, the preamble also recognises the need to "enhance rather than limit competition in international markets". A "least trade restrictive" interpretation of the term "necessary" in Article 5.1 therefore gives the term "necessary" its ordinary meaning of "requisite" and "essential" as applied in the particular context of Article 5 and in the light of the object and purpose of the Safeguards Agreement as a whole.

7.102 The "least trade restrictive" test was accepted by the Panel in *Korea - Dairy* as the proper interpretation of the term "necessary" in Article 5.1. It said: "in order to comply with Article 5.1 a Member must apply a measure which in its totality is no more restrictive than is necessary to prevent or remedy the serious injury and facilitate adjustment."[183]

7.103 In the present case, the remedy applied by the United States was not the least trade restrictive measure available. For example, it was more trade restrictive than that proposed by the USITC, in several respects. First, the USITC proposal for a tariff-rate quota would have retained the in-quota rate at the bound MFN level of approximately 0.2 per cent.[184] The measure imposed by the United States raised the in-quota rate to 9 per cent. In addition, the USITC proposed an over-quota rate in the first year of 20 per cent. The United States measure adopts an over-quota rate in the first year of 40 per cent. The same circumstances prevail in subsequent years.[185] Prima facie, then, the United States has failed to apply a measure that meets the least trade restrictive test.

7.104 The United States measure is more trade restrictive than necessary to achieve its objectives in a further respect. That is, the USITC concluded that there was no actual serious injury to the domestic industry. In other words, the level of imports that existed during the period of investigation was not injurious. Rather, the threat the USITC identified came from potential future increases. Yet, in spite of this, the United States has, through its in-quota tariff, imposed a restriction on imports at levels at and below those existing during the period of investigation - that is to say, at or below levels found not to be injurious. By applying both an in-quota tariff and an out-of-quota tariff, it has not limited the measure to future increases even though it identified those future increases as the basis of the threat of serious injury. In short, the United States has applied a measure directed at dealing with a serious injury that it has found not to exist.

7.105 The necessity requirement of Article 5.1 of the Safeguards Agreement means that a safeguard must be no more trade restrictive than necessary to prevent or remedy serious injury. The United States lamb safeguard measure is more trade restrictive than an alternative measure which its competent authorities found to be sufficient to prevent or remedy the serious injury to the domestic industry. In addition, the United States safeguard measure goes beyond what is necessary to prevent the threat of serious injury found to exist by the USITC to exist in this case by addressing levels of trade which were found not to be injurious. The United States measure therefore does not meet the "least trade restrictive" test.

7.106 The failure of the United States to apply a safeguard measure only to the extent necessary to prevent or remedy serious injury also means that the United States has not chosen the "most suitable"

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by the Secretariat, Council for Trade in Services, *Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to All Services*, S/C/W/96, 1 March 1999, para 22.

[183] Para 7.101.

[184] This is the approximate ad valorem tariff rate equivalent of 0.8c per kg, which was the bound tariff on lamb meat imports in 1999.

[185] The only respect in which the USITC proposed remedy is not less trade restrictive than that adopted by the United States is that the USITC would have continued the measure for a fourth year.

measure within the meaning of Article 5.1. Accordingly, the United States has violated its obligations under that Article of the Safeguards Agreement.

(b) The United States measure is not "necessary" to facilitate adjustment within the meaning of Article 5.1 of the Safeguards Agreement

7.107 The United States has equally failed to meet its obligation to apply a safeguard measure only to the extent necessary to facilitate adjustment. In this context, too, the term "necessary" carries with it the meaning that the least trade restrictive measure must be chosen. Furthermore, as the Panels in *United States - Gasoline* and *Canada - Periodicals*, pointed out, a measure must be capable of achieving its objective before it can be determined to be "necessary".[186] In this case, the United States has provided no explanation of how the measure chosen is either capable of achieving its required objective of facilitating adjustment or less trade restrictive than other reasonably available measures that would achieve that objective.

7.108 The USITC did address the issue of facilitating adjustment. It indicated that its proposed tariff-rate quota should be applied in conjunction with adjustment assistance. This shows that the USITC considered something more was required than the safeguard measure in order to facilitate adjustment. Clearly therefore, in the USITC's view, a tariff-rate quota would not in itself facilitate adjustment. Thus, the United States imposition of a safeguard measure consisting of a tariff-rate quota constitutes a *prima facie* case of failure to apply a measure that is "necessary" to facilitate adjustment.

7.109 Furthermore, in the context of the present case, the United States measure is not capable of facilitating adjustment. As the USITC recognised, one of the problems facing the domestic industry is that of consumer demand for lamb meat. Increasing the costs of imports of lamb meat will lower rather than enhance consumer demand and will accordingly not address this problem.

7.110 The necessity requirement in Article 5.1, as applied to the objective of facilitating adjustment, means that a safeguard measure must be capable of meeting this objective, and must be the least trade restrictive means of doing so. The United States lamb safeguard is neither. It has therefore not been applied only to the extent necessary to facilitate adjustment within the meaning of Article 5.1. In addition, the failure by the United States to apply a safeguard measure that is necessary to prevent serious injury or to facilitate adjustment, means that the United States has not chosen the most suitable measures to achieve the objectives of Article 5.1. Hence, the United States has failed to meet its obligations under this Article of the Safeguards Agreement.

(c) The United States has failed to publish its findings and reasoned conclusions on the necessity of its measure as required by Article 3.1 of the Safeguards Agreement

7.111 Article 3.1 of the Safeguards Agreement requires that the competent authorities of a Member imposing a safeguard measure publish a report setting forth the findings of those authorities and their reasoned conclusions on all pertinent issues of fact and law. Whether a safeguard measure meets the requirements of Article 5 is clearly such a pertinent issue. However, in applying its definitive safeguard measure in the present case, the United States has provided no explanation of how that measure could be regarded as the least trade restrictive measure that would achieve the goal of preventing serious injury. The USITC provided an extensive explanation for its proposed remedy,[187] but that remedy was rejected by the United States Administration, which provided no explanation for the measure it imposed in place of the USITC's recommendation. In addition, neither the USITC nor the United States Administration provided any explanation at all for how their measure met the

[186] *United States - Gasoline*, para 6.31 and *Canada - Periodicals*, para 5.7.
[187] USITC Report, I-29 to I-38.

requirement of Article 5.1 that a measure be applied "only to the extent necessary to facilitate adjustment".

7.112 The failure of the United States to explain how its lamb safeguard measure was "necessary" within the meaning of Article 5.1 places the United States in violation of its obligation under Article 3.1 of the Safeguards Agreement not to apply a measure unless it has published a report setting forth its findings and "reasoned conclusions" on all pertinent issues of fact and law.

5. The United States has Failed to Apply a Safeguard Measure to All Imports Irrespective of Source, Contrary to Article 2.2 of the Safeguards Agreement and Article I of GATT 1994

7.113 Article 2.2 of the Safeguards Agreement provides: "Safeguard measures shall be applied to a product being imported irrespective of its source." In the present case, the United States has not done this. It has excluded imports from Canada, Mexico, Israel and from beneficiary countries under the Caribbean Basin Recovery Act and the Andean Trade Preference Act. However, in making its determination of threat of serious injury, the United States considered the imports of all countries that import lamb meat into the United States market.

7.114 Having made a determination based on all such imports, the United States then sought to exclude some of those imports from the application of its safeguard measure. There is no justification in the Safeguards Agreement for such an exclusion.[188] This has been made explicit in *Argentina - Footwear*, where the Appellate Body rejected a claim by Argentina that it was entitled to exclude from the application of its safeguard measure the imports of MERCOSUR countries that had been included in the making of the injury determination. The Appellate Body said:[189]

> "we find that Argentina's investigation, which evaluated whether serious injury or the threat thereof was caused by imports from *all* sources, could only lead to the imposition of safeguard measures on imports from *all* sources."

7.115 In addition, failure to apply a safeguard measure to all imports irrespective of source constitutes the provision of an advantage to the products of a Member excluded from the application of a safeguard measure that is not granted "immediately and unconditionally" to the products of those Members to which the safeguard measure applies. Accordingly, such a failure contravenes the "Most Favoured Nation" obligation of Article I of GATT 1994 as well as the express requirement in Article 2.2 of the Safeguards Agreement.

6. The United States has Applied a Safeguard Measure that Places it in Violation of its Obligations under Article II of GATT 1994

7.116 The application by the United States of a safeguard measure that is not in conformity with the Safeguards Agreement also constitutes a violation of the United States obligations under GATT Article II. By imposing duties on imports that are not justified under the terms of the Safeguards Agreement in excess of those provided for in its schedule the United States has failed to comply with its obligations under GATT Article II:1(b).

[188] Unless the countries are exempted from the application of the safeguard measure by virtue of Article 9.1, as developing country Members.

[189] Para 113 (emphasis in original).

VIII. CONCLUSION

8.1 By applying its safeguard measure of 7 July 1999 to imports of New Zealand lamb meat, the United States has contravened its obligations under the GATT 1994 and the Agreement on Safeguards.

8.2 For all of the reasons cited above, New Zealand respectfully requests the Panel to find that:

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

2. The United States has failed to demonstrate that its "domestic industry that produces like or directly competitive products" has been threatened by "serious injury" as required by Article 2.1 of the Safeguards Agreement.

3. The United States has failed to demonstrate that any threat of serious injury to its domestic industry has been caused by increased imports as required by Article 2.1 of the Safeguards Agreement.

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

5. The United States has failed to apply a safeguard measure to all imports irrespective of source as required by Article 2.2 of the Safeguards Agreement and Article I of GATT 1994.

6. The United States has applied a safeguard measure that places it in violation of its obligations under Article II of GATT 1994.

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

ANNEX 2-2

LETTER FROM NEW ZEALAND

(9 May 2000)

I refer to the request of the United States (US) for certain preliminary rulings that was submitted to the Panel on Friday 5 May.

New Zealand has now had an opportunity to review the US request and would like to offer our preliminary views on the procedural issues raised by the US.

In our view the various claims contained in the US request lack legitimacy and, in this regard, New Zealand would be pleased to set out its position in writing on the various claims made by the US. We believe that the US has not raised any issue(s) that cannot be dealt with by way of written response for decision by the Panel at the time of the first substantive meeting. In accordance with paragraph 13 of the Panel Working Procedures, we look forward to the advice of the Panel as to the timing for the submission of such written views.

Moreover, we do not see how the US request should in any way require a change to the deadline for the receipt of the US First Submission. This is, after all, a deadline that all of the Parties (including the US) agreed upon following extensive discussions at the organisational meeting of the Panel on 28 March 2000. A request for a preliminary ruling by the Panel should not alter these agreed procedures.

As noted above, New Zealand will provide its detailed views on the US claims in a separate written communication. At this stage, however, we would wish to point out that the request for the establishment of a Panel was communicated to the US on 14 October 1999 and the organisational meeting of the Panel was held on 28 March 2000. Yet the US did not raise any alleged deficiencies in the terms of the Panel request or request any extension to the deadline for its First Submission until 5 May (less than a week before the expiry of the deadline). In this regard, we would recall the Appellate Body's remarks in *United States - Tax Treatment for "Foreign Sales Corporations"* (WT/DS108/AB/R) that the:

> "principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes" (at para 166).

Indeed, as the Appellate Body went onto note:

> "[t]he procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes" (*ibid*).

We look forward to the Panel's advice on the timing proposed for the submission of our written responses to the respective US claims.

ANNEX 2-3

NEW ZEALAND'S RESPONSE TO UNITED STATES' REQUEST FOR PRELIMINARY RULINGS

(17 May 2000)

A. Introduction

1. The United States has requested preliminary rulings from the Panel on three issues.[1]

2. First, it claims that New Zealand's request for the establishment of a Panel is insufficient as a matter of law to satisfy the requirements of Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).[2]

3. Second, the United States claims that New Zealand alleges the United States' safeguard statute, on its face, is inconsistent with United States' obligations under the Agreement on Safeguards (Safeguards Agreement) without having included the statute in its request for the establishment of a Panel.[3] The United States requests a ruling that the consistency of that statute with the Safeguards Agreement is accordingly not within the Panel's terms of reference and is outside the scope of this dispute.[4]

4. Third, the United States raises issues relating to the disclosure of Business Confidential Information (BCI).[5]

5. In a communication from the Secretary to the Panel, New Zealand was invited to submit its views on the request by the United States for preliminary rulings as described above in written form by Wednesday 17 May 2000.[6] New Zealand's views on the request by the United States are set out below.

B. Alleged Insufficiency of Panel Request

1. Background

6. The United States claims that New Zealand's request for the establishment of a Panel is insufficient as a matter of law to satisfy the requirements of Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) that such requests must "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". The United States further alleges that New Zealand failed to provide any indication of the legal basis for its claims and argues that nothing in its panel request provides any information that would in itself further clarify exactly which of the obligations in the named articles is alleged to be infringed. The United States relies, in making these claims, on the recent ruling of the Appellate Body in *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products.*[7]

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[1] United States' Request for Preliminary Rulings, 5 May 2000.
[2] United States' Request for Preliminary Rulings, paras 1-15.
[3] United States' Request for Preliminary Rulings, paras 16-19.
[4] United States' Request for Preliminary Rulings, para 20.
[5] United States' Request for Preliminary Rulings, paras 21-23.
[6] Letter to the Parties from the Secretary to the Panel, 10 May 2000.
[7] WT/DS98/AB/R, 14 December 1999.

7. In addition, the United States alleges that the insufficiency of the panel request has substantially prejudiced the United States by compromising its ability to respond to the claims of New Zealand under Articles 2, 3, and 4 of the Safeguards Agreement. The United States in particular refers to Article 4 of that Agreement.[8] The United States claims that the insufficiency of the panel request prevented it from knowing the true nature of the claims being made against it under these provisions and placed it in the position of "merely guessing" which of the many obligations in these articles might be at issue in this case.[9] It states that this severely limited its ability to begin the task of preparing its defence.

8. In New Zealand's view there is no insufficiency in the New Zealand panel request. Indeed, as New Zealand will demonstrate, in this case the request more than met the minimum standard to form the basis of the panel's terms of reference. In addition, the United States failed to raise its procedural objections to New Zealand's request at the appropriate time. Furthermore, even if, contrary to the New Zealand view, the request were considered to be defective, the United States has not been prejudiced in its defence and the participation of third parties has not been affected because the legal basis of the New Zealand claim was well known. Finally, even if the United States and third parties were prejudiced by any alleged insufficiency in the request for the establishment of a panel, the panel's decision to extend the deadline for delivery of the United States' First Submission has already addressed this issue.

2. Legal Requirements of Panel Request

9. Article 6.2 of the DSU requires that the "specific measures at issue" be identified in a request for the establishment of a panel and that a brief summary of "the legal basis of the complaint" be provided, "sufficient to present the problem clearly".

10. New Zealand considers that given the circumstances of the case its request is, in the words of the Panel in *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, "sufficiently specific to comply with the minimum standards established by the terms of Article 6.2 of the DSU".[10]

Misinterpretation of Korea Dairy

11. As stated above, the United States bases the justification for its claim regarding the alleged insufficiency of New Zealand's request for the establishment of a panel on the recent Appellate Body decision in *Korea - Dairy*. However, the United States quotes only selected excerpts of the Appellate Body's findings on this issue and so misrepresents the findings of the Appellate Body in that case. In fact, what the Appellate Body ruled was that while the identification of the treaty provisions claimed to have been violated was always necessary, it may not *always* be enough. It did not say that the mere listing of those provisions would in all cases *not* be enough. When quoted in full, the Appellate Body said:

> "there may be situations where the simple listing of the articles of the agreement or agreements involved may, *in the light of attendant circumstances*, suffice to meet the clarity in the statement of the legal basis of the complaint. However, there *may* also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This *may* be the case, for instance, where the articles listed establish not one single, distinct obligation, but

[8] United States' Request for Preliminary Rulings, paras 6 and 7.
[9] United States' Request for Preliminary Rulings, para 9.
[10] WT/DS27/R, 22 May 1997, para 7.29. This wording was supported by the Appellate Body: WT/DS27/AB/R, 9 September 1997 at para 141.

> rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, *may* fall short of the standard of Article 6.2.[11] (Emphasis added.)

12. The Appellate Body in *Korea - Dairy* also clarified the meaning of its previous rulings in the *European Communities - Bananas* case. It did not purport in that case, it said, to establish that the mere listing of articles allegedly violated would *always* constitute sufficient compliance with the DSU, "*in each and every case*, without regard to the particular circumstances of such cases.[12] In the *Korea - Dairy* case itself, the Appellate Body held that the examination of the approach taken in any panel request must be made on a case-by-case basis.[13] It also ruled that it is the *claims* of the complainant, not detailed arguments, which must be set out with sufficient clarity.[14] The Appellate Body found in that case that the European Communities' request should have been more detailed "in view of the particular circumstances of the case".[15] These findings indicate that the particular circumstances of each case are fundamental to the sufficiency of any panel request.

13. Clearly then, it is by no means predetermined that the simple listing of relevant articles in a panel request will inevitably result in that request being insufficient to meet the standard required by the DSU. The sufficiency of the panel request in every case must be determined on its own merits, in light of the attendant circumstances and with regard to the particular background of each case. The question is whether the request sets out the claims of the complainant with sufficient clarity to clearly present the problem at the heart of the matter so as to comply with the letter and spirit of the DSU.[16]

14. New Zealand considers that this case, in light of its particular background and the attendant circumstances, is one in which the simple listing of articles of the Safeguards Agreement alleged to have been violated in the panel request is sufficient to present the problem clearly in such a way that the ability of the United States to defend itself in the course of Panel proceedings has not been prejudiced.

Multiple Obligations, Multiple Claims

15. The request by New Zealand for the establishment of a panel in this case listed the articles of the Safeguards Agreement and GATT 1994 which provide the basis of New Zealand's legal claim. The United States alleges that this is insufficient with respect to Articles 2, 3, and 4 of the Safeguards Agreement because those provisions contain multiple obligations. It refers to the statement by the Appellate Body in *Korea - Dairy* which points out that Articles 2 and 4 of the Safeguards Agreement have multiple paragraphs, each of which has at least one distinct obligation.[17]

16. However, New Zealand has claimed a breach of the obligations of the United States under Articles 2.1, 2.2, 4.1(a), 4.1(b), 4.1(c), 4.2(a), 4.2(b), and 4.2(c). It would be redundant to specify in the request that there has been a breach of each of these sub-paragraphs when all of the obligations in those provisions form the basis of the New Zealand claim. In addition, Article 3 contains only one explicit obligation. That provision provides that a Member may only apply a safeguard following an investigation which, among other things, looks at whether or not the application of the safeguards measure would be in the public interest, and contains an obligation to publish a report setting forth the findings and reasoned conclusions reached on all pertinent issues of fact and law. It is this obligation which New Zealand complains the United States has breached.

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[11] Para 124.
[12] Para 123.
[13] Para 127.
[14] Para 123.
[15] Para 131.
[16] See *Korea - Dairy*, paras 120 and 123.
[17] United States' Request for Preliminary Rulings, para 3, and *Korea - Dairy*, para 129.

17. Accordingly, the reference in New Zealand's panel request to Articles 2, 3, and 4 of the Safeguards Agreement in their entirety accords completely with the actual claims of New Zealand in this case.

"Evolving" Nature of Claims

18. In its allegations concerning the defective nature of the request, the United States refers to the "evolving" nature of the complainants' claims. However, as this submission has shown, New Zealand's claims in this case have been set out in very distinct terms. The Appellate Body has made clear that there is a significant difference between the *claims* identified in the request for a panel, which establishes the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions, and the first and second panel meetings with the parties as the case proceeds.[18] For example, in *Korea - Dairy* the Appellate Body stated that "claims, not detailed arguments, are what need to be set out with sufficient clarity".[19] The United States fails to draw the proper distinction between the claims identified in the request for the establishment of the panel, and the arguments supporting those claims. While the *arguments* will indeed continue to evolve throughout the development of the case, New Zealand's *claims* have been clearly set out in the request for a panel and have not changed since that time.

United States' Practice

19. The practice of the United States is also illustrative in determining the understanding of the United States as to the level of detail it considers to be required in panel requests alleging violation of provisions containing multiple obligations. For example, in its request for the establishment of a panel in *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, the United States simply listed a number of provisions, from several WTO Agreements, which it alleged to have been violated by Canada.[20] Yet its claims in that case related only to some of the obligations in some of those provisions. In particular, the listed provisions included "Article 9" of the Agreement on Agriculture. This Article consists of four paragraphs, several of which contain multiple obligations. The United States then argued before the panel violations only of paragraphs 1(a) and 1(c) of that Article.[21] Similarly, in *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) From the United States*, Mexico alleged the insufficiency of the United States' request for the establishment of a panel on grounds remarkably similar to those now claimed by the United States.[22] In that case the United States argued that it had exceeded the minimum requirements of Article 6.[23]

3. United States' Failure to Raise Issues at Appropriate Time

20. In addition the United States has had various opportunities to raise its objections to the request for the establishment of a panel, but has failed to do so. New Zealand's request for the establishment of a panel was submitted to the United States on 14 October 1999. The request was considered by the DSB at its meetings of 27 October and 3 November 1999 and again at its meeting

[18] *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R 19 December 1997, para 88.

[19] Para 123.

[20] WT/DS103/4, 3 February 1998. See also the United States requests in *Canada - Term of Patent Protection* (WT/DS170/2, 15 July 1999) and *Korea - Government Procurement* (WT/DS163/4, 11 May 1999).

[21] Report of the Panel, WT/DS103/R, 17 May 1999, para 3.6.

[22] WT/DS132/R, 28 January 2000.

[23] Para 7.10.

of 19 November 1999.[24] At those meetings New Zealand referred to its panel request and repeated the statement that:

> "New Zealand considered that the safeguard measure in question was inconsistent with the US obligations under Articles 2, 3, 4, 5, 11 and 12 of the Agreement on Safeguards and Articles I, II, and XIX of GATT 1994.[25]

New Zealand went on to state in both meetings that it was requesting the establishment of a panel with standard terms of reference, which is what the DSB in fact agreed to at the 19 November 1999 meeting. According to Article 7.1 of the DSU, the standard terms of reference for a panel refer to the complainant's written request in defining the parameters of the dispute to be considered by the panel.

21. No objection was raised by the United States or any other WTO Member to New Zealand's request for a panel at those meetings of the DSB. Rather, the United States responded to the request with a statement that it believed its measure satisfied all the relevant provisions of the Safeguards Agreement. This contrasts with the discussion in the DSB of the European Communities' request for the establishment of a panel in *United States - Countervailing Duties on Hot-Rolled Lead and Carbon Steel* on 17 February 1999, where the United States expressly raised its procedural objections to that request.[26]

22. Neither was any objection to New Zealand's request raised by the United States at the organisational meeting of the Panel on 28 March 2000. Indeed, the United States failed to raise any objection to the request for the establishment of a panel until 5 May 2000, one week before its First Submission was due, and nearly seven months after receipt of the panel request.

23. As the Appellate Body said in *United States - Tax Treatment for "Foreign Sales Corporations"*[27], a responding Member is required to:

> "seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes.[28]

It is incumbent on panels to prevent litigation techniques from detracting from the fair, prompt and effective resolution of trade disputes.

4. No Serious Prejudice to the Interests of the United States

24. In New Zealand's view, the United States has not demonstrated that it was prejudiced by the alleged insufficiencies in the request for the establishment of a panel. The United States was aware of the detail of the legal basis of the complaint from the time of New Zealand's request for the establishment of a panel.

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[24] WT/DSB/M/70, 15 December 1999 and WT/DSB/M/71, 11 January 2000.
[25] WT/DSB/M/70, p 8 and WT/DSB/M/71, p 14.
[26] WT/DSB/M/55, 29 April 1999.
[27] WT/DS108/AB/, 24 February 2000.
[28] Para 166. The Appellate Body has also in *European Communities - Customs Classification of Certain Computer Equipment* (WT/DS62/AB/R, 5 June 1998) expressed its concern over the potential for long drawn out procedural battles at the early stage of the panel process if too much specificity were required, for example in that case, in the definition of products covered by the dispute: para 71.

25. The Appellate Body in *Korea - Dairy* stated that:

> "whether the mere listing of articles claimed to have been violated meets the standard of Article 6.2 must be examined on a case-by-case basis. In resolving that question, we take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed provisions claimed to have been violated.[29]

26. The Appellate Body in that case denied Korea's appeal relating to the inconsistency of the European Communities' request for a panel with the DSU on the grounds that Korea had failed to demonstrate that the mere listing in the request of the articles alleged to have been violated had prejudiced its ability to defend itself in the course of the panel proceedings. Korea had asserted that it had sustained such prejudice, but had offered no supporting particulars.[30]

27. Similarly, in the case of *European Communities - Bananas*, the Appellate Body found that the European Communities had not been misled by a panel request that merely listed the articles allegedly violated as to what claims were in fact being asserted against it as respondent.[31] Likewise, in *European Communities - Customs Classification of Certain Computer Equipment*, the Appellate Body found that an alleged lack of precision of technical terms in a request for the establishment of a panel had not affected the rights of defence of the respondent in the course of panel proceedings.[32]

28. The Appellate Body stated in *European Communities - Bananas* that Article 6.2 of the DSU requires claims to be specified sufficiently to allow the defending party and any third parties "to know the legal basis of the complaint.[33] Accordingly, it seems clear that whether a panel request meets the requirements of the DSU depends on whether a respondent has suffered serious prejudice in its ability to defend itself, which in turn will depend in any case on whether the legal basis of the complaint was known by the respondent.

29. In the particular case under consideration, New Zealand considers that the United States has not been prejudiced in its defence. The United States knew of the full extent of New Zealand's claims from the time of the request for establishment of a panel. It had also received notice of the full extent of those claims in consultations under both the Safeguards Agreement and the DSU. New Zealand's request for a panel in fact did nothing other than confirm that the issues raised in the consultations were being claimed. This was then reconfirmed in New Zealand's First Submission. There were no surprises in that Submission, and nothing that could have caused prejudice.

30. In particular, the United States had extensive knowledge of the claims of New Zealand under Articles 2, 3 and 4 of the Safeguards Agreement resulting from the three sets of consultations held on this matter. Two sets of consultations were held on the United States' measure under Article 12.3 of the Safeguards Agreement, on 28 April 1999 and 14 July 1999. Further consultations were then held on 26 and 27 August 1999 under the DSU. Written questions were submitted to the United States at the first set of Article 12.3 consultations, and further such questions were submitted to the United States at the DSU consultations.[34] Australia also submitted questions to the United States at

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[29] Para 127.
[30] Para 131.
[31] Paras 140 and 141 and *Korea - Dairy*, para 123.
[32] WT/DS62/AB/R, 5 June 1998, para 70. See also *Korea - Dairy*, para 126.
[33] Para 143. See also *Korea - Dairy*, para 125.
[34] Written questions submitted at consultations under Article 12.3 of the Safeguards Agreement are attached as Annex NZ11. Written questions submitted at consultations under the DSU are attached as Annex NZ12.

consultations under the Safeguards Agreement and the DSU, at which New Zealand also participated as an observer.[35]

31. New Zealand's questions to the United States delivered at consultations under Article 12.3 of the Safeguards Agreement on 28 April 1999 included questions on the United States' obligations under Articles 2.1 (requirements for a valid safeguard), 4.1(c) (definition of domestic industry), and 4.2(b) (non-attribution of other factors and the United States' "substantial cause" test) of the Safeguards Agreement.[36] In addition, New Zealand's questions to the United States delivered at the DSU consultations, on which substantial discussion was held with the United States, included questions on the United States' obligations under Safeguards Agreement Articles 2.2 (exclusion of FTA partners from measure), 3.1 (failure to meet transparency requirements with regard to actual measure imposed), 4.1(b) (clearly imminent threat of serious injury), and 4.2(c) (failure to publish a demonstration of the relevance of the factors examined).[37] US responses to these questions frequently included a reference to specific pages in the USITC Report dealing with the areas under discussion, indicating a clear understanding by the United States as to which obligations under the Safeguards Agreement New Zealand's claims related to.

32. Furthermore, questions posed by Australia at consultations under Article 12.3 of the Safeguards Agreement on 4 May 1999, which New Zealand attended as an observer, in addition to the provisions mentioned above, also covered Articles 4.1(a) (significant overall impairment) and 4.2(a) (evaluation of factors to determine threat of serious injury).[38] The questions delivered to the United States by Australia at consultations under the DSU, on which there was substantial discussion, including by New Zealand, also covered the obligations of the United States under Articles 2, 3, and 4 of the Safeguards Agreement.[39] Once again, United States' responses to these questions, both oral and written, indicated a clear understanding of which obligations were alleged to have been violated by the complainants.

33. The significance of the consultations has been accepted by the Appellate Body in *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products* where it said:

> "For the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of subsequent panel proceedings.[40]

34. In conclusion, therefore, New Zealand does not see how any alleged lack of precision in the claims identified in the request for the establishment of a panel has affected the right of the United States to defend itself. The details of the legal claims made by New Zealand have been known to the United States for some time.

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[35] Australian written questions to the United States at consultations are annexed to Australia's first written submission as Exhibits 25 to 27.

[36] New Zealand questions 2-5 (attached as Annex NZ11).

[37] New Zealand questions 2, 3, 12, 13, 27, and 28 (attached as Annex NZ12). In addition, questions 8, 10, 14, 15, and 16 dealt further with matters already raised in previous consultations under Article 12.3 of the Safeguards Agreement. Other questions for the large part related to provisions listed in New Zealand's request for a panel on which the United States does not claim to have been prejudiced.

[38] Australian questions 6, 9, 11, 13, and 23. See also questions 1, 2, 7, 8, 10-12, 17-19, and 27 in relation to other paragraphs of Articles 2-4 of the Safeguards Agreement. Australian questions at the Article 12.3 consultations of 4 May 1999 are annexed to Australia's first written submission as Exhibit 25.

[39] See in particular questions 1, 5, 7, 13-15, 18-20, and 31. Australia's questions at the DSU consultations are annexed to Australia's first written submission as Exhibit 27.

[40] WT/DS50/AB/R, 19 December 1997, para 94.

3. Panel has Already Mitigated any Prejudice

35. United States has not demonstrated that any alleged insufficiencies in New Zealand's request for the establishment of a panel are so great as to mean that the request is flawed and that it therefore cannot provide the basis of the Panel's terms of reference. Moreover, by arguing that any prejudice suffered by it could be mitigated by extending the deadline for delivery of its First Submission, the United States has acknowledged that an extension of the deadline for its First Submission would be sufficient to address any such prejudice. The alleged insufficiencies of New Zealand's panel request, even if accepted by the Panel, are clearly therefore not such as to warrant a ruling that the Panel lacks a legal basis and cannot go forward.

36. Article 12.1 of the DSU directs a panel to follow the Working Procedures set out in Appendix 3 of the DSU. However, at the same time it authorises a panel to do otherwise than follow those procedures after consulting the parties to the dispute. In this way the DSU gives panels "a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated".[41] In this case the panel has extended the deadline for receipt of the United States' First Submission over the objections of the complaining parties.[42] This is within the panel's discretion following consultations with the parties. New Zealand considers that the Panel has thereby mitigated any prejudice that was alleged to have been suffered by the United States. There are accordingly no grounds for a ruling such as that requested by the United States, that the Panel lacks a legal basis and cannot go forward.

C. Exclusion of US Statute from Panel Terms of Reference

37. The United States claims that New Zealand alleges in its First Submission that the United States' safeguard statute, on its face, is inconsistent with United States' obligations under the Safeguards Agreement.[43] The United States argues that the consistency of the United States' statute is not within the Panel's terms of reference, and requests that the Panel therefore rule that the statute is outside the scope of this dispute.[44]

38. New Zealand fails to understand the basis for the United States' claims on this point. New Zealand requests no finding from the Panel on the consistency of the United States' statute with the Safeguards Agreement.

39. New Zealand claims that the United States wrongfully applies a "substantial cause" test that is not found in the Safeguards Agreement.[45] The application by the USITC of this test is inconsistent with the terms of the Safeguards Agreement. As was made clear in New Zealand's First Submission, it is the finding of the USITC, based on this test, which does not comply with the standards set out in the Safeguards Agreement. In New Zealand's view it is clearly within the Panel's terms of reference to examine the consistency of this finding, as well as the substantial cause test used by the USITC, with the Safeguards Agreement.

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[41] *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, 16 January 1998, page 61, fn 138. See also *EC Measures Concerning Meat and Meat Products (Hormones)*, Canada Panel Report (WT/DS48/R/CAN, 18 August 1997), para 8.18 and United States Panel Report (WT/DS26/R/USA, 18 August 1997), para 8.14. This approach of the panel was considered by the Appellate Body in *EC – Hormones* to be "reasonable": para 152.

[42] Letter to the Parties from the Secretary to the Panel, 10 May 2000, final paragraph.

[43] United States' Request for Preliminary Rulings, para 16.

[44] United States' Request for Preliminary Rulings, para 20.

[45] New Zealand First Submission, paras 7.73-7.76.

40. In accordance with Article 7 of the Dispute Settlement Understanding, the panel is to examine "the matter referred to the DSB". According to the Appellate Body in *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, the "matter" referred to a panel consists of two elements: the specific *measures* at issue and the *legal basis of the complaint.*[46]

41. The specific measure at issue in this case is that referred to in New Zealand's request for the establishment of a panel, namely the definitive safeguard measure imposed under the "Proclamation 7208 of 7 July 1999 - to Facilitate Positive Adjustment to Competition From Imports of Lamb Meat" and the "Memorandum of 7 July 1999 - Action under Section 203 of the Trade Act of 1974 Concerning Lamb Meat".[47]

42. It is clear from the documents referenced in the panel's terms of reference that the subject matter of this dispute is the imposition of a definitive safeguard measure on imports of lamb meat and the United States' domestic legal process which led to the imposition of the measure, including the investigation of the USITC, the findings and conclusions of the USITC, and the process leading to the final determination by the President of the United States. These, together with the claims made concerning their consistency with the Safeguards Agreement, are the "matter referred to the DSB". This forms the basis for the Panel's terms of reference.

43. The findings and conclusions of the USITC encompassed in the Panel's terms of reference include those relating to the substantial cause test. As noted in New Zealand's First Submission, the USITC based its substantial cause test on section 202(B)(1)B of the Trade Act 1974.[48] This is simply a statement of fact. It is not necessary for the panel to find that the United States' statute falls within its terms of reference. Indeed, New Zealand made no such request of the Panel. What is clear, however, is that the issue of the consistency of the substantial cause test used by the USITC with the Safeguards Agreement falls squarely within the Panel's terms of reference.

D. Business Confidential Information

44. Contrary to what the United States has implied, New Zealand has not sought business confidential information that was before the USITC but never disclosed to New Zealand. New Zealand's position on confidential information is set out in paragraphs 7.22 to 7.25 of its First Submission. In the absence of disclosure of the information on which its competent authorities relied, the United States cannot rely on that information to support the conclusions reached by the USITC and by the US Administration to demonstrate its compliance with the obligations under the Safeguards Agreement or GATT 1994.

E. Conclusion

45. New Zealand has shown that there is no basis to the claims made by the United States in its request for preliminary rulings. New Zealand's request for the establishment of a panel is clearly sufficient to satisfy the requirements of the DSU. Furthermore, there is no basis to the United States' request for a ruling that its safeguard statute should be excluded from the Panel's terms of reference. Finally, New Zealand has restated its position with regard to Business Confidential Information.

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[46] WT/DS60/AB/R, 2 November 1998, para 72.
[47] New Zealand First Submission, Annex NZ5.
[48] New Zealand First Submission, para 7.73.

ANNEX 2-4

ORAL STATEMENT OF NEW ZEALAND CONCERNING
REQUESTS FOR PRELIMINARY RULINGS

(25 May 2000)

Mr Chairman, members of the Panel, representatives of the United States, of our co-complainants Australia, and members of the Secretariat:

1. New Zealand has set out its detailed views on the requests by the United States in a written submission delivered to the Panel last week. Accordingly, I will not repeat those views in full in this statement. Instead, I will highlight the key elements of our position in relation to each of the United States requests.

Request Meets Required Standard in This Case

2. New Zealand does not accept that its request for a Panel in this case failed to meet the standard of Article 6.2 of the (DSU), nor that the United States has been prejudiced by the request. The United States delay in bringing this request would suggest that any prejudice to the United States has been caused by its own delay. Furthermore, even if the United States had been prejudiced as it claims, the panel's decision to extend the deadline for delivery of the United States First Written Submission has now addressed this issue. Finally, the lateness of the United States objections to the panel request clearly indicate that those objections are raised as a tactical litigation technique, the only purpose of which was to disadvantage New Zealand in its preparation for this Panel hearing.

3. Notwithstanding United States misrepresentations of the findings in that case, the Appellate Body decision in *Korea - Dairy* clearly indicated that the particular circumstances of each case are fundamental to the sufficiency of any panel request, and that it is the *claims* of the complainant, not detailed arguments, which must be set out with sufficient clarity.[1]

4. In the particular circumstances of this case, New Zealand claimed a breach of the obligations of the United States under all of the sub-provisions of Articles 2 and 4 of the Safeguards Agreement. Any further specificity would have required New Zealand to detail its arguments, something which it is well accepted a Member is not required to do. Moreover, it would have been redundant to specify in the request that a breach of each of the sub-paragraphs in Articles 2 and 4 was claimed. As for Article 3, that provision contains only one explicit obligation, to publish a report setting forth the findings and reasoned conclusions reached on all pertinent issues of fact and law, and that is the obligation which New Zealand complains the United States has breached.

5. As we have pointed out, the United States own practice indicates that the listing of provisions of WTO Agreements allegedly violated can be sufficient in a panel request. In fact, New Zealand has gone beyond what the United States itself has done in the cases of *Canada - Dairy*[2] and *Mexico - High Fructose Corn Syrup.*[3]

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[1] Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products (WT/DS98/AB/R, 14 December 1999), para 123.

[2] United States request for the establishment of a panel, *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products* (WT/DS103/4, 3 February 1998).

[3] United States request for the establishment of a panel, Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) From the United States, (WT/DS132/2, 14 October 1998).

No Prejudice to the United States

6. Even if New Zealand's request for a panel was insufficient, the United States has not demonstrated that it was prejudiced in its ability to defend itself in the course of the panel proceedings. In fact, it was aware of the detail of the legal basis of the complaint from the time of New Zealand's request for the establishment of a panel.[4]

7. The United States claims that it has suffered prejudice from the listing of Articles 2, 3, and 4 of the Safeguards Agreement in the panel request. It claims that it could not have known under which of the multiple obligations contained in those provisions New Zealand would raise claims.[5] But where, as here, a party raises claims under each and every one of the multiple sub-provisions of Articles 2 and 4 and with regard to the only explicit obligation contained in Article 3, I find it difficult to understand how this could have resulted in any prejudice.

8. It might be possible to conceive of prejudice to the preparation of a defence in the opposite situation - that is, if the United States claimed it had understood from the panel request that only certain sub-provisions would be raised, only to find that in fact additional claims were made in the First Submission. In such a situation, the United States may well be justified in arguing that the additional claims made in the submission were prejudicial to its ability to defend itself, and should not be considered by the Panel.

9. However, in the present case this did not occur. New Zealand's panel request implied, through the listing of Articles 2, 3, and 4 of the Safeguards Agreement in their entirety, that all of the obligations of the United States under those provisions would be challenged. And that is exactly what happened. Accordingly, any time spent by the United States preparing its defence on any of those obligations would seem to be time well-spent. Where is the disadvantage?

10. Furthermore, the United States had received notice of the full extent of the complainants' claims prior to the request for a panel, in consultations under both the Safeguards Agreement and the DSU. New Zealand's request for a panel in fact did nothing other than confirm that the issues raised in the consultations were being claimed. The United States participated in discussions on those issues during consultations, and even provided written responses to questions raised by the complainants on the issues of which it now claims to have had no prior knowledge.[6] Both the discussions and the written responses clearly indicate that the United States knew the basis of the claims made by New Zealand in its First Written Submission.

Third Parties

11. Similarly, no prejudice to the interests of third parties has been demonstrated. The European Communities, in its Third Party Submission, asserts that it has been disadvantaged by New Zealand's panel request through not knowing the exact legal basis of its claims under Articles 2, 3, and 4 of the Safeguards Agreement.[7] However, it has provided no evidence of such a disadvantage. Accordingly, its claim is made on exactly the same basis as that of Korea in the *Korea*

[4] In its Third Party submission the European Communities indicates that it agrees with New Zealand that in the specific circumstances of this case the United States was informed of the exact legal basis of the complaint, in keeping with the requirements of the DSU: para 12.

[5] United States letter to the Chairman of 5 May 2000, para 9.

[6] Letter from Permanent Mission of the United States to the Permanent Mission of the WTO of 23 July 1999, attached to New Zealand's Response to United States Request for Preliminary Rulings as Annex NZ11.

[7] Para 11.

- *Dairy* case, which was rejected by the Appellate Body on the basis that "no supporting particulars" had been offered for the alleged impairment.[8]

12. As indicated earlier with regard to United States claims, the European Communities was aware of the detail of the legal basis of New Zealand's claims from the time of the request for a panel. New Zealand's request listed Articles 2, 3, and 4 of the Safeguards Agreement, and our claims relate to all of the sub-provisions under those Articles. Accordingly, the European Communities cannot have been prejudiced by the request.

Any Prejudice Already Mitigated

13. Finally, even if the United States had suffered any prejudice to its ability to defend itself in the course of panel proceedings due to the simple listing of provisions allegedly violated in New Zealand's panel request, the extension by the Panel of the deadline for receipt of the United States First Written Submission has now mitigated any such prejudice.

Failure to Raise Objections at Appropriate Time

14. For all these reasons, the United States request has no basis. But there is an additional matter to which I would like to draw the Panel's attention. The United States chose to raise its procedural objections to the panel request only at a late stage. Having known the contents of that request since October last year, the United States failed to indicate any problem either in the DSB, at the organisational meeting of the Panel, or at any other time to New Zealand. We consider this to be inconsistent with the Appellate Body's ruling in the *Foreign Sales Corporations* case that respondents in dispute settlement cases should bring claimed procedural deficiencies to the attention of the complainant and the DSB or the Panel at an early stage in proceedings, with a view to fair, prompt and effective resolution of the dispute.[9] This is even more important where the dispute relates to measures taken under the Safeguards Agreement.

15. There would have been no disadvantage to the United States in raising its procedural objection to the request at a much earlier stage. There was, however, a considerable disadvantage to New Zealand in raising it at this late stage. New Zealand had already agreed, in the spirit of prompt and efficient resolution of the dispute, to a working timetable of the Panel which allowed it less than 10 working days between receipt of the United States First Written Submission and presentation of New Zealand's case at this hearing. New Zealand's preparation time for this hearing, already minimal, was then further reduced by the need to write an additional submission, at short notice, in response to the United States request for preliminary rulings and by the extension of the United States deadline for its First Written Submission.

16. New Zealand has accordingly been disadvantaged in presenting its claim in the course of the panel proceedings. The United States, however, has suffered no prejudice. As the Appellate Body said in the *Foreign Sales Corporations* case, litigation techniques should not detract from the fair, prompt and effective resolution of trade disputes. Accordingly, in New Zealand's view the Panel should reject the United States request for a ruling that the panel request in this case was insufficient.

Exclusion of US Statute from Panel Terms of Reference

17. As we have noted in our written submission on this matter, New Zealand fails to understand the basis for the United States request for a ruling that its safeguard statute is outside the scope of this

[8] *Korea - Dairy*, para 131.

[9] United States - Tax Treatment for "Foreign Sales Corporations" (WT/DS108/AB/R, 24 February 2000), para 166.

dispute.[10] New Zealand has in fact not requested any finding from the Panel on the consistency of that statute with the Safeguards Agreement. What New Zealand does ask the Panel to find is that the "substantial cause" test applied by the USITC in the course of its safeguard investigation has no justification in the Safeguards Agreement and thus is in violation of its WTO obligations.

18. It is clear from the documents referenced in the panel's terms of reference that the subject matter of this dispute is the imposition of a safeguard measure on imports of lamb meat and the United States domestic legal process which led to the imposition of that measure. That process includes the USITC's investigation and its findings and conclusions, as well as the process leading to the final determination by the President of the United States. These findings and conclusions in turn include those relating to the substantial cause test used by the USITC.

Confidential Information

19. New Zealand made clear in its written submission responding to the United States request for preliminary rulings that, contrary to what the United States has implied, New Zealand has not in fact sought the disclosure of business confidential information from the United States.[11] Our position on confidential information is set out in our First Written Submission.[12] That is, that the United States cannot rely on information not disclosed by the USITC to support the conclusions reached by the USITC in order to demonstrate its compliance with the obligations under the Safeguards Agreement or GATT 1994. Nor can the United States rely on information not disclosed by the United States Administration to demonstrate the compliance of the measure with the obligations under the Safeguards Agreement and the GATT 1994.

Conclusion

20. To conclude, Mr Chairman, the claims made by the United States in its request for preliminary rulings should be rejected.

[10] New Zealand's Response to United States Request for Preliminary Rulings, para 38.
[11] Para 44.
[12] Paras 7.22-7.25.

ANNEX 2-5

FIRST ORAL STATEMENT OF NEW ZEALAND

(25 May 2000)

Mr Chairman, members of the Panel, representatives of the United States, of our co-complainants Australia, and members of the Secretariat:

1. This case involves the interpretation of important provisions of the Safeguards Agreement and of GATT 1994. At issue is the right of Members to have safeguard measures applied against them only in strict accordance with the provisions of the Safeguards Agreement. The United States has imposed a safeguard measure in this case that does not comply with those obligations. Hence, New Zealand has brought this matter before the Panel.

2. In my presentation this morning I shall not go over at length what was said in New Zealand's First Written Submission. Instead, I shall give a brief resumé of the essence of New Zealand's case and then focus on the key issues for the Panel to determine. In doing so, I shall make some comments on the arguments raised by the United States in its First Written Submission. However, at the outset, I would like to make some general comments about the approach of the United States in its response to New Zealand's claim.

3. The central questions in this case are whether the competent agencies of the United States have conducted the investigation and made the determinations that are required by the Safeguards Agreement and GATT 1994 before applying the measure in question, and whether they have applied the measure in accordance with the relevant provisions of those agreements. Much revolves, of course, around the investigation and report of the USITC.

4. In its First Written Submission, the United States simply misses the mark. It provides a rebuttal of arguments that New Zealand did not make, and fails to rebut the arguments that New Zealand did make. It characterises New Zealand's position as one that seeks to reargue the case that was presented to the USITC, and as a result mischaracterises New Zealand's arguments. In particular, the United States says, New Zealand "improperly seeks to have the Panel make its own *de novo* interpretation of the record"[1], inconsistently with the relevant standard of review.

5. This, of course, is not the position of New Zealand. In its First Written Submission, New Zealand pointed out that the USITC had failed to make the determinations or provide the analysis or reasoning that are required by the Safeguards Agreement. This is not a rearguing of the facts; it is an assertion, substantiated by reference to the report of the USITC, that the specific obligations of the Safeguards Agreement and of GATT 1994 have not been met.

6. Moreover, in the light of the allegations it makes in respect of the New Zealand claim, the United States own response is curious. In its First Written Submission, the United States describes the report that it wishes that the USITC had written, not the report that the USITC actually wrote. It fills in gaps in the USITC report and seeks to ascribe reasoning and conclusions to the USITC that simply are not found in the report. In doing so, it misrepresents the findings of the USITC. In this regard, New Zealand respectfully suggests that the Panel look closely at the way the United States First Written Submission allegedly bases its arguments on the USITC Report.

[1] Para 44.

7. Two examples will illustrate this, one relating to the threat of serious injury and the other relating to causation. First, in paragraph 78, the United States says "The essence of the USITC's threat determination rests on evidence in the USITC record supporting four principal findings". These "findings" are then listed in paragraphs 79 to 82. Members of the Panel might have thought, as we did, that this reference to "findings" was to "findings" made by the USITC. But the first clue that this is not so is found in the fact that there are no footnote references to these "findings". And, on further investigation we discovered that none of these alleged "findings" were in fact "findings" of the USITC. They are "findings" cobbled together by the United States in its First Written Submission for the purposes of this case -- an attempt to do the job that the USITC failed to do.

8. Second, in paragraph 110 of its First Written Submission, the United States asserts, "The USITC did not find increased imports to be one among several causes of lower prices and domestic industry sales volumes." This time there is a footnote provided. It takes the reader to page I-26 of the USITC Report. There, the only conceivable statement of the USITC to which the United States could be referring is the statement that, "we find that the increased imports are an important cause, *and a cause no less important than any other cause*, of the threat of serious injury to the domestic lamb meat industry." (Emphasis added.) Thus, the reference actually contradicts the statement in the text. And, indeed, the text prior to page I-26 lists all of those several factors other than increased imports that were considered by the USITC to cause a threat of serious injury, but which were of equal or less importance than increased imports.

9. Thus, it can be readily seen, Mr Chairman, that a careful reading of the actual report of the USITC shows that the USITC did not do what the United States now claims that it had done.

10. The United States cavalier approach to the facts and to the report of the USITC is paralleled by its treatment of the law. In its First Written Submission, New Zealand pointed out that in view of the extraordinary nature of the safeguard remedy, the Agreement on Safeguards was to be interpreted strictly[2] , a point with which the EC agreed in its Third Party Submission.[3] The United States did not disagree with this in its First Written Submission and would appear to accept that a strict approach to the interpretation of the Safeguards Agreement is correct.

11. However, in practice, the United States deviates fundamentally from the proper approach to the interpretation of safeguard obligations under the WTO agreements. The novel, extravagant and expansive interpretations of the provisions of the Safeguards Agreements that the United States offers in its arguments would turn emergency action into routine action. It would turn measures designed to provide interim relief in extraordinary circumstances into measures that would protect a domestic industry from the impact of internal domestic factors or from fluctuations that occur routinely in certain markets.

12. In short, Mr Chairman, the United States arguments in this case, developed in order to justify a domestic process to which the United States appears to be particularly attached, fly in the face of the very object and purpose of rules on emergency action in the Safeguards Agreement and GATT 1994.

Summary of the New Zealand Case

13. As New Zealand pointed out in its First Written Submission, the long-term decline in the United States lamb meat industry, which has been caused by domestic factors, was used by the USITC to justify the imposition of a safeguard measure on imports of lamb meat. In short, imports of lamb meat were to become the scapegoat for problems within the United States lamb meat industry. In doing so, the United States ignored the fact that the increase in imports responded to a demand in the United States that was not being filled by domestic production for the very reasons that were

[2] Para 7.19.
[3] Para 3.

causing its decline. Imports were a response to circumstances that were occurring in the United States lamb meat industry, not the cause of those circumstances.

14. Knowing that it could not justify a case on the basis of the USITC's actual report, the United States First Written Submission sought to focus on a brief window of the period of investigation used by the USITC, essentially a fifteen month period in 1997-98. However, as New Zealand will point out later in this Statement, the United States not only provides a misleading description of what happened in that period, it also seeks to justify the decision of the USITC on the basis of reasoning that is not the reasoning of the USITC. Moreover, in seeking to rely on this new basis for upholding the USITC's determination, the United States misapplies the decision of the Appellate Body in *Argentina-Footwear*.[4]

15. Mr Chairman, there are five fundamental ways in which the United States has failed to comply with its obligations under the Safeguards Agreement and GATT 1994.

> *First*, the United States failed to identify any "unforeseen developments" which resulted in increases in imports, notwithstanding that under Article XIX of GATT 1994 such "unforeseen developments" are a prerequisite to the taking of a safeguard measure.
>
> *Second*, the United States defined its "domestic industry" for the purposes of the safeguard investigation in a way that has no basis in Article 2.1 and Article 4.1(c) of the Safeguards Agreement.
>
> *Third*, the United States reached a conclusion that there was a "threat of serious injury" without complying with its obligation under Article 4.1(b) of the Safeguards Agreement to establish that serious injury was "clearly imminent".
>
> *Fourth*, the United States did not make a finding that the alleged threat of serious injury was caused by an increase in imports because it applied a test for the determination of causation that cannot be justified under Article 2.1 and Article 4.2(b) of the Safeguards Agreement.
>
> *Fifth*, in adopting the actual safeguard measure applied against New Zealand, the United States did not comply with its obligation under Article 5.1 of the Safeguards Agreement to apply such measures "only to the extent necessary" to prevent serious injury and to facilitate adjustment, nor did it provide any justification for its measure.
>
> *Finally*, New Zealand has also claimed that the United States is not in compliance with its obligations under Articles 2.2 and 3.1 of the Safeguards Agreement and of GATT Articles I and II. Furthermore, in the light of information now disclosed by the United States in its First Written Submission, New Zealand will also argue that the United States is in breach of its obligations under Article 12.2 of the Safeguards Agreement.

16. Mr Chairman, I would like now to treat each of these arguments in more detail. However, as a preliminary matter, I would point out, that the obligations under the Safeguards Agreement and under GATT 1994 are obligations with which a Member must comply in determining whether to take a safeguard measure or in the taking of that safeguard measure. The United States cannot now, in these proceedings, stand in the shoes of the USITC and cure the defects that exist in the USITC's reasoning or analysis.

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[4] Argentina - Safeguard Measures on Imports of Footwear (WT/DS121/AB/R, 14 December 1999).

Unforeseen Developments

17. In its First Written Submission, New Zealand pointed out that nowhere in the report of the USITC is there any reference to "unforeseen developments" that resulted in an increase in imports, let alone any attempt to identify what those developments might have been.[5] Yet the existence of such "unforeseen developments" is a prerequisite set out in Article XIX of GATT 1994. That is not a problem, the United States says in its First Written Submission, such unforeseen developments are apparently implicit in the USITC report[6], even though the USITC does not use the term "unforeseen developments" at all.

18. However, the "significant, unexpected changes" identified by the United States as "unforeseen developments" turn out to be nothing more than an increase in imports. Thus, the United States is seeking to establish that the need for "unforeseen developments" as required by GATT Article XIX, is satisfied by showing that there has been an increase in imports, a condition required by Article 2.1 of the Safeguards Agreement.

19. If such an argument was correct, then there would have been no need for the Appellate Body in both *Argentina-Footwear* and *Korea-Dairy*[7] to conclude that the requirement of "unforeseen developments" in GATT Article XIX continues as an obligation on Members. It would have been sufficient to show that imports had increased. In effect, having failed as a third party in *Argentina-Footwear* and *Korea-Dairy* to write the need for "unforeseen developments" out of its WTO obligations, the United States is seeking to achieve that same objective through a different argument in this case.

20. Furthermore, as the EC has pointed out in its Third Party Submission[8], the United States argument is nonsensical. GATT Article XIX provides that in order for a safeguard measure to be applied, increases in imports of a product must "result" from "unforeseen developments." Thus, the United States argument is that increases in imports of lamb meat are the result of an increase in imports of lamb meat, which is simply a tautology. And, as the EC also noted, the United States cannot give such an argument respectability by talking about changes in product mix from frozen to chilled.

21. Indeed, even if this were not a tautology, imports in chilled lamb meat could not be an "unforeseen development". Such imports had been in the United States market at least since 1990. They were a response to developments within the United States market and not an "unforeseen development". Imports of chilled lamb meat increased to meet unfulfilled domestic demand and, as the USITC itself recognised, to respond to new demands. The United States domestic industry was unable to meet that demand because of a contraction in the domestic supply of lambs. Thus, even if imports of chilled lamb meat could qualify in principle as "unforeseen developments", they were in fact foreseeable and foreseen.

22. In any event, the United States arguments on this issue constitute nothing more than *ex post facto* rationalisation. It is an attempt to find within the USITC report some development which can be characterised as "unforeseen" in order to justify consistency with Article XIX of GATT 1994. In order to do this, however, the United States has to mischaracterise what the USITC concluded.

23. The United States argues that the USITC concluded that imported and domestic product became more similar during the period of investigation, through increased imports of fresh and chilled

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[5] Para 7.31.

[6] Para 60.

[7] Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products (WT/DS98/AB/R, 14 December 1999).

[8] Para 22.

lamb meat and increases in the size of imported product.[9] The United States places particular emphasis on the alleged consideration by the USITC of the increasing proportion of imported chilled product.[10] In fact as the USITC made clear in its discussion of remedy, "The conditions of competition in both the domestic and world lamb meat markets have changed in *several* important respects during the past several years."[11] (Emphasis added.) These "several important respects" included not only the increasing proportion of chilled product, but also the fact that lamb meat consumption represents a minimal portion of United States protein consumption; the "significant change" as a result of the repeal of the Wool Act; and the substantial drop in pelt prices occurring around mid-1998.[12] What the United States has done in its First Written Submission is highlight one of these factors, and claim that it is a development that was considered by the USITC to be unforeseen.

24. However, the United States has attributed to this one factor a weight that the USITC did not give it. There was no discussion by the USITC of a "sudden" and unexpected" change in the competition from imported lamb meat. The 1995 USITC Report cited by the United States highlights the fact that chilled lamb meat represented 31 per cent of all lamb meat imports in 1990.[13] In the case of New Zealand product, this proportion was at the same level in 1997.[14] Increases in exports of chilled product cannot therefore have been a sudden and unexpected development.

25. Indeed, the USITC could not have viewed any change from frozen to chilled product as constituting an unforeseen development. It noted that lamb meat was increasingly entering the United States market in chilled and fresh form in making its determination that imported and domestic lamb meat were like products.[15] In doing so, it concluded that both frozen and chilled lamb meat were "like" domestic lamb meat. It would be incongruous to conclude that there was something "sudden", "unexpected", or "unforeseen" about a change from one like product to another.

26. Thus, in order to try and make an argument that increased imports were a result of unforeseen developments, the United States has ignored what the USITC actually found and sought support from what the USITC did not find. It seeks to construct an argument out of things the USITC said when it was assessing causation and like product, and in considering a remedy determination. But, the reality is that at no time did the USITC turn its mind to the question of whether those increased imports resulted from "unforeseen developments" and it is now too late for the United States to concoct such an argument for the USITC.

Domestic Industry

27. In its First Written Submission, New Zealand pointed out that the United States had not applied the terms of the Safeguards Agreement in its determination of what constituted the domestic industry that was allegedly threatened with serious injury.[16] Instead of determining what industry produced a product that was "like or directly competitive" with imported lamb meat, as Articles 2 .1 and 4.1(c) of the Safeguards Agreement require, the United States instead applied a test to determine what constituted the abstract class of "producers as a whole", regardless of whether members of that

[9] USITC Report, I-22.
[10] United States First Written Submission, paras 56 and 57.
[11] USITC Report, I-32.
[12] USITC Report, I-30.
[13] USITC, Lamb Meat: Competitive Conditions Affecting the US and Foreign Lamb Industries, Inv. No. 332-357, August 1995, Table 2-14.
[14] USITC Report, I-32.
[15] USITC Report, I-11.
[16] Para 7.41.

class actually produced a "like or directly competitive product."[17] In doing so, the United States ignored the now well-established rules of interpretation applicable to WTO agreements.

28. Article 31 of the Vienna Convention on the Law of Treaties requires that the words of a treaty be given their ordinary meaning in their context and in the light of the object and purpose of the treaty as a whole. The United States approach is to interpret the words "producers as a whole" in isolation from their context, ignoring the fact that it is only those producers who produce a "like or directly competitive product" that can be included in the class of "producers as a whole".

29. The United States approach equally ignores the fact that the qualifying term " as a whole" defines the scope of the producers within an industry; it is not a term that defines the scope of the industry itself. Its purpose is to ensure that a safeguard investigation is not limited to selected individual members of an industry. Rather, it must look at the industry as a whole. The term "as a whole" was not designed to be used to expand the membership of an industry beyond those who produce "like or directly competitive products."

30. The USITC's determination of the "domestic industry" was based on its view that there was a "continuous line of production" from raw to processed product and a "substantial economic interest" between growers and processors. The United States seeks to justify this approach on the grounds that it is the "traditional USITC approach."[18] But the fact that it is traditional is irrelevant. New Zealand was not accusing the USITC of inconsistency; rather it was asking and still asks, how can such an approach be justified under the Safeguards Agreement?

31. The United States seeks to distinguish the cases referred to by New Zealand where "vertical integration" and "continuous lines of production" theories were rejected. It argues that the facts were different or that the panel report was not adopted.[19] But, the United States cannot find any case where its "vertical integration" or "continuous line of production" theories were applied. And so they remain just that; theories that have not been applied.

32. Nor could those theories have been applied. The United States was right to be so hesitant in its assertion that its analysis, although not necessarily required by the Safeguards Agreement, is nonetheless "permitted" by it.[20] The United States theories could only be "permitted" by the Safeguards Agreement if the actual wording of Articles 2.1 and 4.1(c) is ignored.

Threat of Serious Injury

33. In its First Written Submission, New Zealand demonstrated that the USITC had failed to make any determination that a "significant overall impairment" constituting serious injury was "clearly imminent".[21] Thus its determination that there was a threat of serious injury was not in conformity with the provisions of Article 2.1 and Articles 4.1(a) and 4.1(b) of the Safeguards Agreement. The USITC had referred to a whole variety of factors but had failed to "evaluate" them as required by Article 4.2(a), nor had it "demonstrated the relevance of the factors examined" as required by Article 4.2(c) of the Safeguards Agreement. Moreover, it made no prospective analysis that could be the basis for a determination that what would happen in the future could be regarded as a threat.

[17] USITC Report, I-12 to I-14.
[18] United States First Written Submission, para 62.
[19] United States First Written Submission, paras 72 - 76.
[20] United States First Written Submission, para 70.
[21] Page 53.

34. The United States has objected to New Zealand's analysis, arguing that it constitutes an attempt to reweigh the evidence before the USITC.[22] But the United States misses the point. New Zealand was not, in its First Written Submission, second-guessing the USITC. It was pointing out that the USITC had not analysed the relevant factors as it was required to do under the Safeguards Agreement, nor had it produced reasoned conclusions based on objective evidence.

35. However, the United States own approach to the issue of threat of serious injury is masked in obscurity. Instead of dealing separately with the issues of threat of serious injury and causation, the United States conflates these two issues. Although, it feels somewhat guilty about doing so, stating that Article 4.2(b) "certainly suggests that the demonstration of a causal link may be a distinct conclusion from the establishment of a threat of serious injury"[23], its objective is patent. By mixing the two issues together the United States is able to use considerations relating to causation to bolster its arguments about threat, and to use considerations relating to threat to appear to provide support for its causation argument. If the United States had dealt with the issues separately it would have been readily apparent that the USITC had failed to meet the test for either.

36. In its First Written Submission the United States argues that there was a threat of serious injury to its domestic industry because of increases in imports that occurred in a window during the period of investigation.[24] The United States refers to this as a "surge" in imports "late in the period of investigation" which was projected to continue into 1999.[25] The United States discussion is focused then on increases in imports that occurred in 1997-98. It seeks to draw support for emphasising the most recent period from the decision of the Appellate Body in *Argentina-Footwear*.[26]

37. However, the United States only focuses on part of what was said by the Appellate Body in *Argentina-Footwear*, referring to "the Appellate Body decision's admonition that an injury analysis must examine sudden, recent developments."[27] In fact what the Appellate Body said was that both Article 2.1 of the Safeguards Agreement and Article XIX of the GATT require that "the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'".[28]

38. When the findings of the USITC are examined in fact, it is clear that the conditions set out in *Argentina-Footwear* have not been met. Once again, the United States puts words into the mouth of the USITC that are not to be found in its report. The USITC did not find that imports from Australia and New Zealand *surged* late in the period of investigation. The market share of imports in terms of quantity increased from 11.2 per cent in 1993 to 23.3 per cent in interim 1998.[29] Of that increase in market share, 45 per cent of that increase took place between 1993 and 1996, with 55 per cent occurring between 1997 and interim 1998.[30] This is neither a "surge" as the United States claims, nor something "sudden" or "sharp" enough to come within the terms of *Argentina-Footwear*.

39. Similarly, the United States tries to ascribe to the USITC the view that a change in product mix, from frozen to chilled, led to a fall in domestic prices.[31] But the USITC did not say this. It simply noted that "the increase in imports has caused prices to fall in the short run."[32] There is no

[22] United States First Written Submission, para 139.
[23] United States First Written Submission, para 147.
[24] Para 83.
[25] Para 79.
[26] Paras 78 and 83.
[27] Para 83.
[28] Argentina - Footwear, para 131.
[29] USITC Report, Table 32, II-50.
[30] USITC Report, Table 32, II-50.
[31] United States First Written Submission, para 81.
[32] USITC Report, I-24.

reference by the USITC to the impact of different product mixes. Furthermore it is incorrect to state, as the United States does[33], that the USITC found that the trends in lamb meat prices would continue in the future. There was no prospective analysis by the USITC of w hat the trend in the economic indicators might show in the future.

40. The United States seeks to link its window of increases in imports with a fall in domestic prices in 1997-98.[34] But in doing so, it fails to take into account the fact that according to the USITC the fall in domestic prices which began in mid-1997 had begun to recover by July 1998.[35] What the United States is asking the Panel to accept is that such a price decline in one season alone is a sufficient basis on which to place a safeguard measure on imports. Further, were one to adopt the United States approach to the interpretation of *Argentina- Footwear*, of focusing only on the *most* recent developments, the focus in this case would then be on the last three months, when domestic prices had increased.

41. The United States First Written Submission also produces a new theory. Drawing on the USITC's conclusion that there had been a stabilisation of demand from 1996 on, the United States now claims that faced with such a demand an increase in supply as a result of increased imports will have a negative effect on prices.[36] This, too, is a theory that cannot be found in the USITC's Report. Moreover, such a theory ignores several factors, all of which can be found in the USITC's Report.

42. Even where demand has stabilised, an increase in supply does not necessarily mean that there will be a decrease in price. Promotional or market development activities will affect price. The USITC itself recognised that the failure of the United States industry to implement an effective marketing programme to bolster demand could have had an important impact on the industry, and hence on price.[37] Prices may also decline because of the competing prices of other meats. Lamb meat competes on the market with other meats, notably pork. Indeed, there was a fall in the prices of beef and pork over much the same period as the fall in lamb meat prices.

43. The assumption in the United States First Written Submission that an increase in imports during a period of stabilised demand would result in price declines, is also based on a supposition that domestic prices for lamb meat would fall in the face of undercutting of prices by imported product. The United States claims underselling by imports of some individual cuts apparently throughout the period of investigation, but has failed to disclose the data on which it relies.[38] As Figure 5 in New Zealand's First Written Submission shows, imported prices followed domestic prices, they did not lead them and they did not fall to the same degree as domestic prices over 1997 and 1998.

44. In short, the new United States theory that increased imports into a market where consumer demand had stabilised would result in a threat of serious injury simply does not stand up to analysis. The fallacy in the position now advocated by the United States in its First Written Submission, is that conclusions can be drawn about the impact of imports by taking a snap-shot of a short period of time. Only in circumstances where the short-term indicators are clear can any such conclusions be drawn. But, as has been pointed out already, the short-term indicators are not conclusive in this case. That is why the USITC sought to look at a broader picture. What the United States is doing is seeking to base a safeguard measure on a conclusion that it has drawn on the basis of what is no more than a usual fluctuation in agricultural trade.

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[33] United States First Written Submission, para 81.

[34] United States First Written Submission, para 81.

[35] USITC Report, I-20; II-55. On page I-18 of its report the USITC states, however, that the fall in domestic prices began in late-1997 and continued in 1998.

[36] Para 81.

[37] USITC Report, I-26.

[38] Para 87.

45. The reality is that neither the USITC nor the United States, in its role as the reviser of the USITC Report, has examined any trends in economic indicators which might have demonstrated that significant overall impairment was "clearly imminent". There is no prospective analysis undertaken by the United States of the likely trends in the economic indicators of the health of the domestic industry. The only prospective analysis is related to increased imports. And that is no more than an assumption, based on the United States commingling of the issues of causation and threat, that if imports increase then domestic industry indicators will deteriorate. This is the kind of conjecture that the Safeguards Agreement proscribes.

46. By focusing on just one aspect of the decision of the Appellate Body in *Argentina-Footwear*, that of the need to look at a recent period, the United States has ignored the essential point of that decision. It has identified an increase in imports that are recent enough, but none of the United States arguments demonstrate that they are sudden enough, sharp enough or significant enough to meet the standard established in *Argentina-Footwear*.

Causation

47. As New Zealand pointed out in its First Written Submission, Article 2.1 of the Safeguards Agreement provides that a safeguard measure may be imposed only where increased imports cause the threat of serious injury.[39] The Safeguards Agreement does not qualify the concept of "cause" in any way. Indeed, it provides that injury caused by factors other than increased imports cannot be attributed to increased imports. As a result, a Member cannot apply a safeguard measure to a threat of serious injury that is caused by both increased imports and other factors. A safeguard measure can be applied only if the threat of serious injury is caused by increased imports.

48. Accordingly, the USITC's determination that causation existed is flawed because it was based not on a finding that the alleged threat of serious injury was caused by increased imports, but on a finding that increased imports were a "substantial cause" of that alleged threat. But nowhere in the Safeguards Agreement is the word "cause" qualified by the word "substantial", nor is such an interpretation justified under that Agreement or under GATT 1994.

49. The United States appears to argue that the "substantial cause" test is justified because it is found in a United States statute and has been there for "over 25 years."[40] Neither of these considerations is relevant. It does not matter whether the test applied by the USITC is based on a statute or developed by the USITC of its own accord. The question for a WTO panel is simply whether the test conforms with WTO law. The fact that the test has been applied by the USITC for over 25 years is equally irrelevant. Longevity is hardly a defence to WTO-inconsistency.

50. The United States argues that the wording of Article 2.1 on causation leaves open the "*degree* of cause required" before a safeguard measure can be imposed.[41] This belief in the open-ended nature of the causation test allows the United States to assert that a test that attributes to imports a cause "which is important and not less than any other cause" complies with the terms of the Safeguards Agreement. The United States criticises the New Zealand argument that this is less stringent than the WTO standard, and asserts as a matter of dogma that "US law in fact embodies a *more stringent* test" than that provided in the Safeguards Agreement.[42]

51. Yet, the United States own description of the test applied by the USITC demonstrates that it cannot be in conformity with the provisions of the Safeguards Agreement. By the United States own

[39] Para 7.70.
[40] United States First Written Submission, para 112.
[41] United States First Written Submission, para 114.
[42] Para 120.

admission, a safeguard measure can be applied even where increased imports are, for example, only one of three equal causes of a threat of serious injury. In such circumstances, the increased imports would be an "important" cause and a cause not less important than any other cause". Yet it would still be a minority cause of the threat of serious injury.

52. Such a situation cannot be regarded as complying with the provisions of the Safeguards Agreement. It would certainly be true to say that in such circumstances increased imports were a "substantial cause" of the threat of serious injury, but it would be a misuse of language to say that the "cause" of the threat of serious injury was increased imports. The first sentence of Article 4.2(b) requires the competent authority to establish "the existence of *the* causal link between increased imports of the product concerned and serious injury or threat thereof", not the existence of *a* link between increased imports and serious injury or threat, as the United States misquotes the provision in paragraph 77 of its First Written Submission.

53. Mr Chairman, the example I have given of multiple causes is not an hypothetical illustration. It closely accords with what happened in this case. In seeking to establish causation, the USITC looked at other factors.[43] It found that the termination of the Wool Act was a less important cause than increased imports. It concluded that competition from other meat products was not a more important cause. It concluded also that concentration in the packer segment of the industry was not a more important cause. But in none of these instances did the USITC conclude that these factors were not causes of injury at all; they were just not causes that were more important than increased imports.

54. Moreover, with respect to the failure of the industry to develop and implement an effective marketing arrangement, the USITC found that such a programme could have had an important impact on the industry, but it was not a more important cause of the threat of serious injury than increased imports.[44] In this case, the USITC did not conclude that it was a less important factor, simply that increased imports were no less important. In effect, they were of equal importance.

55. Thus, contrary to the United States claim, the USITC found that increased imports was one of a number of factors that caused a threat of serious injury. Collectively, those other factors may well have been more significant than increased imports. Individually they were not, and that was sufficient to satisfy the "substantial cause" test.

56. The United States also misrepresents the effect of the second sentence of Article 4.2(b) which provides that injury caused by other factors is not to be attributed to increased imports. This implies, the United States says, that since injury can be caused by a variety of factors this mandates "the application of a 'substantial cause' or similar causation standard."[45] This is truly an "Alice in Wonderland" approach to the interpretation of the second sentence of Article 4.2(b). A provision that is designed to prevent injury attributable to other factors from being attributed to increased imports, is being interpreted as justifying a finding of serious injury caused by increased imports when a significant part of that injury is not in fact caused by increased imports.

57. In the course of its rather contradictory discussion of the second sentence of Article 4.2(b), the United States makes an important point. That provision, the United States says, "instructs Members not to blame increased imports for any injury caused by other factors..[46] Precisely. But of course, the United States recognition of this carries with it a corollary. A determination that a threat of serious injury has been caused by increased imports when in fact not all of that injury has been caused by increased imports is doing exactly what the United States says cannot be done. That is, it is blaming increased imports for injury caused by other factors.

[43] USITC Report, I-24 and I-25.
[44] USITC Report, I-26.
[45] United States First Written Submission, para 118.
[46] United States First Written Submission, para 119.

58. Once again, the United States is failing to apply the correct approach to interpretation of the provisions of the Safeguards Agreement. It is seeking to ascribe to the words of Article 2.1 a meaning that does not conform with the ordinary meaning of the words, in their context. Under Article 2.1, the increased imports must "cause" the injury. Article 2.1 does not say that the increased imports need only be a contributing, albeit an important, cause. Yet that is the meaning the United States wishes to ascribe to the concept of causation in the Safeguards Agreement.

59. The United States also criticises New Zealand for its suggestion that the USITC might have considered using econometric analysis in order to determine whether the alleged threat of serious injury was caused by increased imports.[47] The United States argues that the USITC does not perform econometric analysis; instead, it "evaluates the evidence of an objective and factual nature with respect to each of the relevant factors and makes its findings and conclusions on the basis of that analysis".[48]

60. However, in its criticism of the New Zealand position, the United States overlooks the essential point. That is, in order to make any determination of causation, the USITC had to find a methodology that would allow it to distinguish between injury caused by domestic factors and injury caused by increased imports. In its First Written Submission New Zealand pointed out that the USITC's approach does not allow it to distinguish between circumstances where domestic production declines because of domestic factors and where it declines because of increased imports. The United States denies that this could be done by econometric analysis, but even if that form of analysis is denied, economic analysis can provide guidance on those issues.

61. In order to illustrate this, New Zealand has attached to this Statement an economic analysis of the relationship between imports and domestic decline in the United States lamb meat industry during the USITC's period of investigation.[49] This analysis shows, first, that it is possible for such analysis to be done, and second, that if it had been done by the USITC in the course of its investigation, the USITC would have reached a different conclusion. But the USITC did not do this. Instead, its analysis focused on factors that, in its view, led to a conclusion that there was threat of serious injury and then, almost as a matter of intuition, it found causation. No methodology, or any method at all, was invoked by the USITC for reaching this conclusion. The USITC did not demonstrate the "causal link" between increased imports and the threat of serious injury on the basis of objective evidence as required by Article 4.2(b) of the Safeguards Agreement.

The Application of the Safeguard Measure

62. In its First Written Submission, New Zealand set out the failure of the United States to comply with its obligation under Article 5.1 of the Safeguards Agreement, to apply a safeguard measure only "to the extent necessary" to prevent serious injury and to facilitate adjustment.[50] New Zealand pointed out that the obligation to do no more than necessary was an obligation to apply the least trade restrictive measure that would prevent serious injury and facilitate adjustment. This, the United States has not done.

63. In its First Written Submission, the United States contests this interpretation of the concept of "necessary" in Article 5.1. It purports to make a distinction between "necessary" and "only to the extent necessary", which turns out to be a distinction without a difference.[51] It describes the "least

[47] United States First Written Submission, paras 131-133.
[48] Para 133.
[49] Attached as Annex NZ13.
[50] Paras 7.97-7.111.
[51] Paras 183-185.

trade restrictive" test as "a virtually impossible standard" that is at variance with the way that Article 5.1 has been interpreted to date.[52] However, the United States does not explain how this test is different from the one posited by the panel in *Korea-Dairy*, which the United States cites.[53]

64. The United States then embarks on an analysis of New Zealand's errors. Finally, some seven pages and 25 paragraphs later, the United States puts forward its own view of the obligations of a Member under Article 5.1. What we find as part of the United States "multi-step inquiry" is that there has to be an assessment of whether the measure is "more restrictive than required" to prevent serious injury and to assist in adjustment.[54] In the context in which the United States uses the term "restrictive", it can only mean "trade restrictive".

65. Mr Chairman, apparently we stand corrected. The "least trade restrictive" test is a "no more restrictive of trade than required" test.

66. Beyond this rather pointless diversion into semantics, the United States also asserts that it is not prohibited from imposing a safeguard measure that goes beyond preventing the threat that gives rise to the right to impose the measure. According to the United States a Member may impose a safeguard measure that will restore the industry in question to competitiveness.[55]

67. .The United States arguments on this point reflect once again its confusion over the relationship between threat and causation and over what it is that can be the subject of a safeguard measure. If an industry's competitiveness is threatened because of the threat of serious injury caused by increased imports, then a safeguard measure that prevents the threat of serious injury will prevent the threat to its competitiveness. However, if the threat to competitiveness is caused by factors other than increased imports, then a measure that prevents only the threat from increased imports will not get at the problem. It will not prevent the threat to competitiveness caused by other factors.

68. Thus, the United States claim that it is entitled to adopt a measure that will restore competitiveness would only be compelling if the United States had properly excluded injury threatened by other factors from its determination of a threat of serious injury. It did not do so in this case, and thus it cannot place on imports the burden of preventing a threat to its domestic industry that was not caused by imports. For that is what its claim to be able to restore competitiveness is seeking to do.

69. Furthermore, the United States mischaracterises New Zealand's arguments on the nature of the United States obligations under Article 5.1 of the Safeguards Agreement. New Zealand did not argue that the United States must accept the majority recommendation of the USITC on remedy. New Zealand argued that the United States must apply a remedy that is no more trade restrictive than is necessary to prevent serious injury and facilitate adjustment. The United States Administration is free to choose a remedy that will prevent serious injury and facilitate adjustment, provided that such a remedy is applied only to the extent necessary to achieve that goal. Thus, assuming that the appropriate conditions had been met, the application of a safeguard measure which was less trade restrictive than that proposed by the majority of the USITC, but which equally prevented serious injury and facilitated adjustment, would have been consistent with the United States obligations under Article 5.1.

70. Mr Chairman, there is a final point that New Zealand wishes to make in relation to the actual measure applied by the United States. In its First Written Submission, the United States sought to demonstrate that it had devised a measure that would address the threat to injury only to the extent

[52] Para 182.
[53] Para 190.
[54] Para 210.
[55] United States First Written Submission, para 177.

necessary to prevent that threat, by referring to an "economic model" that it had developed.[56] Information on that economic model has never been disclosed to New Zealand. Accordingly, the United States is precluded from relying on that alleged modelling to justify its measure.

Additional Arguments

71. In its First Written Submission, New Zealand pointed out that the United States had failed to publish its findings and reasoning on the necessity of the safeguard measure chosen, contrary to Article 3.1 of the Safeguards Agreement.[57] New Zealand reaffirms those arguments. Equally, New Zealand reaffirms its arguments that the United States exclusion of certain countries from the application of its safeguard measure constitutes a violation of Article 2.2 of the Safeguards Agreement and of GATT Article I.[58] I shall not elaborate on these matters in this statement, but New Zealand will provide further details in its Final Written Submission.

72. However, New Zealand wishes now to make an additional point. In the course of the consultations pursuant to Article 4 of the DSU, the United States was asked if any further analysis had been done following the USITC Report which formed the basis for the final determination of the President. In the course of its responses, the United States said: "Nothing exists that you don't have", and later it said: "The USITC Report is the sum total of the universe for us."[59] On the basis of that answer, New Zealand decided that it would not include an argument on breach of Article 12.2 of the Safeguards Agreement by the United States in its First Written Submission.

73. Nevertheless, in its First Written Submission, the United States referred to modelling that was done by the United States "to test various combinations of in-quota and out-of-quota tariffs in order to find the combination of variables that would address the injury without going beyond the extent necessary."[60] Clearly, if this modelling was done after the report of the USITC was rendered, then the answer given to New Zealand in the consultations was incorrect.

74. In these circumstances, New Zealand can only conclude that the United States did not disclose to the Committee on Safeguards "all pertinent information", as required by Article 12.2 of the Safeguards Agreement, and thus the United States is in violation of its obligations under that provision.

Conclusion

75. Mr Chairman, that concludes the Oral Presentation of New Zealand. We shall be providing additional details in our rebuttal submission and are ready to respond to any questions the Panel may have.

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[56] Para 216.
[57] Paras 7.110 and 7.111.
[58] Paras 7.112-7.114.
[59] Consultations under the DSU between the United States, New Zealand, and Australia, held in Geneva on 26 August 1999 (afternoon session).
[60] Para 216.

ANNEX 2-6

ORAL RESPONSE OF NEW ZEALAND TO UNITED STATES' COMMENTS ON EXHIBIT NZ-13

(26 May 2000)

Mr Chairman, Members of the Panel, yesterday the United States made some comments about Annex NZ13, attached to New Zealand's Oral Statement. I would like to make some remarks in response.

1. New Zealand wishes to point out that under paragraph 14 of the panel's working procedures a Member may deposit supporting material up until the conclusion of the first substantive meeting. In attaching the Annex, New Zealand was simply availing itself of that right.

2. The New Zealand Annex was prepared in response to the assertion of the United States in paragraph 130 of its First Written Submission that the USITC had "conducted the appropriate analysis in determining that imports of lamb meat were in such increased quantities as to cause the threat of serious injury." New Zealand has been unable to discover what analysis the USITC undertook to reach that conclusion.

3. In accordance with the terms of the Safeguards Agreement, the USITC was obliged by Article 4.2(b) to establish "the causal link" between increased imports and the threat of serious injury. As New Zealand has argued, this causal link must be demonstrated, not assumed.

4. In *Argentina-Footwear* the Appellate Body took the view that any conclusions reached by the competent authority must be based on reasoned analysis. In order to determine whether economic analysis could provide a basis for a reasoned conclusion on the relationship between increased imports and the threat of serious injury to the domestic industry, New Zealand commissioned the study that is set out in the Annex.

5. New Zealand did not attach the study to its Statement in order to invite the panel to engage in a *de novo* review. New Zealand provides this study as a illustration, an example, of reasoned analysis of the question that was before the USITC. It demonstrates that the issue that the USITC had to address could be addressed by reasoned analysis and not merely by intuition.

6. The information on which the study is based is information drawn from primary data sources cited in the USITC Report. Thus, it is information available to the staff of the USITC. All of that information is available on disc and can be provided to the Panel and the parties.

7. The United States raises concerns about limitations on its ability to file appropriate responsive material. Again, we would refer the United States to paragraph 14 of the working procedures. The United States is fully entitled to file any supporting rebuttal material it wishes with its final submission.

ANNEX 2-7

CLOSING STATEMENT OF NEW ZEALAND

(26 May 2000)

Mr Chairman, members of the Panel:

1. In my closing statement, I would like briefly to recap what New Zealand sees as the essence of this case. As you stated yesterday morning in the context of discussing the preliminary requests, Mr Chairman, the central issue in this case is whether the United States has complied with its WTO obligations in imposing its safeguard measure on imports of lamb meat.

2. In its statement yesterday the United States described at some length its view that the Safeguards Agreement embodies a fundamental component of multilateral trading rules which has existed for over 50 years. It made the point that Members must be able to take temporary action to prevent or remedy serious injury or threat of serious injury to their domestic industry in emergency situations.

3. New Zealand fully agrees. However, in exercising their rights to impose safeguard measures, Members must also have regard to the rights of other Members. The Safeguards Agreement seeks to establish rules to maintain the balance of rights between Members imposing safeguards and Members on which those measures are imposed. It lays down clear requirements which Members *must* follow in imposing any safeguard measure. Thus, the central issue in this case is simply whether the United States has met those requirements in imposing this safeguard measure.

4. Yesterday the United States described once more what it claims the USITC did. I would like to make two comments on that description. The first is that, as in its First Written Submission, the United States Oral Statement has attributed to the USITC conclusions and analysis that cannot be found in the USITC Report.

5. Secondly, although the United States continued to *assert* in its Oral Statement that it had complied with all of the requirements of the Safeguards Agreement, it again made no attempt to show *how* its actions comply.

6. As I said in my statement yesterday, and as New Zealand has previously made clear in its First Written Submission, a careful analysis of the report of the USITC shows that the United States did not in fact meet its obligations under the Safeguards Agreement. The United States has not rebutted New Zealand's arguments on the key issues of unforeseen developments, domestic industry, threat of serious injury, causation, and the necessity of the measure imposed, or on other matters, either in its First Written Submission or in yesterday's statement.

ANNEX 2-8

NEW ZEALAND'S RESPONSES TO QUESTIONS BY THE PANEL

(22 June 2000)

Was the "unforeseen developments" provision of Article XIX:1 of GATT 1994 fulfilled?

1 You seem to argue (citing to the Appellate Body reports in Korea Dairy and Argentina Footwear) that since developments subsequent to the negotiation of a trade concession could have been foreseen there was no basis for the safeguard measure to be applied to US imports of lamb meat. How could it ever be proven by a Member that has applied a measure that it could not have foreseen or did not foresee a given development occurring after its negotiation of a concession?

Answer 1

New Zealand argues that the United States cannot take the measure it has imposed on imports of lamb me at unless it was applied in response to developments subsequent to incurring obligations under GATT 1994 that were unexpected or unforeseen.[1]

A Member need not prove that in the particular case it could not have foreseen or did not foresee a given development occurring after it incurred obligations under GATT 1994. It is not required that the developments be "unforeseeable", or "incapable of being foreseen or anticipated".[2] Rather, a Member is required objectively to demonstrate as a matter of fact the existence of circumstances or events that were unforeseen or unexpected at the time obligations under GATT 1994, including tariff concessions, were incurred. It is the developments which lead to the increased imports which must be unforeseen or unexpected, and must be demonstrated.

A demonstration of the existence of "unforeseen developments" would involve an objective consideration by the competent authorities of the facts, events and circumstances which led to the product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry, and whether these were of an unexpected nature so that a Member would not have foreseen them when the trade obligation was incurred.

Depending on the circumstances of a particular case, a Member would be able to demonstrate the existence of such unforeseen or unexpected developments where, for example, there had a been a diversion of product as a result of a collapse in another market, or a massive currency revaluation which encouraged imports into a country because they were comparatively cheaper. What is essential is that there be an objective consideration of the circumstances which lead to the importation of the product at issue and a demonstration of the existence of such unforeseen or unexpected developments.

2 You seem to argue that the existence of "unforeseen developments" in the sense of Article XIX is a "prerequisite" (NZ) or a "legal requirement" (AUS). The Appellate Body in Korea - Dairy Safeguard and Argentina - Footwear Safeguard explicitly stated that "unforeseen developments" do not constitute an "independent condition" for the application of a safeguard

[1] The Appellate Body has noted that it must be demonstrated as a matter of fact that an importing Member has incurred obligations under the GATT 1994, including tariff concessions (*Argentina - Footwear*, para 91, *Korea - Dairy*, para 84). The unforeseen developments must be subsequent to the *incurring of obligations* under GATT 1994, not subsequent to the *negotiation of a concession*.

[2] Argentina - Footwear, para 91; Korea - Dairy, para 84.

measure but rather constitute a "circumstance" the existence of which "must be demonstrated as a matter of fact". By arguing that it is a "prerequisite" or "legal requirement", are you not in effect arguing that "unforeseen developments" constitutes a "condition"? How would you define the difference if any between a "legal condition" and a "factual circumstance"?

Answer 2

The Appellate Body reasoning in *Argentina - Footwear* and *Korea - Dairy* in relation to "unforeseen developments" is based on the ordinary meaning of Article 11.1(a) of the Safeguards Agreement 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"[3], Furthermore the Appellate Body suggested that Article XIX not only continues in full force and effect but "establishes certain prerequisites for the imposition of safeguard measures".[4]

The Appellate Body went on to state that it did not view the first clause of Article XIX:1(a) as establishing "independent conditions" for the application of a safeguard measure, additional to the conditions set forth in the second clause of that paragraph. Rather, it describes "circumstances" which "must be demonstrated as a matter of fact" in order for a safeguard measure to be applied consistently with Article XIX.[5] It is clear from the Appellate Body's rulings that such circumstances *must* be demonstrated as a matter of fact. If they have not been demonstrated a safeguard measure has not been applied consistently with Article XIX. It is therefore a prerequisite or a legal requirement that the existence of "unforeseen developments" be demonstrated in order for a safeguard measure to be applied consistently with Article XIX. This is borne out by the Appellate Body in *Korea - Dairy* which expressly *reversed* the Panel's conclusion in that case that Article XIX of GATT did not contain a "requirement"[6]

The Appellate Body rightly drew a distinction between an independent condition and a factual circumstance which must be demonstrated. An independent condition is a stipulation that must be complied with in order for a particular action to be legally valid. In the case of a factual circumstance it is the demonstration of that factual circumstance which is required by the Safeguards Agreement. Both independent conditions and the demonstration of the factual circumstance of unforeseen developments are legal requirements. One can ask whether a safeguard measure can be applied if "unforeseen developments" have not been demonstrated? The answer to this question is clearly no. The existence of "unforeseen developments" must, therefore, be *demonstrated* for the safeguard measure to be applied consistently with the provisions of Article XIX of GATT 1994 and the Safeguards Agreement. As New Zealand pointed out in its First Written Submission and Oral Statement, the USITC in this case failed to demonstrate the existence of "unforeseen developments".[7]

3 You also seem to argue that there must be an explicit "finding" of, in so many words, "unforeseen developments" in a report on an investigation. If this is your position, on what treaty language do you base this contention, particularly in the light of the above-quoted language of the Appellate Body? If the "existence" of "unforeseen developments" can be discerned from the report of a competent authority, even if these precise words are not found in that report, why would this element of Article XIX not be fulfilled?

[3] Argentina Footwear, para 83; Korea - Dairy, para 77.
[4] Argentina - Footwear, para 83.
[5] Argentina - Footwear, para 92; Korea - Dairy, para 85.
[6] Para 90.
[7] New Zealand's First Written Submission, paras 7.29 and 7.31 and Oral Statement at the First Panel Hearing, para 17.

Answer 3

New Zealand argues, in accordance with the Appellate Body's rulings, that the existence of "unforeseen developments" must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with GATT 1994 and the Safeguards Agreement. That the competent authorities must demonstrate the existence of "unforeseen developments" is clear from the decision of the Appellate Body in *Argentina – Footwear*.[8] Furthermore, Article 3.1 of the Safeguards Agreement requires the competent authorities to publish a report setting forth their findings and reasoned conclusions reached on "all pertinent issues of fact and law". The unforeseen developments requirement is a "pertinent issue of fact and law". To comply with the provisions of the Safeguards Agreement and to be consistent with the ruling of the Appellate Body, therefore, the competent authorities must demonstrate the existence of "unforeseen developments" and set forth their findings and reasoned conclusions reached on "unforeseen developments".

4 You seem to focus in your arguments concerning unforeseen developments on the contention that the increase in imports, as such, must be the result of "unforeseen developments" and in turn must cause or threaten to cause serious injury, for a safeguard measure to be permissible. The relevant language of Article XIX:1 of GATT 1994 seems broader than this, however, in that it refers to imports "in such increased quantities and under such conditions" resulting in part from unforeseen developments. The Appellate Body in Korea - Dairy Safeguard and Argentina - Footwear Safeguard also referred to both "increased imports" and "under such conditions" in its discussion of unforeseen developments. The text of Article XIX:1 thus might import that in a given case, the "unforeseen developments" might be in respect of the "conditions" under which the increased imports are competing in the importing country market, rather than solely in respect of their quantity. In such a case, this "unforeseen" change in the conditions of competition (rather than some other unforeseen factor bringing about an increase in imports as such) might be the reason that the increased imports are causing or threatening to cause serious injury. Please comment.

Answer 4

> Article XIX.1(a) of GATT 1994 provides in part:
>
> 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 Appellate Body in *Argentina - Footwear* and *Korea - Dairy* considered that the first clause of Article XIX:1(a), the "unforeseen developments" clause, was a dependent clause that was linked grammatically to the words "is being imported" in the second clause of the article.[9] The Appellate Body also made explicit that the developments which *lead* to a product being imported in such increased quantities and under such conditions must have been "unexpected".[10] The use of the conjunction "and" means that the increased quantities of imports *and* the conditions under which they are imported must "result" from something unexpected. To be consistent with the views of the Appellate Body and the ordinary meaning of the clause, therefore, the unforeseen developments must relate to the importation of the product in terms of quantity *and* conditions, and must be the unexpected events or circumstances which lead to that importation.

[8] Para 98. The Appellate Body stated that it was not necessary in that case to rule on "whether the Argentine authorities have, in their investigation, demonstrated" the existence of unforeseen developments.

[9] Argentina - Footwear, para 92; Korea - Dairy, para 85.

[10] Argentina - Footwear, para 91; Korea - Dairy, para 84.

There is a logical progression of events from the unforeseen developments to the import of the product in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry. Neither increased imports nor the conditions under which they are imported can in themselves be an unforeseen development within the meaning of Article XIX, as increased imports and the conditions under which they are imported must be the *result* of the unforeseen developments. To foreshorten the progression from unforeseen developments to serious injury incurred by the domestic industry in this way would be to ignore the views of the Appellate Body that there is a *logical connection* between the circumstances described in the first clause (unforeseen developments) and the conditions set out in the second.[11] This would also effectively write the "unforeseen developments" clause of Article XIX out of GATT 1994. This would be inconsistent with the exhortation of the Appellate Body that "a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them harmoniously".[12]

Is the definition of the "domestic industry" that was used in the USITC's investigation consistent with the Safeguards Agreement and GATT 1994?

5 The USITC noted some vertical integration and common ownership between companies operating in the grower, feeder, packer and breaker industry segments. Australia and New Zealand do not contest that fact per se but argue that there are few such examples in the US industry. In WTO dispute settlement practice (eg, EC - Bananas III) vertically integrated companies have been deemed potential suppliers of like distribution services. By the same token, any grower or feeder of live lambs could at the same time actually or potentially enter the packing or breaking business. On what basis could such potential producers of lamb meat be excluded from the domestic industry producing like or directly competitive products?

Answer 5

New Zealand contests the United States claim that "extensive integration exists between firms at different stages in that continuous line of production".[13] New Zealand considers that this is not consistent with either the record of evidence before the USITC or the USITC report.

The USITC report gives examples of some firms identified as feeders which were also growers[14], and of some firms identified as packers which also processed lamb into cuts.[15] Thus most of the integration actually found by the USITC was between growers and feeders on the one hand and packers and breakers on the other hand: namely, integration between the producers of live lambs on the one hand and between producers of lamb meat on the other.

The USITC also noted in its report that "there are some growers who engage in both feeding and slaughtering of lambs".[16] This is hardly surprising. Amongst 74,000 United States lamb growers, many of whom the USITC found to be part-time or hobby farmers raising only a few animals[17], it would not be unusual for some of them to feed and slaughter animals for their own use. However, the USITC Report contains no evidence of firms which both grow live lambs and engage in packing operations.

[11] Argentina - Footwear, para 92; Korea - Dairy, para 85.
[12] Argentina - Footwear, para 81.
[13] United States First Written Submission, para 69.
[14] USITC Report, II-13.
[15] USITC Report, II-15.
[16] USITC Report, I-13 and I-14.
[17] USITC Report, II-12.

The only example given by the USITC of vertical integration and common ownership between companies is that of Transhumance, a domestic lamb packer, which also owns a breaker operation and a feeder operation.[18] Transhumance actively opposed the petition before the USITC. In light of the total number of producers in the United States industry, such vertical integration is clearly a rarity. This does not accord with the United States claim of "extensive integration", nor that "the industry is so highly integrated it is not possible to focus on only one respective sector of the production process".[19]

Even if the Panel accepts the United States claim of vertical integration, the *Bananas III* case does not detract from New Zealand's argument that only packers and breakers are "producers of the like or directly competitive product" as required by the Safeguards Agreement. The Panel in that case found that where service distributors form part of vertically integrated companies and provide services to those companies, the distributors have the *capability* and *opportunity* to also enter the market for distribution of like services to others.[20] As applied to producers of goods, this simply means that the producer of a raw product which is part of a vertically integrated company also producing an end-product, and to which the producer supplies the raw product, has the capability and opportunity to also enter the market for supply of that raw product to others.

The relevant domestic industry for the purposes of a safeguards investigation depends on the *actual* producers of like or directly competitive products, not potential future producers of those products. Accordingly, New Zealand considers that growers and feeders should be excluded from the domestic industry producing like or directly competitive products, as they are not actual producers of lamb meat.

6 Suppose a market situation where virtually all of the value of the end-product is added through raw materials and intermediate goods and where the industry segment producing the end-product is highly concentrated and has the market power to "pass back" virtually all injury caused by imports of like or directly competitive end-products to producers of those raw materials or intermediate goods. In such a situation, why should not all of these producers be included in the domestic industry? In your view, in the absence of serious injury suffered by the industry producing the end-product due to the "pass-back" effect, would it simply become practically impossible to impose safeguard measures on like or directly competitive end-products of foreign origin? How would Australia or New Zealand treat such a situation under their own domestic safeguard procedures? Please explain in detail.

Answer 6

Article 4.1(c) of the Safeguards Agreement expressly defines the relevant domestic industry for the purposes of a safeguards investigation as "the producers as a whole of the like or directly competitive product". Accordingly, the determination of what constitutes the domestic industry for the purposes of a safeguards investigation has to be based on a determination of whether the industry produces a "product" that is "like or directly competitive" with the imported product. Any broadening of the definition so as to include producers of raw materials and intermediate goods as well as those of the "like or directly competitive" product would require a rewriting of the clear provisions of the Safeguards Agreement. It would in effect be a substitution of one Member State's judgement of what is equitable in the place of what the Safeguards Agreement actually says.[21]

[18] USITC Report, I-14.

[19] United States First Written Submission, para 73.

[20] European Communities - Regime for the Importation, Sale and Distribution of Bananas WT/DS27/R, 22 May 1997, para 7.320.

[21] Panel on United States Definition of Industry Concerning Wine and Grape Products, adopted 28 April 1992, SCM/71, BISD 39/436, para 3.19.

Accordingly, if the producers of an end-product are the only producers of the "like or directly competitive product", then there must be serious injury to *those* producers, caused by increased imports, in order to justify a safeguard measure. If those producers of the end-product cannot be shown to have suffered serious injury, then no safeguard measure can be imposed. If the only serious injury that can be shown is serious injury suffered by producers of other products used in the production process, and not by producers of the end-product, then there is no serious injury which meets the requirements of the Safeguards Agreement.

Under New Zealand's domestic safeguard procedures, a safeguard measure can be imposed only where serious injury or threat thereof is found to the industry which produces the like goods and directly competitive goods. Furthermore, in determining the like goods and directly competitive goods, New Zealand authorities take a competition analysis approach, looking at whether there is direct competition between products in a particular market. New Zealand procedures do not allow for account to be taken of any "pass-back" effect to producers of other products used in the production process. Over the years, a number of primary producers in New Zealand have made applications in the trade remedies context regarding injury alleged to have been suffered due to imports of processed products. These applications have consistently been rejected on the basis that the primary producers are not producers of like goods to the imported processed product.[22] For example, in the case of a recent application to the New Zealand authorities to initiate a safeguard investigation on imports of pork meat, pig farmers have been considered not to be part of the domestic industry producing pork meat. The complainants have been asked to resubmit their application for an investigation on behalf of a more narrowly defined industry.

Did the USITC demonstrate that there was a "threat of serious injury" due to "increased imports"?

7 Could you specify how a prospective analysis of injury factors should be conducted in order to assess whether a "threat of serious injury" exists? Under which conditions would you consider projections of how injury factors would develop in the near future a sufficient basis for an analysis of threat? What in your view are the flaws of the US methodology in making such projections in the case? Would you consider that certain injury factors are more important for an analysis of 'threat" than others? If so, which ones? How could any such "prospective" analysis about future developments in the various injury factors be anything other than "allegation, conjecture or remote possibility"?

Answer 7

The Safeguards Agreement defines a "threat of serious injury" as significant overall impairment in the position of a domestic industry that is "clearly imminent" and is a determination "based on facts and not merely on allegation, conjecture or remote possibility". Any determination of threat must be supported by "specific evidence and adequate analysis".[23] In order to determine whether a development is "clearly imminent" or soon to happen, there must be an objective assessment of what is likely to happen in the future. Such an assessment must be based on facts and must examine the likely trends in the relevant factors having a bearing on the position of the domestic industry. There are various methods by which such a prospective analysis, or an analysis of future developments, may be undertaken. New Zealand does not suggest that a particular methodology should be adopted. However there must be an analysis that is grounded in relevant factual evidence and examines the likely future position of the domestic industry in terms of the relevant injury factors. In examining the likely future position of the industry it is not sufficient to look merely at a projected increase in imports. A threat of *serious injury* must be demonstrated, not a threat of *increased*

[22] For example, producers of tomatoes, apricots, and grapes, in dumping complaints regarding canned tomatoes, canned apricots, and bulk wine.

[23] Panel Report, *Argentina - Footwear*, WT/DS121/R, 25 June 1999, para 8.285.

imports. In order to assess how injury factors may develop in the future, the New Zealand competent authorities would examine the trends in supply and demand of a product in the domestic market. They would examine the factual evidence of the position of the domestic industry in the past and extrapolate how it was likely to develop in the future. They would pay particular regard to trends in the domestic and imported prices of the product and, based on these past trends and on any evidence of forward contract prices, how prices were likely to develop in the future. Their analysis of trends would be based on data relating to at least the last three preceding years. The New Zealand competent authorities regard this as especially important in the case of a seasonal or agricultural product because of the seasonal fluctuations that occur in such markets. In such cases an analysis of price trends based on information from one season alone would not provide the basis for an objective determination "based on facts, and not merely on allegation, conjecture or remote possibility".

In order to determine whether there was a threat of serious injury, it is not sufficient, as the United States has done, to examine simply whether imports are projected to increase in the future and then to assume that this will adversely affect the position of the domestic industry. This is the same as finding a threat of serious injury based on the threat of increased imports, an approach that was rejected by the Panel in *Argentina – Footwear*.[24]

8 Please clarify your argument at para. 13 of New Zealand's oral statement and para. 37 of Australia's oral statement (and the similar arguments in your first written submissions). In particular, you seem to be arguing both that the US industry is in a long-term decline because of declining consumption, as demand for lamb meat has contracted due to changing consumer tastes, (i.e., that US supply was significantly in excess of demand), and that the reason that imports increased was to fill demand that was not being filled by domestic supply (i.e., that US supply was significantly below demand). Is this a correct understanding of your argument? Please explain.

Answer 8

The long term decline in the United States live lamb and lamb meat industries is due to a combination of domestic demand and supply factors. Over any given period either supply or demand factors will exert the dominant influence. From the mid-1970s through to 1993 there was a substantial decline in the real price of lamb, indicating that over that period United States supply exceeded demand. This was most likely the result of the loss of price competitiveness with other meats combined with the general shift in consumer preferences away from red meat. The fall in the real price of lamb in this period increased the importance of the Wool Act subsidies to live lamb growers.

From 1993 to 1997 consumption of lamb meat declined further. However, at the same time the real price of live lamb and lamb meat increased significantly. This clearly indicates that demand was exceeding supply over this period as purchasers were prepared to pay a higher price for a product that was in short supply. In these circumstances the declines in production created latent demand, that is, demand from consumers that would normally have been filled but for the shortage of supply. The significant fall in domestic production which occurred over this period was most likely in response to the removal of the Wool Act subsidies, since prices for lamb had increased. The shortfall in supply, reflected in higher prices, stimulated an increase in imports. By 1997 imports had increased by 47.5 per cent over 1993 levels even though prices for live lambs and lamb meat were significantly higher in real terms than in 1993.[25]

[24] Panel Report, *Argentina - Footwear*, WT/DS121/R, 25 June 1999, para 8.284.
[25] New Zealand First Written Submission, Figure 2, page 14 and Figure 5, page 61.

In interim 1998 imports increased a further 19.5 per cent. All of this increase in imports was accounted for by higher lamb meat consumption.[26] In other words there was latent demand in the United States market which absorbed increases in both imports and domestic shipments in interim 1998.[27] Prices for lamb in 1998 declined relative to 1997, but this was most likely in response to the decline in prices for competing meats, in particular pork, which occurred over the same period.

9 What specific information in the USITC report shows that the effect of the termination of the Wool Act subsidies had not finished by 1996?

Answer 9

The USITC stated on page I-24: "We also believe that it is unrealistic to conclude that the effects of the termination of Wool Act payments had completely disappeared as of 1997". There was no explanation of how the USITC came to this conclusion.

The Wool Act subsidy payments to producers of live lambs totaled US $125 million and $69 million in 1994.[28] The USDA estimated that wool producers would have received an additional US $60 million if the phase-out of the wool subsides had not taken place.[29] The proportion of total net sales revenue from wool and wool subsidies obtained by growers dropped from 25.4 per cent in 1993, to 21.1 per cent in 1995, and to 12.2 per cent in 1996. It fell even further to 5.5 per cent in interim 1998.[30] Given that the Wool Act had provided subsidies for 40 years, and that the last payments were not phased out until 1996, it is not realistic to conclude that an industry would be able to adjust in a short period of time to a 20 per cent drop in its revenue.

Support for this comes from the USITC Report and the discussion of the USITC Commissioners on remedy, where they identified the termination of the Wool Act payments as a *significant* change in the market conditions under which the domestic industry must operate.[31] As a result of this change, the Commissioners concluded that the domestic industry producing live lambs would have to continue to adjust *in the future* to a domestic market without the Wool Act subsidy payments.[32]

10 The United States has argued that even if the domestic industry would be defined as comprising only packers, packers/breakers and breakers, the investigation would have led to a determination that a safeguard measure is necessary to prevent a "threat of serious injury" and facilitate adjustment. On the basis of which specific elements in the USITC report do you consider that this statement is unfounded?

Answer 10

Article 4.2(a) of the Safeguards Agreement identifies the factors to be considered by an investigating authority in determining whether increased imports have caused or are threatening to cause serious injury to a domestic industry, as, aside from imports: changes in the level of sales, production, productivity, capacity utilisation, profits and losses, and employment.

[26] USITC Report, II-17, Table 5.
[27] Domestic shipments increased slightly in interim 1998: USITC Report, II-17, Table 5.
[28] USITC Report, II-78, Table 45.
[29] USITC Report, II-78.
[30] USITC Report, II-26, Table 12.
[31] USITC Report, I-30.
[32] USITC Report, I-32.

The USITC found that production of packers fluctuated over the period, while production of breakers trended upwards.[33] More specifically production of packers in 1997 was 11.5 per cent higher than in 1995.[34] Production of lamb meat decreased by 2 per cent in interim 1998.[35] On a full year basis, therefore, production in 1998 was still significantly higher than in 1995.

In relation to capacity the USITC Report found that the largest firms in the United States packing industry were shown to be increasing their capacity over the period 1995-interim 1998.[36] In particular capacity increased by 15 per cent between 1995 and 1997 and then rose by 14 per cent in interim 1998. This follows a reduction in capacity over 1993 to 1995. Such an expansion suggests that the firms in question are profitable. This is not consistent with the assertion that the industry faces a threat of serious injury.

Given that the production in 1998 was still significantly higher than in 1995, the decline in capacity utilisation in the packing industry identified by the USITC[37], must have been solely due to the expansion in capacity. This was probably occurring in the largest firms as they sought to increase their market share of a declining lamb slaughter market.

In relation to profitability, the USITC stated that there was a significant decline in the value of net sales and in operating income of packers and breakers.[38] No further information on the financial condition of the packers, packer/breakers and breaker is disclosed by the United States. Nevertheless it would seem clear that given the increase in capacity undertaken by the United States packing operations, any decline in operating incomes could not be caused by imports, but rather must have been caused by the firms' own actions in expanding capacity.

Inventories of packers decreased in interim 1998 by comparison with the previous year.[39] This would seem to indicate an improved ability to make sales over this period. The only statement on employment in relation to packers is that direct labour and other costs of packing operations remained relatively constant over the period of investigation.[40] In relation to productivity the USITC stated that the data on direct labour costs from packers and breakers indicated that productivity remained relatively constant over the period of investigation.[41] No further information is disclosed. The information on inventories, employment and productivity does not, therefore, support a conclusion that packers and breakers were threatened with serious injury.

Specific information concerning breakers is confidential and has not been disclosed. However, the fact that the USITC had financial data from only one specialist breaker[42], suggests that the USITC would not have had a reliable basis for assessing whether the breakers were facing a threat of serious injury.

It follows that there is no basis in the information set out in the USITC Report on which to draw the conclusion that there is a significant overall impairment in the position of the packers, packer/breakers and breakers that is clearly imminent. Rather, the evidence in the USITC Report would indicate that there was no such imminent significant overall impairment to the lamb meat producers.

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[33] USITC Report, I-18, fn 78.
[34] USITC Report, II-22, Table 8.
[35] USITC Report, II-21.
[36] USITC Report, II-22, Table 8.
[37] USITC Report, I-20.
[38] USITC Report, I-19.
[39] USITC Report, II-22.
[40] USITC Report, II-27.
[41] USITC Report, I-20.
[42] New Zealand First Written Submission, para 4.9.

11 On what statement(s) in the USITC report do you base your argument that the USITC made a "finding" that there was no serious injury?

Answer 11

On page I-16 of the USITC Report the USITC set out the statutory criteria of "whether the domestic industry is *either* seriously injured *or* threatened with serious injury" (emphasis added). It then found that "the domestic industry is threatened with serious injury that is clearly imminent".[43] Later, in their conclusions on the remedy to be imposed, the Commissioners stated that they "have taken into account that the US lamb industry is not currently experiencing serious injury, but rather is threatened with serious injury".[44] There is a similar statement by the Commissioners that they "found a threat of serious injury ... as opposed to present serious injury".[45] Based on these statements New Zealand concludes that the USITC made a finding that there was no serious injury.

12 What is the specific, detailed basis in the record evidence as set forth in the USITC's report for New Zealand's argument (oral statement at para. 38) that the increase in imports during 1997 and interim 1998 was neither "sudden" enough nor "sharp" enough to meet the standard enunciated by the Appellate Body in Argentina - Footwear Safeguards?

Answer 12

In order to assess the suddenness and sharpness of increases in imports it is useful to look at the rate of increase in imports in one year over the previous year. Table 5 of the USITC Report[46] shows that imports began to increase in 1995 when they rose by 11.9 per cent. Imports increased by 17.1 per cent in 1996, 19.2 per cent in 1997 and 19.5 per cent in interim 1998. Thus the increase in imports was already well underway by 1997 and the rate of increase in 1997 and interim 1998 was similar to that occurring in 1996. Moreover the increase in imports in interim 1998 was fully accounted for by the expansion in consumption in that year.[47] This shows that imports are rising in response to an expansion in demand.

The market share being held by imports is another useful indicator of the relative importance of imports in a market. The USITC Report, Table[48], shows that the market share of imports in terms of quantity increased from 11.2 per cent in 1993 to 23.3 per cent in interim 1998. Of that increase in market share, 45 per cent took place between 1993 and 1996, with 55 per cent of that increase occurring between 1997 and interim 1998.

It is clear, therefore, from the evidence before the USITC that the increase in imports in 1997 to interim 1998, whether viewed in isolation or as a share of the total market, is neither "sudden" nor "sharp" and therefore does not come within the ambit of the statement of the Appellate Body in *Argentina - Footwear*.

Is the USITC's finding that increased imports were a "substantial cause" of threat of serious injury consistent with the Safeguards Agreement and GATT 1994?

[43] USITC Report, I-16.
[44] USITC Report, I-29.
[45] USITC Report, I-33, fn 166.
[46] USITC Report, II-17.
[47] USITC Report, II-17, Table 5.
[48] USITC Report, II-50.

13 We note New Zealand's arguments (i) that if there were three equal causes of a threat of serious injury of which imports was one, imports would be a "minority cause" of the threat of serious injury (para 51 of New Zealand's oral statement), and (ii) that a determination that a threat of serious injury has been caused by increased imports when in fact not all of that injury has been caused by increased imports constitutes blaming increased imports for injury caused by other factors (para 57 of New Zealand's oral statement). These arguments seem to suggest that in New Zealand's view, only where imports are the sole cause of serious injury could a safeguard measure be justified. If this is your argument, how do you reconcile your position with the reference in Article 4.2(b) to factors other than increased imports that are causing injury "at the same time"? If this is not a correct understanding of your argument, please explain.

Answer 13

New Zealand's argument is that, consistent with Article 2.1, a safeguard measure can only be applied in circumstances where *increased imports* cause or threaten to cause "serious injury". In determining whether increased imports have caused or threatened serious injury, Article 4.2(b) specifically provides that "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". In accordance with well-established WTO jurisprudence, these provisions are to be given their ordinary meaning in their context.[49] Where injury is caused by factors other than increased imports, such injury cannot be attributed to increased imports in assessing whether "serious injury" has been caused or threatened by the increased imports. In other words, a safeguard measure can only be applied where increased imports in themselves cause or threaten to cause a degree of injury that is "serious", regardless of any injury that might be caused by or attributed to other factors.

Serious injury or threat thereof may be contributed to by a variety of factors, including increased imports. If, when the injury caused by factors other than increased imports is excluded "serious injury" or threat thereof still remains, then that serious injury or threat can be attributed to increased imports. In that sense, increased imports have to be *the* cause or the sole cause of the "serious injury" or threat thereof. If, on the other hand, when the injury attributable to other factors is excluded what is left is not "serious injury" or threat thereof, then there is no "serious injury" or threat to attribute to increased imports.

14 In a hypothetical situation in which increased imports were one of three equal causes of serious injury, in your view would this by definition mean that a safeguard measure could not be applied? What if it could be shown that the portion of the injury attributable to increased imports by themselves could be characterised as "serious" injury (ie that the total injury suffered by the industry far surpassed the "serious injury" threshold such that one-third of that level of injury was still "serious")?

Answer 14

In New Zealand's view, a safeguard measure could be applied in a hypothetical situation where increased imports were one of three equal causes of serious injury if the domestic industry was suffering or was threatened with significant overall impairment caused by increased imports in themselves and the injury caused by other factors was not attributed to increased imports.

Is the measure imposed by the US President, which differs from the USITC's recommendation, consistent with the United States' obligations under the Safeguards Agreement and the GATT 1994?

[49] *Japan - Taxes on Alcoholic Beverages* WT/DS8/AB/R, 4 October 1996, page 12.

15 It appears to be your view that Article 5.1 requires, where a measure is to be applied, that that measure must be <u>the</u> least trade restrictive measure that would prevent or remedy serious injury and facilitate adjustment. Is this a correct understanding of your position? If not, please explain. How in your view should the burden of proof be allocated under Article 5.1?

<u>Answer 15</u>

A measure that is more trade restrictive than necessary to achieve the objectives of preventing serious injury and facilitating adjustment is not a measure that is "applied only to the extent necessary" to fulfill those objectives. In that sense, what is required is a measure that is the least trade restrictive *of those measures that will achieve the objectives*. A recommendation by a Member's competent authorities, following a full investigation into the facts, must be considered a measure that would achieve the goals of preventing serious injury and facilitating adjustment. Accordingly, to impose a measure more restrictive than such a recommendation would not be to apply the measure "only to the extent necessary" within the meaning of Article 5.1.

The Appellate Body has held that it is up to the Member alleging any inconsistency with WTO obligations to present evidence and argument sufficient to establish a presumption of inconsistency.[50] Once such a presumption is established, the burden then shifts to the Member accused of inconsistency to bring evidence and argument to rebut the presumption. In the present case New Zealand has established a presumption that the safeguard measure imposed by the United States was not the least trade restrictive of those measures that would achieve the objectives of preventing serious injury and facilitating adjustment, and therefore was applied to a greater extent than necessary to prevent serious injury and facilitate adjustment. Accordingly, the burden is now on the United States to rebut the presumption that it has failed to apply a measure "only to the extent necessary to prevent serious injury and facilitate adjustment" as required by Article 5.1 of the Safeguards Agreement.

16 In view of the infinite number of potential safeguard measures that could be applied, how could a Member ever conclusively determine that the measure it chose to apply in fact was <u>the one measure</u> that was the least trade restrictive measure that would prevent or remedy serious injury and facilitate adjustment?

<u>Answer 16</u>

New Zealand's argument is that a Member must impose the least trade restrictive *of those measures that will achieve the objective of preventing serious injury and facilitating adjustment*. There may be several such measures, and in certain circumstances more than one of those measures may be equally least trade restrictive. In any event, a recommendation by a Member's competent authorities, familiar with all the facts, must be considered to be a measure that will achieve the goals of preventing serious injury and facilitating adjustment. Accordingly, where such a recommendation exists, a Member must not impose a measure more restrictive of trade than that recommendation. Otherwise its measure would clearly be applied to an extent more than necessary to achieve the objectives of a safeguard measure. It would not, however, be necessary for a Member to conclusively determine that the measure it had chosen to apply was *the one measure* that was the least trade restrictive of an infinite number of potential measures that could be applied. It must simply show that it was no more trade restrictive than other measures available which would achieve the desired objectives.

[50] United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India WT/DS33/AB/R, 25 April 1997, p 13.

17 On what basis, specifically, do you argue that the measure applied by the United States is more restrictive than the measure recommended by the USITC, given that the recommended measure was of four years duration, while the measure applied is of three years duration only?

Answer 17

New Zealand considers that in assessing the relative trade restrictiveness of the measures recommended by the USITC and imposed by the United States, the initial duration of the measure is irrelevant. Under both the Safeguards Agreement and the United States legislation a safeguard measure can be extended for a maximum duration of eight years. Accordingly, whether a measure is initially imposed for three or four years cannot be an accurate assessment of its trade restrictiveness. There are three levels of restrictions to be assessed in comparing the USITC recommended measure and the actual United States measure: quota levels, in-quota tariffs, and out-of-quota tariffs. The quota levels under both measures are roughly equivalent.[51] The USITC recommended measure contained no in-quota tariff beyond the ordinary WTO bound rate of 0.8c per kg.[52] Accordingly, in-quota costs under the USITC recommended measure amount to no more than they would be with no safeguard measure in place. The only additional costs to trade under the USITC recommended measure, in all years, is the out-of-quota cost. In particular, the only cost which can be attributed to the fourth year of the USITC recommended measure, when there may be no safeguard under the actual United States three-year measure imposed[53], is the out-of-quota tariff rate. The USITC recommended a rate of 10 per cent in that year, 1 per cent higher than the first year in-quota tariff rate of the actual United States measure.

With regard to the first three years of both measures, the United States has argued that there is no difference in the trade restrictive effect of a 20 per cent out-of-quota tariff rate, as recommended by the USITC, and a 40 per cent out-of-quota rate, as imposed by the United States, because both were designed to be trade-preclusive.[54] The United States is evidently wrong. By any definition, 20 per cent is less than 40 per cent. Furthermore, according to basic economic principles, trade at the out-of-quota rate will nevertheless be profitable any time that the difference in percentage terms between the United States wholesale price for lamb and the world price for lamb is greater than the out-of-quota rate. Clearly, this is more likely to happen when the out-of-quota rate is 20 per cent than when it is 40 per cent. The out-of-quota rate imposed by the United States is therefore more restrictive of trade than the out-of-quota rate recommended by the USITC.

A comparison of in-quota costs under both measures also reveals that the actual United States measure is considerably more trade-restrictive than the USITC recommended measure. Estimated costs to trade for New Zealand at levels up to the quota level under the USITC recommended measure in year one would be US$116,000.[55] Under the actual United States measure up to the quota level imposed estimated costs would be US$7,125,000. The difference between these figures is US$7,010,000. In year two, in-quota costs to New Zealand under the USITC recommended measure would be US$121,000, and under the actual United States measure they would be US$4,878,000: a difference of US$4,757,000. In year three, respective costs to New Zealand would be US$106,000 and US$2,503,000, with a difference of US$2,397,000. In total, over the first three years of both measures, the measure imposed by the United St ates would result in in-quota costs to New Zealand of US$14.164 million more than under the measure recommended by the USITC.

The measure imposed by the United States set similar quota levels as the USITC recommended measure. The shorter initial duration of the measure imposed by the United States is

[51] Each measure allows for a small increase in the quota level after the first year of the measure.
[52] This is scheduled to drop to 0.7c per kg in 2001.
[53] Assuming that the measure had not been extended.
[54] United States First Written Submission, para 202.
[55] Based on a constant 1998 CIF price.

irrelevant to a determination of the trade restrictiveness of the measure as it can be extended to a duration of up to eight years. The out-of-quota costs to New Zealand trade of the actual United States measure are clearly substantially more than those of the USITC recommended measure. And the in-quota costs to New Zealand of the United States measure will be approximately US$14.2 million more than the USITC recommended measure. It is on this basis that New Zealand argues the measure imposed by the United States is more restrictive than the measure recommended by the USITC.

18 Article 5.1 provides that "a Member shall apply safeguard measures only to the extent necessary to prevent ... serious injury and to facilitate adjustment". In order to fulfill that standard, does a Member imposing a safeguard have to apply, e.g., (i) an "effective" measure, (ii) the least trade-restrictive measure, (iii) a "proportionate" measure, or something else?

Answer 18

The words "only to the extent necessary" as used in Article 5.1 clearly indicate a constraint on the measure that can be imposed. In the context of an agreement concerned with restrictions on trade for the legitimate purpose of preventing serious injury, that constraint must refer to the extent of the trade restrictiveness of the measure. A more trade restrictive measure than necessary to achieve the goals of the measure would not be one that was applied "only to the extent necessary" as required by Article 5.1. In addition, the words "necessary to prevent serious injury and facilitate adjustment" clearly require that the measure must achieve the goals of preventing serious injury and facilitating adjustment. Taken together, the phrase "only to the extent necessary to prevent serious injury and facilitate adjustment" must therefore mean that there has to be some proportionality between the ends and means of the measure. In this sense, whether the standard of Article 5.1 is expressed as "the least trade restrictive", or "no more restrictive than required"[56], or more generally as a requirement of proportionality, the end result is the same.

However, New Zealand does not consider that an "effective" measure would by itself fulfill the standard provided in Article 5.1 of the Safeguards Agreement. A measure does have to achieve the dual objectives of preventing or remedying serious injury and facilitating adjustment. In that sense, a measure must be "effective". But an "effective" measure would not necessarily be limited "only to the extent necessary" to achieve those objectives. In other words, a measure could be "effective", and also go beyond the limits provided for in Article 5.1.

Is the exclusion of Canada, Mexico and Israel from the safeguard measure consistent with the Safeguards Agreement and GATT 1994?

19 In the light of the interpretative note to Annex 1A to the Agreement Establishing the WTO, what is the relationship between Article 2.2 and the last sentence of footnote 1 to Article 2.1 of the Safeguards Agreement, on the one hand, and Article XXIV:8(b) of GATT 1994 on the other?

Answer 19

Article XXIV:8 does not include safeguards amongst the explicit exceptions in Article XXIV to the requirement that all restrictive regulations of commerce be eliminated from FTAs. Article 2.2 provides that safeguard measures must be applied to a product, irrespective of source. The interpretative note to Annex 1A to the Agreement Establishing the WTO gives priority, in the event of any conflict between the provisions of GATT 1994 and of a WTO Agreement such as the Safeguards Agreement, to the provisions of the latter. However, the last sentence of footnote 1 to the Safeguards

[56] As formulated by the United States in its First Written Submission, para 210.

Agreement indicates that that Agreement does not take any position on the relationship between Article XIX and Article XXIV:8.

New Zealand considers that, consistent with the findings of the Appellate Body in *Argentina - Footwear*, there must be a parallel between a determination of injury in a safeguards investigation and the application of a safeguard remedy.[57] In New Zealand's view there is no foundation in either the Safeguards Agreement or GATT 1994 for the United States claims that the case of *Argentina - Footwear* should be distinguished from the present case simply on the grounds that there is a difference in the quantity of imports involved. The Appellate Body based its conclusions on the legal principle, not on the amount of imports involved.

Furthermore, the objective of both the Safeguards Agreement and Article XIX of GATT 1994 is to provide temporary relief from imports as an "emergency action" in certain strictly defined circumstances. In accordance with those defined circumstances, New Zealand considers that the imposition of safeguard measures should be allowed only to provide temporary relief from imports *which are found to be causing or threatening serious injury*. Accordingly, imports from FTA partners which are excluded from a safeguard remedy must also have been excluded from the safeguard investigation establishing injury and causation.

Under their Closer Economic Relations Agreement, in any safeguards investigation Australia and New Zealand do exactly that: they exclude each other's imports from the entire safeguards process, including determinations on injury and causation. There is no requirement of a separate causation or "important contribution" determination. All such imports are excluded from the whole safeguards process as a matter of course. In contrast, under NAFTA the United States includes imports from its NAFTA partners in its determination of injury and causation. It then excludes those imports from any safeguard measure imposed unless a separate causation test establishes that they accounted individually for a "substantial share" of total imports and "contributed importantly" to the injury which was found to have been caused by all imports.

Nothing in Article XXIV of GATT provides for the approach taken by the United States. Nor does this approach have any basis in the Safeguards Agreement or in Article XIX of GATT. New Zealand considers that, taken together, those provisions establish a definitive safeguards regime under the WTO. The United States approach of "important contribution" has no foundation in those provisions and is therefore not consistent with that regime.

[57] Para 113.

ANNEX 2-9

SECOND SUBMISSION OF NEW ZEALAND

(29 June 2000)

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NZ20. Ambassador Barshefsky, United States Trade Representative, transcript of House Agriculture Committee Meeting, 23 June 1999.

I. INTRODUCTION

1.1 In its written and oral pleadings in this case, New Zealand has established how the United States actions in imposing safeguard measures on imports of lamb meat do not conform with the United States obligations under the Safeguards Agreement and the GATT 1994: no unforeseen developments that resulted in increased imports have been demonstrated; the domestic industry allegedly threatened with serious injury has been improperly identified; there has been a failure to demonstrate that any threat of serious injury was caused by increased imports; the measure imposed cannot be demonstrated to have been applied only to the extent necessary to prevent serious injury or to facilitate adjustment; and the measure has not been applied to all imports irrespective of source.

1.2 The United States response in its First Written Submission and in its Oral Statement before the Panel, has sought to refashion the report of the USITC in attempt to demonstrate that it complies with the United States WTO obligations. However, a careful comparison of what the USITC said with what the United States now claims it said, shows that the United States description of the USITC report does not withstand analysis. The United States ascribes to the USITC conclusions that it did not make and draws together a range of disparate comments made by the USITC, and then claims that they collectively represent a conclusion of the USITC. In this way, the United States seeks to reconstruct the USITC report, by suggesting that it draws conclusions that are not made and omits statements that are. This attempt by the United States to disregard the actual report prepared by the USITC in favour of a new report prepared by the United States in an effort to defend the claims made against it in this case cannot be entertained. The Safeguards Agreement requires that the investigating authority "evaluate" and "demonstrate" and provide reasoned conclusions and analysis. Such obligations are not met by subsequent attempts by the United States to show what the USITC should have said.

1.3 The United States also seeks to have the Panel give it broad latitude in its interpretation of its obligations under the Safeguards Agreement. In its Oral Statement to the Panel at the First Hearing, the United States argued that the ability of Members to take safeguards measures should not be unduly limited.[1] In its responses to questions from the Panel, the United States argues that the Panel should not interpret safeguards obligations "narrowly" or "strictly".[2] Clearly, the United States has in mind that its ability to take safeguards measures should not be subject to close scrutiny.

1.4 In it its First Written Submission, New Zealand pointed out that safeguards actions are exceptional measures and, as the Appellate Body stated in *Argentina – Safeguard Measures on Imports of Footwear*, "when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account."[3] This approach does not depend on any characterisation of the safeguards provisions of the WTO agreements as exceptions. It is a recognition that Members must observe their obligations carefully when taking measures that involve a temporary suspension of treaty obligations that deprives other Members of negotiated benefits. In short, there is no basis for the latitude in interpretation that the United States claims in this case. Rather, the Safeguards Agreement should be interpreted according to the ordinary meaning of its words in their context, and that interpretation should not be stretched to accommodate the way in which it has been interpreted domestically by one Member.

1.5 In this Second Written Submission, New Zealand will reaffirm the arguments that it has made in its earlier written and oral submissions, showing that the United States attempts at refuting New Zealand's arguments are ill-founded. New Zealand will show that the USITC did not demonstrate the existence of unforeseen developments. It will also show that the United States

[1] United States Oral Statement at the First Panel Hearing, para 3.
[2] United States Responses to Questions by the Panel, paras 119 and 120.
[3] WT/DS121/AB/R, 14 December 1999, para 94. See paras 7.16 and 7.18 of New Zealand's First Written Submission.

definition of the "domestic industry" allegedly threatened by serious injury has no basis in WTO law. New Zealand will demonstrate that the USITC made a determination that its domestic industry was threatened with serious injury on the basis of nothing more than a supposition that if imports increase the domestic industry will suffer, and not on the basis of reasoned objective analysis. Furthermore, the United States did not demonstrate that any threat of serious injury to its domestic industry was caused by imports and it attributed injury caused by other factors to increased imports. Finally, the United States failed to apply a remedy only to the extent necessary to prevent serious injury and facilitate adjustment, and did not apply the remedy to all of the imports which allegedly contributed to the threat of serious injury facing its domestic industry.

II. UNFORESEEN DEVELOPMENTS

2.1 In its First Written Submission, New Zealand pointed out that the USITC had failed to identify any "unforeseen developments", within the meaning of GATT Article XIX, to which the safeguard measures imposed by the United States responded.[4] Moreover, as New Zealand made clear, there were no such unforeseen developments, since the decline in the United States lamb industry was well-known, foreseen and foreseeable.[5] In its First Written Submission, the United States sought to remedy this defect in the USITC Report by referring to "significant, unexpected changes" which it perceived to be increases in imports and particularly increases in chilled product.[6] However, as New Zealand argued in its Oral Statement at the First Panel Hearing, such increases do not constitute "unforeseen developments" within the meaning of GATT Article XIX on which the United States can rely in this case.[7] Furthermore, it is up to the USITC at the time of its investigation, not the United States *ex post facto*, to demonstrate the existence of unforeseen developments.

2.2 GATT Article XIX.1(a) provides in relevant part,

> "If as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury…."

In *Argentina – Footwear* the Appellate Body said that although by referring to "unforeseen developments" the opening clause of Article XIX.1(a) did not establish independent conditions for the application of a safeguard measure, it did describe "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."[8]

2.3 In articulating the test in this way, the Appellate Body made clear that although the existence of "unforeseen developments" was not a "condition" in the sense of the provisions of Article 2.1 of the Safeguards Agreement relating to increased imports, causation and serious injury, it was, nevertheless, something that had to be demonstrated. The Appellate Body did not say that "unforeseen developments" have simply to exist; it said that they have to be "demonstrated". Moreover, the Appellate Body also indicated that it was for the competent authorities to make such a demonstration. It pointed out in *Argentina – Footwear* that since it had reached a decision on other grounds that there was no legal basis for the safeguard measure imposed by Argentina, "we do not believe that it is necessary to complete the analysis … by ruling on whether the Argentine authorities

[4] New Zealand's First Written Submission, para 7.31.
[5] New Zealand's First Written Submission, paras 7.33 to 7.35.
[6] United States First Written Submission, paras 49 and 59.
[7] New Zealand's Oral Statement at the First Panel Hearing, paras 20 to 25.
[8] Argentina - Footwear, para 92.

have, *in their investigation*, demonstrated that the increased imports in this case occurred 'as a result of unforeseen developments…'."[9] The issue was whether the Argentine authorities conducting the investigation had demonstrated the existence of unforeseen developments; it was not whether the Argentine government acting *ex post facto* in the course of WTO proceedings had been able to do so.

2.4 That the competent authorities themselves must demonstrate the existence of "unforeseen developments" also follows from Article 3.1 of the Safeguards Agreement. The demonstration of the existence of "unforeseen developments" clearly falls into the category of "all pertinent issues of fact and law" on which Article 3.1 requires the competent authority to report.

2.5 In its response to the Panel's questions, the United States seeks to bolster its view that the competent authorities do not have to find the existence of unforeseen developments in the course of their investigation, by arguing that there is nothing in Articles 2, 3 and 4 of the Safeguards Agreement that furnishes a standard on the basis of which the competent authorities could decide whether negotiators could have foreseen later developments.[10] Competent authorities, the United States claims, would accordingly have to make additional inquiries into whether unforeseen developments existed and whether they were foreseen.[11]

2.6 However, such a suggestion is a thinly disguised reiteration of the argument, rejected in *Argentina - Footwear*, that the Safeguards Agreement does not impose an obligation on Members to find the existence of unforeseen developments. That obligation is found in GATT Article XIX, not the Safeguards Agreement, and so it is not surprising that no articulation of the standards for its application are found in Articles 2, 3 or 4 of the Safeguards Agreement. Moreover, WTO Members have an obligation to carry out the terms of the WTO agreements, and not just to comply with those obligations only in those circumstances where specific standards are found in the agreements for their application.

2.7 Furthermore, the distinction between a legal condition and a factual circumstance on which the United States places so much emphasis does not carry with it the consequence that the United States implies. While there is obviously a difference between a legal condition which has to be fulfilled and a factual circumstance whose existence has to be demonstrated, in both instances they constitute a legal requirement that has to met. Failure to meet a legal requirement for the application of a safeguard measure means that the measure cannot be applied.

2.8 In its First Written Submission, the United States appears to suggest that a demonstration of "unforeseen developments" can be implied from the USITC's Report.[12] It bases its argument on things that were said in a range of disparate contexts and seeks to put them together as an implicit demonstration of the existence of "unforeseen developments." The USITC discussed changes in conditions of competition when discussing causation;[13] it discussed changing market conditions when discussing remedy;[14] and it discussed increases in chilled product when considering whether imported and domestic lamb meat were like products.[15] These references are apparently meant to show that the USITC was inferentially demonstrating that "unforeseen developments" were resulting in increased imports. But this inference is simply manufactured out of thin air. It bears no relationship to what the USITC actually said in its Report.

[9] *Argentina - Footwear*, para 98 (emphasis added).
[10] United States Responses to Questions by the Panel, para 14.
[11] United States Responses to Questions by the Panel, footnote 11.
[12] United States First Written Submission, paras 49 to 60.
[13] USITC Report, I-22.
[14] USITC Report, I-30.
[15] USITC Report, I-11.

2.9 Even if it were possible at this late stage for the United States to remedy a defect in the USITC Report, it has not done so in its First Written Submission or in its Oral Submission to the Panel. In large measure, the United States argument is that there was an increase in imports. But the requirement of "increased imports" is a condition of the application of a safeguard measure set out in Article 2.1 of the Safeguards Agreement that is separate from the circumstance of "unforeseen developments". That is the precise point of the decision of the Appellate Body in *Argentina – Footwear* which established that unforeseen developments constituted a circumstance that must be demonstrated.[16] It is not sufficient simply to show that the conditions of Article 2.1 of the Safeguards Agreement have been met. It must also be *demonstrated* that the increased imports occurred *as a result of* unforeseen developments. That is the very question that the Appellate Body said in *Argentina - Footwear* it did not have to address because it had decided on other grounds. If those other grounds had not been present, the Appellate Body would have had to address the question of whether the Argentine competent authorities had demonstrated that increased imports had resulted from unforeseen developments.

2.10 Nor can the other implicit argument of the United States withstand analysis. In its First Written Submission, the United States implies that it was not just the increase in imports that constituted an "unforeseen development", it was the change in product mix from frozen to chilled that constituted a change in conditions of competition or market conditions that was unforeseen.[17] But this argument suffers from the same defects as the one considered above. It stems from a misreading of Article XIX.1(a) of the GATT 1994. That provision makes clear that any increase in imports and any change in the conditions under which they are imported must be as a result of "unforeseen developments". It is necessary to show that increased imports *and* the conditions of import are a result of something unexpected.

2.11 To allow the import increase or any change in the conditions of import to be "unforeseen developments" would be to accept that increased imports and the conditions under which they are imported must occur as a result of increased imports and the conditions under which they are imported. This is tantamount to saying that they must "result" from themselves. Such an approach would render meaningless the requirement that the existence of unforeseen developments be demonstrated. It would be to read out of the law precisely what the Appellate Body confirmed in *Argentina – Footwear* was part of the law.

2.12 In its responses to the questions posed by the Panel, the United States tried to characterise New Zealand's position as an argument that the term "as a result of" in Article XIX of the GATT 1994 means the same as the term "to cause" in that Article and in Article 2.1 of the Safeguards Agreement.[18] New Zealand makes no such argument. Rather, New Zealand argues that in order to comply with the requirement that unforeseen developments be demonstrated, the United States must indicate some developments that were unforeseen that led to products being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury. As the United States itself appears to recognise, the "outcome" of increased imports under such conditions as to cause or threaten to cause serious injury must "generally follow" from certain unforeseen developments.[19] But it need not be caused by them. In short, the United States characterisation of the New Zealand position as imposing a double causation test is incorrect.

[16] Argentina - Footwear, para 92.
[17] United States First Written Submission, paras 50 to 59.
[18] United States Responses to Questions by the Panel, para 5.
[19] In its responses to the Panel the United States says, "the expression 'If, as a result of' suggests that the framers of Article XIX were seeking to characterize a situation in which a particular outcome ('a result') has followed generally from earlier occurrences.": United States Responses to Questions by the Panel, para 3.

2.13 As the Appellate Body affirmed in *Argentina – Footwear*, the classic interpretation of the term "unforeseen developments" remains that laid down by the GATT Working Party in the *Hatters Fur* case:

> "developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated."[20]

In that case, it was the "degree to which the change in fashion affected the competitive situation" that constituted the unforeseen development.[21]

2.14 In its response to questions from the Panel, the United States has attempted to minimise the significance of the *Hatters' Fur* test to the point of non-existence.[22] The essence of the United States position is that if imports increase that is sufficient of itself to constitute an unforeseen development. Indeed, the United States goes as far as saying that there is a presumption that subsequent increases in imports were not foreseen.[23] The United States says: "Because Members cannot be presumed intentionally to place their industries in jeopardy through the grant of tariff concessions, it must be presumed that later developments which imperil their producers are of a kind that were 'unforeseen' when the concessions were negotiated."[24] Moreover, from the Exhibits attached to the United States responses to the Panel's questions, it is apparent that this is a long-held position of the United States.[25] The United States itself quotes from the remarks of the Chairman of the Tariff Commission in testimony to the Senate Finance Committee in June 1948 that when imports enter in such increased quantities and under such conditions as to cause or threaten to cause serious injury, the situation "must, in the light of the objective of the trade agreements program and of the escape clause itself, be regarded as the result of unforeseen developments."[26]

2.15 Notwithstanding the United States claim to parentage of the escape clause, the United States arguments demonstrate both the unreliability of relying on the negotiating history of one party as well as the United States determination to remove any content from the concept of unforeseen developments. Its arguments in this case come to little more than an attempt to read any requirement of demonstrating the existence of "unforeseen developments" out of its safeguards obligations.

2.16 GATT Article XIX requires that there must have been something that was unexpected or unforeseen that triggered an increase in imports in such quantities and under such conditions as to cause or threaten to cause serious injury. The United States must show that something unexpected or unforeseen occurred. It has not done this. Indeed, as New Zealand has pointed out, the developments that resulted in increased imports were the direct result of actions taken by the United States government, and thus could not have been unforeseen. As a result, the United States has fallen back on trying to show that the developments that were unforeseen were the increased imports themselves. However, as New Zealand has pointed out, that approach, too, voids the requirement of unforeseen developments of any content.

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[20] 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, para 9. See Argentina - Footwear, para 96.

[21] Hatters' Fur, para 12.

[22] United States Responses to Questions by the Panel, paras 23 to 25.

[23] United States Responses to Questions by the Panel, para 26.

[24] United States Responses to Questions by the Panel, para 8.

[25] See in particular United States Exhibit 25, attached to its Responses to Questions by the Panel.

[26] United States Response to Questions by the Panel, para 21.

2.17 Nor is the United States argument that the unforeseen developments were increased imports made any more plausible when it is couched in terms of a change in the conditions of competition. The United States argues that there was an "abrupt reversal" in the pattern of competition after 1995[27], which was "sudden" and "unexpected"[28], and that this constituted an "unforeseen development" within the meaning of Article XIX of the GATT 1994.[29] The United States bases its reasoning on the alleged view of the USITC that the imported and domestic product became more similar and therefore more directly competitive from 1995, as a result of the change in the product mix from frozen to fresh and chilled product, and an increase in the size of the imported product.

2.18 However, the record of evidence in the USITC report does not support this allegation. The USITC attempted to examine the conditions of competition between imported and domestic product by comparing the sales of eight different product cuts.[30] Of the eight cuts chosen, three could not be compared because there were insufficient sales of either the domestic or imported product, and in two cases (both frozen product) there were few domestic sales. There were sufficient domestic and imported sales of only three products, two of which were considered to be domestic products and one an imported product. Based on the evidence before it[31], the USITC did not find much overlap, and therefore not much direct competition, between those imported and domestic lamb meat cuts. Furthermore, responses to questions put to importers on what significant changes in lamb meat cuts had occurred over the last five years identified an increase in the types of imported products which the domestic industry did not produce.[32] This is consistent with the USITC's finding of "evidence of *differences* between products from different sources"[33], rather than of direct competition.

2.19 Similarly the claim by the United States of more direct competition through the larger size of the imported product does not stand up to scrutiny. The USITC found that the average carcass weight of the United States product was 67 pounds, compared to 35 pounds for New Zealand slaughter lambs.[34] The USITC also found that New Zealand racks of lamb were commonly in the 14 to 16 ounce range.[35] The United States racks are in the 24 to 28 ounce range.[36] The only real evidence before the USITC concerning an increase in the size of the imported product is evidence that the average carcass weight of Australian product increased from 40 pounds in 1993 to 42 pounds in 1996 and 1997.[37] This is hardly a sufficient basis on which to conclude that the imported product has become more comparable in size to the domestic product. Indeed the United States now appears to acknowledge this in its responses to questions of the Panel, where there is no mention made of the larger size of the imported product.[38]

2.20 Nor is there any hard evidence that a change in the product mix from frozen to fresh and chilled made the imported product more directly competitive with the domestic product. The USITC found that domestic and imported lamb meat have the same uses, citing evidence that fresh, chilled and frozen lamb meat are used in the same way.[39] If that is the case, a shift in the product mix can have had no impact on the degree to which the products compete in the marketplace.

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[27] United States First Written Submission, para 54.
[28] United States First Written Submission, para 56.
[29] United States First Written Submission, para 60.
[30] USITC Report, II-74 to II-76.
[31] Testimony of Kirk Halpern, injury hearing, attached as Annex NZ-14.
[32] USITC Report, II-65.
[33] USITC Report, I-23 (emphasis added).
[34] USITC Report, II-8.
[35] USITC Report, II-75.
[36] USITC Report, II-74.
[37] USITC Report, II-37.
[38] United States Responses to Questions by the Panel, paras 9 to 13.
[39] USITC Report, I-11.

2.21 Even if that were not the case, it is clear that much of the increase in the fresh and chilled product did not compete with the domestic product. The USITC found that many imports supplied new demand.[40] Since 1994 New Zealand fresh and chilled lamb meat has been supplied to a major American restaurant chain and to warehouse clubs which preferred the small size, taste, leanness and consistency of New Zealand lamb. These firms had not purchased lamb meat before 1994. Most of the growth in fresh and chilled imports has been due to the natural growth in the number of outlets of those American purchasers.[41] The fresh and chilled imported lamb meat supplying this new demand is therefore not in direct competition with the domestic product. Imported product cannot therefore be "displacing domestic product" as alleged by the United States.[42]

2.22 Furthermore, the increase in fresh and chilled product cannot have been an "unforeseen" development within the meaning of Article XIX:1(a) of the GATT 1994. Fresh and chilled lamb meat has been imported from New Zealand since 1986.[43] Fresh and chilled product represented 31 per cent of all lamb meat imports in 1990.[44] In 1997 the majority of total lamb meat imports was still frozen.[45] Fresh and chilled lamb meat imports from New Zealand comprised only 30 per cent of New Zealand total lamb meat imports in 1997.[46] Given the higher prices of fresh and chilled product, and therefore the likely higher returns to exporters from that type of product, it would have been both expected and foreseen in 1995 that fresh and chilled product would increase. Indeed the USITC in its 1995 report referred to the lifting of the restrictions on imports of New Zealand chilled lamb meat entering the European Community market by 1 July 1995 in the context of identifying the allowance for "high-value chilled sheepmeat" within total New Zealand imports.[47] Clearly, therefore, the likelihood of an increase in high-value chilled lamb imports into the United States would have been expected and foreseen at the beginning of 1995.

2.23 The United States has accordingly failed to show that the imported and domestic product competed more directly since 1 January 1995, when the United States incurred obligations under GATT 1994. Even if this had been shown, the United States has failed to demonstrate that this would have constituted an "unforeseen development" within the meaning of Article XIX.1(a) of the GATT 1994.

2.24 Thus, even if it were possible to do so *ex post facto* the United States has failed to discharge the burden of demonstrating the existence of "unforeseen developments". New Zealand has shown in its First Written Submission[48] and Oral Statement at the First Panel Hearing[49] that the increase in imports in this case resulted from a decline in domestic production, which in turn was a consequence in large part of the removal of the subsidy paid to producers under the Wool Act. Such a consequence was clearly foreseeable. The United States has not even attempted to rebut this. It has not sought to demonstrate that the decline in domestic production was unforeseen or unforeseeable, nor could it do so, as that decline was the consequence of the United States own actions. The resulting decline in domestic production drew imports into the market in order to meet demand that was not being filled.

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[40] USITC Report, I-32.

[41] Testimony of John Cassidy and Brian Comfort, injury hearing, attached as Annex NZ-15.

[42] United States Responses to Questions by the Panel, para 12. The United States claim, at para 12 of its responses to questions of the Panel, that New Zealand conceded that imports displaced lamb meat is incorrect. New Zealand made no such concession.

[43] USITC Report, II-20.

[44] USITC, Lamb Meat: *Competitive Conditions Affecting the US and Foreign Lamb Industries* , Inv. No. 332-357, August 1995, USITC Publication No 2915, Table 2-14, attached as Exhibit 10 to the United States First Written Submission.

[45] USITC Report, II-43.

[46] USITC Report, II-43.

[47] USITC, Lamb Meat: *Competitive Conditions Affecting the US and Foreign Lamb Industries*, Inv. No. 332-357, August 1995, USITC Publication No 2915, page 4-20.

[48] New Zealand's First Written Submission, paras 7.33 to 7.35.

[49] New Zealand's Oral Statement at the First Panel Hearing, para 21.

As New Zealand has pointed out, this case involves an attempt by the United States to pass on to imports by means of a safeguard measure burdens that result from its own actions within its domestic market.

III. DOMESTIC INDUSTRY

3.1 In its First Written Submission, New Zealand pointed out that the USITC had determined what constituted the domestic industry allegedly threatened with serious injury on the basis of a test that finds no justification in the Safeguards Agreement.[50] Rather than determining the domestic industry by looking at the producers of "like or directly competitive products", the USITC sought to expand the category of producers to those who did not produce "like or directly competitive products." The United States claims that this approach is consistent with the Safeguards Agreement on the basis that the term "producers as a whole" in Article 4.1(c) of the Safeguards Agreement should be interpreted to include "producers" who are part of a "continuous line of production" from the raw to the processed product, and where there is a "substantial coincidence of economic interest" between the producer of the raw product and the producer of the processed product.[51] However, such an approach ignores the context in which the words "as a whole" are used in Article 4.1(c) and has no basis in the Safeguards Agreement or in the GATT 1994.

3.2 In its First Written Submission, the United States does not argue that live lambs are "like or directly competitive" with lamb meat. It simply says that the issue is "inapposite".[52] Rather, it seeks to sustain the position taken by the USITC on the ground that there is an integral relationship between the producers of live lambs and the producers of lamb meat. In this case, the United States asserts, there is extensive integration between firms at different stages in a continuous line of production. Such "vertical integration" justifies, in the United States view, the inclusion of those who do not produce like or directly competitive products within the domestic industry for the purposes of the USITC's investigation. In seeking to support this argument, the United States relies on a case that is not relevant, and seeks to distinguish, or to simply ignore, cases that are directly on point.[53]

3.3 The GATT panel decision in *New Zealand – Imports of Electrical Transformers from Finland*[54], on which the United States relies, simply has no relevance to this case. There, the panel rejected the idea that distinctions could be made between different producers of the same product. That is not the question here. It is whether producers of different products – products that are not like or directly competitive – can be included within the definition of domestic industry. The case would be relevant if the argument was made that producers of certain kinds of lamb meat ought to have been excluded from the definition of domestic industry. But that is not New Zealand's contention.

3.4 Equally, the United States attempt to distinguish the cases of *Canada - Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC*[55] and *Panel on United States Definition of Industry Concerning Wine and Grape Products*[56] is unconvincing. The fact that the panel decision in *Canada -Manufacturing Beef* was never adopted is irrelevant. New Zealand did not cite the case as binding authority. It cited it to show a consistent pattern of reasoning under which the idea that a like or directly competitive product determination should be made on the basis of some

[50] New Zealand's First Written Submission, paras 7.40 and 7.41.

[51] United States First Written Submission, paras 62, 63 and 68. In responding to questions by the Panel on this point, the United States cited three different dictionaries as support for its alleged "ordinary meaning" of the three words "product", "production", and "output": United States Responses to Questions by the Panel, para 30. This illustrates that the "ordinary meaning" of those words is constructed by the United States for the purposes of interpretation of Article 4.1(c).

[52] United States First Written Submission, para 61.

[53] United States First Written Submission, paras 71 to 76.

[54] BISD 32S/55, adopted on 18 July 1985.

[55] SCM/85, 13 October 1987.

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

notion of the vertical integration of an industry was consistently rejected by GATT panels. That pattern of reasoning is illustrated as well in *Canada – Import Restrictions on Ice Cream and Yoghurt*[57], a decision that the United States conveniently ignores.

3.5 In *United States - Wine and Grape Products* the panel recognised that the processing of primary agricultural products is often a separately identifiable economic process, irrespective of ownership, so that it is in fact an industry that is separate from the industry that is engaged in the production of those primary products.[58] The panel also said that economic interdependence between such separate industries is irrelevant to the definition of the industry.[59] In *Canada – Manufacturing Beef* the panel stated that the only case in which common ownership will affect the definition of industry is where it results in such complete integration of production processes that it is impossible to analyse each process separately.[60] As the USITC itself recognised, that type of integration occurs in this case only between grower and feeder operations and between packers and breakers.[61] There is accordingly no support in WTO or GATT jurisprudence for the approach taken by the United States in determining the domestic industry in this case.

3.6 In any event, even if it had some basis in law, the United States "vertical integration" theory fails on the facts of this case. In the United States, the vertical integration that occurs within sectors, that is between growers and feeders, the producers of live lambs, and between packers and breakers, the producers of lamb meat, does not occur in the same way across those sectors. Only one firm, Transhumance, a firm that actively opposed the petition to the USITC, operates across both live lamb and lamb meat sectors. But, even in the case of Transhumance separate business operations could be identified and treated as separate industries for the purposes of investigating serious injury or threat. Thus, the reality of "vertical integration" actually supports New Zealand's contention on the appropriate domestic industry, not that of the United States.

3.7 Moreover, the United States "continuous line of production" theory characterises live lambs as no more than a raw input in a production process. But that is completely misleading. Live lambs are a distinct product. They are sold for breeding stock. They are a source of wool.[62] They are not just inputs into the production of lamb meat. The claim by the representatives of the United States in the oral hearing that the United States has no export trade in live lambs does not alter the fact that live lambs constitute a separate and distinct product from lamb meat.

3.8 Apart from its incompatibility with the reality of the live lamb and lamb meat industries, and with the actual wording of Article 4.1(c) of the Safeguards Agreement, the United States argument that the producers of inputs into products should be treated as part of the domestic industry for a determination under the Safeguards Agreement also has important systemic implications. It opens the possibility that the producers of all inputs, no matter how insignificant, could be considered part of the domestic industry. Such an approach would render safeguard disciplines meaningless.

3.9 In its responses to questions from the Panel, the United States has sought to minimise the consequences of its arguments by saying that the USITC includes producers of a raw input in the class

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[57] Adopted on 5 December 1989, BISD 36S/68.

[58] United States - Wine and Grape Products, paras 4.3 and 4.5.

[59] United States - Wine and Grape Products, para 4.5.

[60] Canada - Manufacturing Beef, para 5.14.

[61] USITC Report, II-29 and II-33. In answer to a question from the Panel during the hearing on 26 May 2000 as to whether the United States industry is so highly integrated that the segments cannot be separated, the United States replied only that as most lamb is produced for meat, there is a tendency for all segments to rise and fall together. This does not amount to an inability to differentiate between industries.

[62] The USITC itself recognised that the removal of the Wool Act subsidy had a significant impact on producers of live lambs, illustrating that the production of wool is also an important use of live lambs: USITC Report, I-30.

of producers of the final processed product only in the case of agricultural products.[63] In other words, the United States is claiming that there are two definitions of producers of like or directly competitive products applied in United States safeguards practice. One applies to agricultural products and the other applies to manufactured products. But a justification for such a distinction cannot be found in either the Safeguards Agreement or the GATT 1994. The only distinction made between agricultural products and other products for the purposes of safeguard measures in the WTO system is found in Article 5 of the Agreement on Agriculture, which provides a special safeguard measure for certain agricultural products. The negotiators of the Safeguards Agreement were well aware of the option of distinguishing between agricultural and other products if they wished to do so. They did not do so for the purposes of defining the domestic industry under Article 4.1(c) of the Safeguards Agreement. Thus, this new United States position does nothing more than highlight the extent to which its safeguards practice deviates from its obligations under the WTO agreements.

3.10 The concept of "the domestic industry that produces like or directly competitive products" in Article 2.1 of the Safeguards Agreement was intended to have a limiting effect. Indeed, Article 2.1 provides the primary reference to domestic industry, and defines it clearly by the qualification that it is the industry "that produces like or directly competitive products". The primacy of Article 2.1 in this respect is made clear by Article 4.1(c) which explains in its first clause that a domestic industry is to be understood as the "the producers as a whole of *the* like or directly competitive products …". The definite Article "the" can refer only to like or directly competitive products as identified in Article 2.1.

3.11 The wording of Article 4.1(c) also makes clear that the term "producers as a whole" is a quantitative measure of the class of producers. It does not serve to expand the class to those who do not produce a like or directly competitive product, as the United States argues. This is reinforced by the second clause of Article 4.1(c) which refers, as an alternative to "producers as a whole", to "those whose collective output of the like or directly competitive products constitutes a major proportion of the domestic production of those products." Both are alternative ways of ensuring that there is a representative class of the domestic industry and not just isolated producers within that industry that are claiming serious injury or threat.[64] Neither phrase expands the meaning of "producer" to include more than producers of the like or directly competitive product, as the United States seeks to do.

3.12 In short, the problem with the United States approach to the determination of the domestic industry in the present case is that it simply does not do what the Safeguards Agreement requires, that is, to determine who constitutes a producer by looking at what they produce. The United States claims that in this case this would constitute an "artificial definition" of the domestic industry.[65] However, it is the United States, not New Zealand, that advances an artificial definition. Such artificiality arises because of the United States insistence that producers of a product that is *not* like or directly competitive with an imported product should nevertheless be part of the industry composed of producers of a product that *is* like or directly competitive with the imported product. In arguing this way, the United States seeks to rewrite the clear words of the Safeguards Agreement.

3.13 Finally, the United States seeks to nullify the effect of the USITC's wrongful determination of the domestic industry by arguing that on the facts it does not matter. It claims that even if the domestic industry were restricted to packers and breakers – those who actually produce a like or directly competitive product in this case – that domestic industry would still be threatened with serious injury caused by increased imports.[66] However, as New Zealand will show in the next

[63] United States Responses to Questions by the Panel, para 28.

[64] The United States expressly agrees with this position in para 41 of its responses to questions by the Panel.

[65] United States Oral Statement at the First Panel Hearing, para 15.

[66] United States Oral Statement at the First Panel Hearing, para 16.

section, even if it were admissible to make such a claim at this late stage, the claim that a domestic industry composed of packers and breakers is threatened with serious injury has no basis whatsoever.

IV. THREAT OF SERIOUS INJURY

4.1 In its First Written Submission, New Zealand pointed out that the USITC had failed to demonstrate that a threat of serious injury existed because it had not shown that any serious injury was "clearly imminent".[67] In both its First Written Submission and before the Panel, the United States has sought to obscure this issue, arguing that causation factors go to show the existence of a threat and that threat factors prove causation. The United States also seeks to discourage the Panel from looking closely at the USITC's reasoning on the specious ground that this would constitute a *de novo* review.[68] However, the fact remains that the USITC did not determine on the basis of facts, rather than "allegation, conjecture or remote possibility" that there was a threat of serious injury.[69] Neither the USITC nor the United States in this case have explained how the continuation of an economic pattern that has a long past history and which does not constitute serious injury in the present, can suddenly become a threat of serious injury in the future.

4.2 In order to determine whether there was a threat of serious injury, it is not sufficient, as the United States has done, to examine simply whether imports are projected to increase in the future and then to assume that this will adversely affect the position of the domestic industry. What must be demonstrated is a threat of serious injury, not a threat of increased imports. The panel in *Argentina - Footwear* expressly rejected the possibility of finding a threat of serious injury based simply on the threat of increased imports.[70]

4.3 As New Zealand has argued in its First Written Submission, the USITC failed to apply any method that would allow it to determine whether there was any significant overall impairment that was clearly imminent.[71] The Appellate Body has indicated that in looking at significant overall impairment, the competent authority is to look at the "overall picture" of the industry.[72] In examining whether a significant overall impairment in the position of the domestic industry was "clearly imminent", a competent authority should therefore examine how the overall picture of the industry is likely to develop in the future, compared to its position in the past.

4.4 In this way serious injury or threat thereof is a relative concept. It means significant overall impairment in the position of the domestic industry relative to some point in the past. In the case of threat of serious injury an investigating authority must compare the overall position of the domestic industry in the past with how it is likely to develop in the future, based on those past trends. In order to make a determination that is not based on allegation, conjecture or remote possibility, an investigating authority should therefore examine the factual evidence of the position of the domestic industry in the past, and extrapolate how it was likely to develop in the future.

4.5 The USITC failed to establish "threat" on the basis of any serious analysis of either the past or the future. The USITC took the view that there had been a continuation of an impairment that existed in the past, but which did not constitute serious injury, and concluded, as the United States pointed out in its responses to the questions from the Panel, that the industry was "on the verge of a significant overall impairment of its position."[73] But this "verge" of impairment was based only on information for 1997 and through to September 1998 - information which in the nature of agricultural markets can

[67] New Zealand's First Written Submission, paras 7.56 and 7.69.
[68] United States First Written Submission, para 92.
[69] See Article 4.1(b) of the Safeguards Agreement.
[70] Panel Report, *Argentina - Footwear* WT/DS121/R, 25 June 1999, para 8.284.
[71] New Zealand's First Written Submission, paras 7.56 to 7.70.
[72] Argentina - Footwear, para 139.
[73] United States Responses to Questions by the Panel, para 43.

be no more than a measurement of a fluctuation, as indeed it was. Prices rose from the latter part of 1998 and, as now disclosed in information provided by the United States they continued to rise through 1999.[74] The industry was clearly not on the "verge" of impairment. There was therefore no reasoned basis for the conclusion of the USITC that the industry was faced with significant overall impairment or that significant overall impairment was "clearly imminent".

4.6 In attempting to argue that there was a threat of significant overall impairment in the position of the domestic industry, the United States argues that prices are the key indicator of the domestic industry's financial condition and that where demand is stable increased imports will result in a decline in prices.[75] However, its conclusion that there was a threat of serious injury to the domestic industry caused by increased imports, based as it was on the period 1997 to September 1998, did not reflect the industry as a whole over a representative period. It was not based on any analysis grounded in the factual evidence before the USITC.

4.7 What the USITC engaged in was speculation, not informed or reasoned analysis. This is contrary to the decision of the panel in *Argentina - Footwear* that "any determination of threat must be supported by specific evidence and adequate analysis."[76] The United States has sought to support its reliance on a short period of price fluctuation for determining the existence of a threat of serious injury by invoking the Appellate Body decision in *Argentina – Footwear*.[77] But that case involved a determination of actual serious injury. Such a determination is a factual matter. Either an industry has reached a state of significant overall impairment or it has not. If it has reached that state then serious injury has occurred and it does not matter that it has only just reached such a state. A determination of a threat of serious injury is different. It is an analysis of what is likely to happen in the future based on past trends. Reliable assessments of what will happen in the future cannot be made on the basis of the analysis of short-term conditions. Based on a fluctuation in the prevailing prices in one season only, the United States could not reasonably extrapolate that price dip into the future.

4.8 In this regard, it is necessary to examine what the USITC did in reaching its determination that there was a threat of serious injury. Such an examination does not constitute a *de novo* review as the United States claims. The United States cannot shield the actions of the USITC from Panel scrutiny or use *de novo* review claims to chill proper Panel consideration of this case. In accordance with Article 11 of the DSU, the function of the Panel is to make an objective assessment of the facts of the case and of the conformity of the actions of the United States with its obligations under the Safeguards Agreement. This involves determining whether the competent authorities of the United States made the appropriate determinations and supported those determinations with reasoning on all pertinent issues of fact and law. Furthermore, contrary to the claims of the United States in its responses to the Panel's questions, New Zealand did assert in its first Submission that Article 3.1 of the Safeguards Agreement applied to the United States obligations in respect of its determination of a threat of serious injury.[78]

4.9 If, as the United States argues, the key indicator of the health of the domestic industry was prices, the USITC should have examined how prices might develop in the future, based on an analysis of price trends. However, the USITC failed to undertake any price analysis. Indeed, based on USDA information that came before the USITC, domestic prices were expected to increase in 1999.[79] In fact, prices recovered somewhat in the final three months of interim 1998[80], at the same time as

[74] United States Exhibit 42, attached to its Responses to Questions by the Panel.
[75] United States First Written Submission, paras 81 and 86.
[76] Panel Report, *Argentina - Footwear*, para 8.285.
[77] United States First Written Submission, para 93.
[78] New Zealand's First Written Submission, paras 7.9 and 7.54.
[79] Testimony of Daniel Sumner, injury hearing, attached as Annex NZ-16.
[80] USITC Report, II-55, Figure 3.

increased imports occurred. This fact is consistent with the view that increased imports had and were likely to have little direct influence on domestic prices.

4.10 The United States determination of threat of serious injury is based on a number of suppositions. It assumes that increased imports had a negative effect on domestic prices. This assumption appears to be based on the allegation that imported lamb meat undersold domestic lamb meat by 20 per cent over the period of investigation.[81] The evidence indicates that this statement is grossly misleading. A close examination of the product comparisons relied upon for this statement demonstrates that in fact there was little direct comparison between the products considered. Moreover, the information recently made available by the United States in its responses to questions of the Panel, shows that there is no consistent trend for the imported products to grow faster than the equivalent domestic product, which one would expect if the United States "displacement" theory had any validity.[82]

4.11 The information provided by the United States shows that the price difference between imported and domestic product has fluctuated throughout the period of investigation. Often the price gaps recorded over the last year of the period were less than those observed earlier.[83] In one case where there was direct comparison of fresh chilled square cut shoulder (a large volume cut, especially for the domestic lamb meat producers), the imported product was virtually always priced higher than the domestic product.[84] Overall, the so-called "underselling" tended to *reduce* over the period of investigation and in any case was present *throughout* that period. United States allegations of underselling cannot, therefore, explain the contraction in the domestic price for lamb meat. For such a situation of persistent "underselling" to exist would be more an indication of product differentiation than of price undercutting. Moreover, as indicated in New Zealand's First Written Submission, imported prices did not fall to the same degree as domestic prices over 1997 and 1998.[85] It cannot, therefore, have been increased imports which led to a decline in domestic prices in 1997 and interim 1998.

4.12 The United States also assumes that there was and would be no impact on prices due to changes in the competing prices of other meats. However, whether prices rise or fall for a product will always depend at least in part on the prices for other products which directly compete with that product in the market. The fall in the price of lamb meat on the domestic market occurred at the same time as a fall in the price of competing meats, particularly pork.[86] To claim that domestic lamb meat prices are driven by imports, is therefore to ignore the key relevant factor of the price of competing meats. In this regard, the United States assertion, made in its responses to questions from the Panel[87], that "with respect to competition from other meat products, the USITC found no evidence that other meat products were displacing lamb meat" is simply incorrect.

4.13 The USITC Commissioners clearly had competition with other meats in the forefront of their deliberations, one stating that "there's a good argument to be made that the bigger competition [to imported lamb meat], the more difficult competition is from other alternative sources of protein, most particular[ly] other meats".[88] Neither is the United States statement consistent with the actual findings of the USITC. The USITC Commissioners found that lamb meat consumers are sensitive to

[81] United States First Written Submission, para 87.
[82] United States Exhibit 41, Tables 39 and 40, attached to its Responses to Questions by the Panel.
[83] United States Exhibit 41, Tables 39 to 42, attached to its Responses to Questions by the Panel.
[84] United States Exhibit 41, Table 43, attached to its Responses to Questions by the Panel.
[85] New Zealand's First Written Submission, page 61, Figure 5. The United States, in para 45 of its First Written Submission, queries the source of Figure 5 (and Figure 6). The *Red Meat Yearbook*, which is the source of the Figures is referred to as the data source for Table 37 of the USITC Report, and Tables D1 and D2 in Appendix D of the USITC Report.
[86] USITC Report, II-70, Figure 17.
[87] United States Responses to Questions by the Panel, para 70.
[88] Commissioner Crawford, remedy hearing, attached as Annex NZ-17.

price.[89] And it considered that it was "plausible" that some purchasers of lamb meat had substituted other meats.[90] The United States assertion on the lack of impact of the competition of other meats is therefore groundless.

4.14 The United States also does not take into account the fluctuation in agricultural prices and the situation pertaining to the rest of the United States agriculture sector in 1997 and 1998. The background to the USITC investigation was a dramatic fall in the prices of all agricultural products in 1997 and 1998. The USITC was told during its hearing that "you can't make the money in anything these days" and that when prices for hogs and cattle drop, so do those for live lambs.[91] The United States, however, ignores the impact of these other competing meats on the price of lamb meat.

4.15 The third false assumption that the United States makes is that with the stabilisation of consumption from 1996, increased imports would depress prices. This reliance on the stabilisation in consumption in the 1996 to 1998 period as an indication of health in the industry is also misplaced. The United States fails to take account of the fact that consumption over that period had fallen from previous years and that total consumption of lamb meat had been higher in the earlier part of the period of investigation.[92] The reason for the stabilisation in 1996-1998 was the slow-down in the decline in the production of domestic lamb meat. The fall in domestic shipments in 1997 was the smallest decline in the four years since 1993, and shipments increased in interim 1998.[93] Even though consumption of lamb meat stabilised from 1996, and even increased in interim 1998, it was still far below the level of consumption in 1993.

4.16 The United States also fails to take into account the nature of demand and supply in the United States lamb meat market. Prices for lamb meat in 1996 and early 1997 were at high levels not witnessed in the preceding years. These high prices were the result of a reduction in supply below the levels of demand existing in the market. The fall in domestic production over 1993 to 1996, due to the elimination of the Wool Act subsidy payments, left key purchasers with little option but to turn to imports in order to maintain sales. While imports increased over this period, they increased by less than the fall in domestic production.[94] In such circumstances imports cannot be displacing domestic product. Indeed increased imports in interim 1998 were channelled into increases in consumption, meeting both unfilled demand and new demand previously not supplied with lamb meat.

4.17 The position of the domestic industry in 1998 was influenced by supply and demand factors on the lamb meat market. The termination of the Wool Act had been expected to have, and did have, a profound effect on the domestic industry. This effect continues today. In order to withstand a 20 per cent drop in revenues, growers and feeders increased prices until mid 1997. But once consumers of lamb meat were faced with a choice between high priced lamb meat and significant falls in the price of competing meats, there was a natural correction in prices. By addressing only what was occurring in the period since 1997 the United States has failed to take into account this overall position of the domestic industry. This is not a reasoned basis on which to impose a determination that significant overall impairment in the position of the domestic industry was clearly imminent.

4.18 In addition, the United States failed to undertake any analysis of how the position of the domestic industry was likely to develop in the future, compared to its position in the past. There was no factual basis or analysis on which to determine how prices would develop in the future. Had a

[89] USITC Report, I-31.
[90] USITC Report, II-80.
[91] Testimony, Daniel Sumner, remedy hearing, quoting a United States grower representative, attached as Annex NZ-18.
[92] USITC Report, II-17, Table 5.
[93] USITC Report, II-17, Table 5.
[94] USITC Report, II-21, Table 7.

proper analysis been undertaken, the United States could not have concluded that the domestic industry was threatened with serious injury that was clearly imminent.

4.19 The United States both in its First Written Submission and in its Oral Statement at the First Panel Hearing fails to explain how the USITC's reasoning conforms with the terms of the Safeguards Agreement. The United States now advances the new argument that even if the domestic industry were restricted to packers and breakers, a threat of serious injury would be established.[95] However, even if this were true it would be irrelevant. The USITC made no such finding. The United States cannot now make such a finding in place of the USITC. If the competent authority has not made the findings as required by the Safeguards Agreement, then the measure adopted by the United States cannot stand. Furthermore, even if this new claim by the United States were admissible, the factual evidence in this case simply does not support such an argument.

4.20 The USITC found that production of packers fluctuated over the period of investigation, while production of breakers trended upwards.[96] More specifically production of packers in 1997 was 11.5 per cent higher than in 1995.[97] Production of lamb meat decreased by 2 per cent in interim 1998.[98] On a full year basis, therefore, production in 1998 was still significantly higher than in 1995. Furthermore the information now disclosed by the United States shows that the unit value of packers' total shipments increased over 1993 to 1997, with the only decline occurring in interim 1998.[99]

4.21 In relation to capacity the USITC Report found that the largest firms in the United States packing industry were shown to be increasing their capacity over the period 1995-interim 1998.[100] In particular capacity increased by 15 per cent between 1995 and 1997 and then rose by 14 per cent in interim 1998. This follows a reduction in capacity over 1993 to 1995. Similarly in the case of breakers both production and capacity increased since 1995 with capacity rising faster than production. These trends continued into 1998.[101] Such an expansion suggests that the firms in question are profitable. This is not consistent with the assertion that the industry faces a threat of serious injury.

4.22 Given that the production in 1998 was still significantly higher than in 1995, the reported decline in capacity utilisation in the packing industry identified by the USITC[102], must have been solely due to the expansion in capacity. This was probably occurring in the largest firms as they sought to increase their market share of a declining lamb slaughter market.

4.23 In relation to profitability, the USITC stated that there was a significant decline in the value of net sales and in operating income of packers and breakers.[103] The information now provided by the United States shows that direct labour and other processing costs of packers rose substantially in interim 1998, clearly contributing to a decline in profits in that period.[104] The evidence of the financial condition of packer/breakers shows gross profit increasing in interim 1998, up 53 per cent.[105] No information on the financial condition of the one reporting breaker is disclosed by the United States. It would seem clear that on the information provided only packers had some declining profitability in 1998. Given the increase in capacity undertaken by the United States packing

[95] United States Oral Statement at the First Panel Hearing, para 16.
[96] USITC Report, I-18, fn 78.
[97] USITC Report, II-22, Table 8.
[98] USITC Report, II-21.
[99] United States Exhibit 41, Table 9, attached to its Responses to Questions by the Panel.
[100] USITC Report, II-22, Table 8.
[101] United States Exhibit 41, Table 3, attached to its Responses to Questions by the Panel.
[102] USITC Report, I-20.
[103] USITC Report, I-19.
[104] United States Exhibit 41, Table 16, attached to its Responses to Questions by the Panel.
[105] United States Exhibit 41, Table 18, attached to its Responses to Questions by the Panel.

operations, any decline in operating incomes could not be caused by imports, but rather must have been caused by the firms' own actions in expanding capacity.

4.24 Inventories of packers decreased in interim 1998 by comparison with the previous year.[106] This would seem to indicate an improved ability to make sales over this period. The only statement in the USITC Report on employment in relation to packers is that direct labour and other costs of packing operations remained relatively constant over the period of investigation.[107] However it is clear from the information now disclosed that direct labour costs and other processing costs rose substantially in interim 1998.[108] In relation to productivity the USITC stated that the data on direct labour costs from packers and breakers indicated that productivity remained relatively constant over the period of investigation.[109] No further information is disclosed. The information on inventories, employment and productivity does not, therefore, support a conclusion that packers and breakers were threatened with serious injury.

4.25 Specific information concerning breakers is confidential and has not been disclosed. However, the fact that the USITC had financial data from only one specialist breaker[110], suggests that the USITC would not have had a reliable basis for assessing whether the breakers were facing a threat of serious injury. Indeed the information made available on breakers' production capacity and unit values is supportive of the view that breakers are not threatened with significant overall impairment.[111]

4.26 It follows that there is no basis in the information set out in the USITC Report on which to draw the conclusion that there is a significant overall impairment in the position of the packers, packer/breakers and breakers that is clearly imminent. Rather, the evidence in the USITC Report would indicate that there was no such imminent significant overall impairment to the lamb meat producers. In short, if the domestic industry had been restricted to packers and breakers no determination of threat of serious injury could have been made.

4.27 In summary therefore, the USITC failed to take account of the facts regarding the overall situation of the domestic industry, including its long term decline, the effect of the termination of the Wool Act payments, and the price of competing meats. It sought to determine that there was a threat of significant overall impairment simply on the ground that prices which reached a high in early 1997 could not be maintained. That was not a reasoned conclusion based on objective evidence. It was a determination based on conjecture. This is not consistent with the requirements of the Safeguards Agreement.

V. CAUSATION

5.1 In its First Written Submission New Zealand demonstrated that the United States had failed to meet its obligations under Articles 2.1 and 4.2(b) of the Safeguards Agreement to show the causal link between increased imports and the threat of serious injury.[112] Furthermore the USITC had applied a "substantial cause" test that had no basis in the Safeguards Agreement or in GATT 1994[113], and had attributed to increased imports injury caused by other factors.[114] Although the United States affirms that in its view the substantial cause test conforms with WTO law, it seeks to support the USITC

[106] USITC Report, II-22.
[107] USITC Report, II-27.
[108] United States Exhibit 41, Table 16, attached to its Responses to Questions by the Panel.
[109] USITC Report, I-20.
[110] New Zealand's First Written Submission, para 4.9.
[111] United States Exhibit 41, Tables 3 and 4, attached to its Responses to Questions by the Panel.
[112] New Zealand's First Written Submission, paras 7.77 to 7.93.
[113] New Zealand's First Written Submission, paras 7.73 to 7.76.
[114] New Zealand's First Written Submission, paras 7.94 to 7.96.

determination on causation on the basis that the USITC in fact found increased imports to be in effect the sole cause of the threat of serious injury.[115] In doing so, the United States has had to refashion the USITC's Report to conform to this new interpretation.

5.2 Article 2.1 of the Safeguards Agreement stipulates that increased imports must "cause or threaten to cause" serious injury. The causal link between imports and serious injury or threat, Article 4.2(b) provides, must be demonstrated on the basis of objective evidence. The second sentence of Article 4.2(b) provides that injury caused by other factors is not to be attributed to increased imports.

5.3 In New Zealand's view, the effect of these provisions is that the causal relationship between the threat of serious injury and increased imports must be such that the threat of serious injury must have been *caused* by imports. This is "the causal link" that must be demonstrated in accordance with Article 4.2(b). Furthermore, where there are multiple causes that go to make up serious injury or the threat of serious injury, the injury caused by other factors cannot be attributed to increased imports. The "serious injury" or "threat of serious injury" found must be traced back to or attributed to increased imports, not to those other factors. This is the meaning of the second sentence of Article 4.2(b).

5.4 It is for this reason, as New Zealand has argued, that the "substantial cause" test does not comply with the Safeguards Agreement. The approach of the United States in situations where there are multiple causes of serious injury or threat of serious injury is to consider the "relative importance" of those causes through the application of the "substantial cause" test.[116] The United States in this case concludes that since no factors other than increased imports were found to be "significant" by the USITC, there could not have been any attribution of serious injury or threat thereof to factors other than increased imports.[117] However, this approach is not consistent with the Safeguards Agreement, in particular Article 4.2(b).

5.5 Article 4.2(b) allows for the possibility that other factors besides increased imports may impair the position of a domestic industry. Where that is the case, Article 4.2(b) requires that any such injury not be attributed to increased imports. In applying the "substantial cause" test the USITC instead determined that there were no factors of "significance" other than increased imports that caused or threatened to cause serious injury. The United States claims on the basis of that determination that there was no attribution of serious injury to factors other than increased imports. In adopting this approach the United States is not in compliance with Article 4.2(b).

5.6 Furthermore, as New Zealand pointed out in its Oral Statement at the First Panel Hearing, the "substantial cause" test as articulated by the USITC means that where serious injury or the threat of serious injury is caused by three factors equally, one of which is increased imports, then that would be sufficient in itself to meet the causation test. But such a result involves attributing to increased imports injury that is caused by other factors. It involves treating as the cause of "serious injury" or "threat of serious injury" a cause that may in fact be a minority cause of that serious injury or threat thereof. This is not consistent with Article 4.2(b), under which the injury caused by the causal factors other than increased imports must not be attributed to those imports. Only if "serious injury" or "threat of serious injury" still remains once the injury caused by those other factors is excluded can it be said that increased imports have "caused" the serious injury or threat.

5.7 Serious injury may be contributed to by a variety of factors, including increased imports. If, when the injury caused by factors other than increased imports is excluded serious injury or threat thereof still remains, then that serious injury or threat can be attributed to increased imports. In that

[115] United States First Written Submission, para 108.
[116] United States First Written Submission, para 118.
[117] United States First Written Submission, para 108.

sense, increased imports have to be *the* cause or the sole cause of the "serious injury" or threat thereof for which a safeguard remedy is applied. If, on the other hand, when injury attributable to other factors is excluded what is left is not serious injury or threat thereof, then there is no serious injury or threat to attribute to increased imports.

5.8 The United States seeks in its responses to the Panel's questions to avoid the consequences of this analysis by resorting to dictionary definitions of the term "cause" in order to show that the word is *capable* of bearing the meaning of one of many causes t hat the United States wishes to ascribe to it.[118] It justifies this resort to the generic term "cause" by stating that Articles 2.1 and 4.2 of the Safeguards Agreement both "employ the verb 'to cause' in one form or another."[119] The objective of the United States in resorting to these dictionary definitions is made clear in a single revealing statement. It asserts that "Article 4.2(b) requires a competent authority simply to demonstrate a connection between the increased imports and the injury it has found."[120] Thus, "cause" in the Safeguards Agreement is reduced by the United States to nothing more than a mere "connection".

5.9 Apart from this attempt to read causation, as well as unforeseen developments, out of its safeguards obligations, the United States resort to the dictionary definition of "cause" also misses the point. Article 2.1 uses the term "to cause" which gives the generic concept of cause more specific direction or content. To cause something is different from being one of many causes of something. Moreover, the critical provision of Article 4.2(c) employs the term "cause" as an adjective, referring to the causal link as "*the* causal link" which refers to a single causal link, not "*a* causal link" which could be one among many. Thus, the whole United States argument about the open-ended nature of the concept of cause is based on a false premise.

5.10 Moreover, the United States resort to negotiating history simply does not prove the point the United States wishes to make.[121] Rather, it shows that the negotiating history does not provide any assistance on this matter. There was obviously a variety of views on the meaning of cause in the negotiations, and no consensus. This reinforces the importance of the cardinal rule of interpretation, that the intention of the parties is to be gained from the text itself, and not from the often conflicting views of the parties in the drafting process which ultimately coalesced around the final text.

5.11 The United States also argues in its response to the Panel's questions, that the decision of the panel in *United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*[122] somehow supports its view that serious injury or the threat of serious injury can be contributed to by other factors.[123] However, the panel in *United States - Atlantic Salmon* found that the USITC had concluded that "material injury" had been caused by increased imports. Since the USITC had reached that conclusion, it was not, in the panel's view, obligated to assess other factors that might also have contributed to the injury being suffered by the domestic industry in question.[124] As the panel noted, the obligation on the USITC was that it was

> "required to conduct an examination sufficient to ensure that in its analysis of the factors set forth in Articles 3:2 and 3:3 it did not find that material injury was caused by imports from Norway when material injury to the domestic industry allegedly

[118] United States Responses to Questions by the Panel, para 46.
[119] United States Responses to Questions by the Panel, para 46.
[120] United States Responses to Questions by the Panel, para 48.
[121] United States Responses to Questions by the Panel, paras 52 and 53.
[122] ADP/87, 30 November 1992.
[123] United States Responses to Questions by the Panel, paras 54 and 55.
[124] United States - Atlantic Salmon, paras 547 and 548.

> caused by imports from Norway was in fact caused by factors other than these imports."[125]

The problem in the present case is that the USITC did not do this. The threat of serious injury that the USITC found was contributed to by a variety of causes. Nevertheless, the USITC attributed it all to increased imports.

5.12 In the present case, the USITC did not exclude injury caused by other factors from its causation analysis. It did not conclude that there was a threat of "serious injury" that was attributable to increased imports. It concluded instead that increased imports were a cause that was no less important than any other single cause of the threat of serious injury. But if the USITC had eliminated the injury that was caused by factors other than increased imports it would have had to conclude that what remained did not constitute a threat of "serious injury". There was, in fact, no threat of serious injury to attribute to increased imports.

5.13 Furthermore, in its First Written Submission and Oral Statements to the Panel at the First Hearing, the United States has sought to recharacterise the USITC's determination as a determination that "increased imports were the only cause of any significance of the deterioration in the condition of the domestic industry in 1997 and interim 1998...".[126] But it supports this by nothing more than an assumption that because a decline occurred, it must have been caused by increased imports. The United States theory of causation ignores other factors that caused a decline in the domestic industry and ignores the evidence that shows increased imports to be a *response* to a decline in domestic supply rather than the *cause* of domestic decline.

5.14 The USITC, and the United States in these proceedings, discount the impact of the removal of the Wool Act subsidy on the domestic industry. The United States argues, without evidence to substantiate its allegation, that the termination of the Wool Act payments did not have much influence on events after 1996 and in any event it was not paid to packers and breakers.[127] The latter argument is curious in light of the United States claim that there is vertical integration within the industry which means that prices affect growers/feeders and packers/breakers similarly and that their financial fortunes rise and fall together.[128] Neither does it fit with the argument made by the United States that the operations of packers and breakers would be highly affected by the supply and quality of the live lambs produced by growers and feeders.[129] In such circumstances one would expect that injury in one part of the industry would be passed on to the other part, and that a decline in the supply of live lambs would lead to a decline in the output of the lamb meat industry.

5.15 The United States attempt to minimise the importance of the termination of the Wool Act payments ignores the essential point of the New Zealand argument that increased imports *resulted from* the decline of the industry, they did not cause it. The Wool Act subsidy removal had a negative impact on growers and feeders and the production of live lambs. The Wool Act subsidies granted to the producers of live lambs totalled US$125 million in 1993 and US$69 million in 1994.[130] The USDA estimated that wool producers would have received an additional US$60 million if the phase-out of the wool subsides had not taken place.[131] The proportion of total net sales revenue from wool and wool subsidies obtained by growers dropped from 25.4 per cent in 1993, to 21.1 per cent in 1995,

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[125] United States - Atlantic Salmon, para 554.

[126] United States Closing Statement at the First Panel Hearing, para 13. See also United States Opening Statement at the First Panel Hearing, para 17, and United States First Written Submission, para 108.

[127] United States First Written Submission, para 90.

[128] United States First Written Submission, para 67.

[129] United States First Written Submission, para 65, citing USITC Report, I-13.

[130] USITC Report, II-78, Table 45.

[131] USITC Report, II-78.

and to 12.2 per cent in 1996. It fell even further to 5.5 per cent in interim 1998.[132] This 20 per cent drop in revenue led to a decline in the number of producers of live lambs and in turn a reduction in supply of live lambs and therefore of lamb meat. This reduction in supply, which continued beyond 1996, resulted in an unfilled domestic demand that was then met by increased imports. Neither the USITC nor the United States have met this argument or contradicted what obviously flows from it: increased imports were a consequence of the decline in the domestic industry, not the cause of it.

5.16 In attempting to take a snap-shot of the situation occurring in 1997 and interim 1998, without regard to the industry situation in the years preceding, the United States is ignoring the very conclusions of the USITC. In discussing the remedy to be applied, the USITC Commissioners identified the termination of the Wool Act payments as a *significant* change in the market conditions under which the domestic industry must operate.[133] As a result of this change, the Commissioners concluded that the domestic industry producing live lambs would have to continue to adjust in the future to a domestic market without the Wool Act subsidy payments.[134]

5.17 The United States also attempts to gloss over the USITC's conclusions based on the evidence of the competition from other meats. The United States points to the fact that the per capita consumption of lamb meat had remained relatively steady since 1995.[135] However, per capita consumption of lamb meat was around 1.1 pounds in 1995 to 1997, compared to an average per capita consumption of red meat of 120 pounds.[136] Actual consumption of pork was 60 times the consumption of lamb meat in interim 1998, while consumption of beef was more than 85 times that of lamb meat.[137] In light of the disparity between the size of the markets for lamb meat and other competing meats, the markets for those competing meats will clearly have an impact on the market for lamb meat.

5.18 Indeed, the USITC found that final demand for lamb meat was determined among other things by "prices of lamb meat and substitute products".[138] In comparing the retail price of lamb meat to that of other competing meats, it is clear that the price of lamb meat has been consistently priced higher than competing meats and that there was a significant fall in the prices of competing meats that occurred from mid-1997, at the same time as the fall in the price of lamb meat.[139] The USITC Report includes evidence that the lower price trends of potential substitutes may have resulted in some substitution away from lamb meat towards these other products.[140] The USITC Commissioners concluded that final consumers of lamb meat were somewhat sensitive to price.[141]

5.19 Although the USITC reached the conclusion that the price of competing meats was not a "more important cause" of threat of serious injury than increased imports, the evidence set out in the USITC Report shows that the competition from other meats was a factor strongly influencing the position of the domestic industry. There was a causal relationship between the difficulties of the domestic industry and the competing prices of other meats.

5.20 Other causes of the threat of serious injury were treated similarly by the USITC. For example, the USITC considered whether concentration in the packer segment of the industry and the failure of the industry to develop and implement an effective marketing programme were "more

[132] USITC Report, II-26, Table 12.
[133] USITC Report, I-30.
[134] USITC Report, I-32.
[135] United States First Written Submission, para 91.
[136] USITC Report, II-69, Table 36.
[137] USITC Report, II-71, Table 37.
[138] USITC Report, II-66.
[139] New Zealand's First Written Submission, Figure 4, sourced from USITC Report, II-70, Figure 17.
[140] USITC Report, II-69.
[141] USITC Report, I-31. Apparent consumption held steady and then actually increased at the end of the period of investigation, at the same time that prices fell.

important causes" of the threat of serious injury than increased imports. While it found that they were not "more important" causes, they were clearly identified by the USITC as causes.[142] Indeed, the inference from the USITC report appears to be that the latter factor was even viewed by the USITC as a cause as important as increased imports. While the USITC concluded that concentration in the packer segment was a less important cause of the threat of serious injury, it interestingly refrained from stating the same with regard to the failure to develop and implement an effective marketing programme. While finding that the latter was not a "more important" cause than increased imports, the USITC also noted that this factor was likely to have "an important impact on the industry".[143]

5.21 The approach adopted by the USITC to causation in using its "substantial cause" test was to disregard other factors which may be causing serious injury by considering that they individually are not more important causes of serious injury than increased imports. Having determined that individually those other factors, including the effect of the termination of the Wool Act payments, the price competitiveness of other meats, and the failure to develop and implement an effective marketing programme for lamb meat, were not more important causes than increased imports of the threat of serious injury, it was assumed that the entire serious injury or threat thereof was caused by the increased imports. There was no attempt to avoid attributing injury caused by other factors to increased imports, in conformity with Article 4.2(b). The USITC and the United States thereby wrongly assumed that all the "serious injury" or threat thereof was caused by increased imports.

5.22 In its Oral Statement to the Panel, the United States began a new tack and started a process of reinterpretation of the USITC's report in order to show that the USITC had regarded increased imports as in fact the sole cause of a threat of serious injury. In its response to the questions of the Panel, the United States continued this reinterpretation. The USITC is viewed, according to the United States new interpretation, as having considered all of the other potential causes of threat of serious injury in order to reject them and thus to comply with Article 4.2(b) and not attribute to increased imports injury caused by other factors. The fact that the USITC used language that would conform with its domestic statute should not, the United States claims, detract from the fact that in substance it was doing what the Safeguards Agreement requires.

5.23 Such an argument could have plausibility only if the actual words of the USITC are completely ignored; indeed, the USITC's words have to be taken to mean precisely the opposite of what the USITC said. As New Zealand pointed out in its Oral Statement to the Panel, the USITC found that the termination of subsidies under the Wool Act was a cause; it found that competition from other meats was a cause; it found the lack of an effective marketing programme a cause; and it found that concentration in the packer segment was a cause.[144] It is too late for the United States now to claim that the USITC did not mean what it said.

5.24 Nor is the United States view consistent with the adjustment assistance package recommended by the USITC and that implemented by the President. Both of these included components to address the other causes of difficulties facing the domestic industry, including the lack of promotion and marketing, and lack of demand for lamb meat compared to other meats, which the United States now claims were *not* factors affecting the domestic industry.[145] The attempt by the United States in its responses to questions of the Panel to now claim that it is the "content of the USITC Report as a whole" rather than the actual words used which should be determinative[146], does not detract from the fact that the adjustment assistance package was implemented to address a factor

[142] USITC Report, I-25 and I-26.
[143] USITC Report, I-26.
[144] New Zealand Oral Statement at the First Panel Hearing, paras 53 and 54.
[145] USDA "Domestic Adjustment Assistance Package", December 1999 and related press articles, attached as Annex NZ-19.
[146] United States Responses to Questions by the Panel, para 86.

that the USITC said was not "a more important cause" of threat of serious injury than increased imports.[147]

5.25 If the USITC really had eliminated all these factors as causes of a threat of serious injury as the United States now claims, on what basis was there any threat of serious injury within the meaning of Article 4.1(b) left?

5.26 Throughout its arguments the United States seeks to avoid content being given to the obligation to ensure that any threat of serious injury is caused by increased imports. In its response to the Panel's questions, the United States challenges the idea of "precision in the evaluation of causal factors."[148] Yet, as New Zealand pointed out in its Oral Statement to the Panel, and in the economic analysis it attached to that statement[149], a proper assessment and analysis *is* possible. It is possible through the use of simple economic analysis for distinctions to be made between injury caused by domestic factors and injury caused by increased imports. The USITC failed to employ any such analysis and thus it did not demonstrate the causal link between increased imports and the threat of serious injury that it claimed existed.

5.27 As a result, the United States has not made a determination in accordance with the terms of the Safeguards Agreement that a threat of serious injury has been caused by increased imports.

VI. NECESSITY

6.1 In its First Written Submission, New Zealand pointed out that the safeguard measure imposed by the United States was not applied to the extent "necessary" to prevent serious injury, nor to the extent "necessary" to facilitate adjustment, contrary to the obligations set out in Article 5.1 of the Safeguards Agreement.[150] In addition, the United States had not published any findings or reasoned conclusions on the matter and hence was in violation of Article 3.1 of the Safeguards Agreement.[151]

6.2 New Zealand argued in its First Written Submission that the obligation under Article 5.1 of the Safeguards Agreement to apply a measure "only to the extent necessary to prevent or remedy serious injury or to facilitate adjustment" is an obligation to choose the least trade restrictive measure that will achieve those objectives.[152] The United States objected to this formulation, arguing in its First Written Submission that there is no basis for a "least trade restrictive" test in the context of Article 5.1 of the Safeguards Agreement.[153] This does not equate with what the United States Trade Representative, Charlene Barshefsky, told a Congressional Committee in June 1999, that in determining the safeguard remedy to be applied to imports of lamb meat, the United States was "weighing what we believe ... the most appropriate and least trade-restricting remedy would be."[154] However, the United States does concede that in determining whether a measure complies with Article 5.1, it is necessary to determine whether the measure "in its totality, is more trade restrictive than required both to prevent serious injury from occurring and to assist the industry in adjusting to import competition."[155]

6.3 In New Zealand's view, in the context of Article 5.1, a "least trade restrictive" test and a "no more restrictive of trade than required" test amount essentially to the same thing. The requirement in

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[147] USITC Report, I-26.
[148] United States Responses to Questions by the Panel, para 90.
[149] Attached to New Zealand's Oral Statement at the First Panel Hearing as Annex NZ-13.
[150] New Zealand's First Written Submission, paras 7.97 to 7.109.
[151] New Zealand's First Written Submission, paras 7.110 and 7.111.
[152] New Zealand's First Written Submission, paras 7.98 to 7.101.
[153] United States First Written Submission, para 191.
[154] Transcript of House Agriculture Committee, 23 June 1999, attached as Annex NZ-20.
[155] United States First Written Submission, para 210.

Article 5.1 that a measure be applied only to the extent necessary to achieve the goals of that provision is a requirement that there must be some degree of proportionality between ends and means. The measure must be applied in a manner that will allow it to achieve the objectives of preventing or remedying serious injury and facilitating adjustment, but the limitation that it must be applied only to "the extent necessary" must have some substantive content. In the context of an agreement concerned with restrictions on trade for the purpose of preventing injury, that content can be discovered only by reference to the extent of the trade restrictiveness of the measure.

6.4 In other words, Article 5.1 requires some degree of proportionality between the end of preventing serious injury and facilitating adjustment and the trade restrictive means of achieving that goal. It places a limit on the trade restrictiveness of the measure that can be adopted. A measure that was more trade restrictive than necessary to achieve the goal of preventing serious injury or facilitating adjustment would undoubtedly not be a measure that was being applied only to the extent necessary to prevent serious injury or facilitate adjustment. In that sense, what is required is a measure that is the least trade restrictive of those measures that will achieve the objective.

6.5 Thus, whether the Article 5.1 requirement is expressed in terms of "least trade restrictive" or "no more restrictive of trade than required" or more generally as a requirement of proportionality, the end result is the same. In the present case, the measure chosen by the United States met none of these formulations.

6.6 In its response to the Panel's questions, the United States seeks to avoid responsibility for demonstrating that the measure chosen by the United States meets the requirements of Article 5.1 by asserting that the burden rests with New Zealand to establish a *prima facie* case that Article 5.1 has been complied with.[156] However, New Zealand has discharged that burden. It has demonstrated that the remedy chosen by the United States is more trade restrictive than necessary to achieve the goal of preventing serious injury since the United States had available the less trade restrictive alternative proposed by the plurality of the USITC. However, the United States seeks to avoid the consequences of this argument by asserting that it cannot be assumed that the USITC proposed remedy "would be sufficient to prevent serious injury and facilitate adjustment."[157] The plurality recommendation, the United States claims "should not be presumptively regarded as adequate."[158]

6.7 By this ingenious argument, the United States is seeking to place New Zealand and the Panel on the horns of a dilemma. On the one hand, the United States claims that the Panel cannot engage in a *de novo* review of the USITC's investigation. On the other hand, it says that the Panel cannot presume that the USITC has met its obligation to propose a remedy that would be effective to prevent serious injury and facilitate adjustment. *Ergo*, New Zealand has not met the burden of proof of showing that the United States has not complied with its Article 5.1 obligations, and it cannot meet that burden as this would be an invitation to the Panel to engage in a *de novo* review.

6.8 In New Zealand's view, the Panel should reject such sophistry. The USITC plurality proposed a remedy to prevent serious injury and to facilitate adjustment. According to the United States law this remedy finding is to be treated as the remedy finding of the USITC by the President.[159] The United States Administration adopted a different remedy. The Panel is entitled to compare those remedies. Thus, the United States must convince the Panel that the remedy chosen by the USITC does not meet the requirements of Article 5.1 to avoid a comparison being made between the Administration remedy and that recommended by the USITC for the purposes of determining whether the provisions of Article 5.1 have been complied with.

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[156] United States Responses to Questions by the Panel, para 162.
[157] United States Responses to Questions by the Panel, para 111.
[158] United States Responses to Questions by the Panel, para 111.
[159] USITC Report, I-29.

6.9 The United States also seeks to argue that, in fact, the measure adopted by the United States was no more trade restrictive than that proposed by the USITC.[160] But close analysis shows that this is clearly incorrect. There are three levels of restrictions to be assessed in comparing the USITC recommended measure and the actual United States measure:[161] quota levels, in-quota tariffs, and out-of-quota tariffs. The quota levels under both measures are roughly equivalent.[162] The USITC recommended measure contained no in-quota tariff beyond the ordinary WTO bound rate of 0.8c per kg.[163] Accordingly, in-quota costs under the USITC recommended measure are no more than they would be with no safeguard measure in place. The only additional costs to trade under the USITC recommended measure, in all years, is the out-of-quota cost. In particular, the only cost which can be attributed to the fourth year of the USITC recommended measure, when there may be no safeguard under the actual United States three-year measure imposed[164], is the out-of-quota tariff rate. The USITC recommended a rate of 10 per cent in that year, 1 per cent higher than the first year in-quota tariff rate of the actual United States measure.

6.10 With regard to the first three years of both measures, the United States has argued that there is no difference in the trade restrictive effect of a 20 per cent out-of-quota tariff rate, as recommended by the USITC, and a 40 per cent out-of-quota rate, as imposed by the United States, because both were designed to be trade-preclusive.[165] The United States is patently wrong. By any definition, 20 per cent is less than 40 per cent. Furthermore, according to basic economic principles, trade at the out-of-quota rate will nevertheless be profitable any time that the difference in percentage terms between the United States wholesale price for lamb and the world price for lamb is greater than the out-of-quota rate. Clearly, this is more likely to happen when the out-of-quota rate is 20 per cent than when it is 40 per cent. The out-of-quota rate imposed by the United States is therefore more restrictive of trade than the out-of-quota rate recommended by the USITC.

6.11 A comparison of in-quota costs under both measures also reveals that the actual United States measure is considerably more trade-restrictive than the USITC recommended measure. Estimated costs to trade for New Zealand at levels up to the quota level under the USITC recommended measure in year one would be US$116,000. Under the actual United States measure up to the quota level imposed estimated costs would be US$7,125,000.[166] The difference between these figures is US$7,010,000. In year two, in-quota costs to New Zealand under the USITC recommended measure would be US$121,000, and under the actual United States measure would be US$4,878,000: a difference of US$4,757,000. In year three, respective costs to New Zealand would be US$106,000 and US$2,503,000, with a difference of US$2,397,000. In total, over the first three years of both measures, the measure imposed by the United States would result in in-quota costs to New Zealand of US$14.164 million more than under the measure recommended by the USITC.

6.12 The measure imposed by the United States set similar quota levels as the USITC recommended measure. The shorter initial duration of the measure imposed by the United States is irrelevant to a determination of the trade restrictiveness of the measure as it can be extended to a duration of up to eight years. The out-of-quota costs to New Zealand trade of the actual United States measure are clearly substantially more than those of the USITC recommended measure. And the in-quota costs of the United States measure will be approximately US$14.2 million more than the

[160] United States First Written Submission, paras 193 to 198, 201, and 202.

[161] In assessing the relative restrictiveness of the measures the initial duration of the measures is irrelevant, as both the Safeguards Agreement and the United States legislation allow the extension of a measure up to a maximum duration of eight years.

[162] Each measure allows for a small increase in the quota level after the first year of the measure.

[163] This is scheduled to drop to 0.7c per kg in 2001.

[164] Assuming that the measure had not been extended.

[165] United States First Written Submission, para 202.

[166] These estimated costs were calculated by computing the tariff that would be payable on imports at the quota level at a constant 1998 CIF price.

USITC recommended measure. It is on this basis that New Zealand argues the measure imposed by the United States is more restrictive than the measure recommended by the USITC.

6.13 In seeking to support the remedy it has chosen, the United States places great emphasis on the need to facilitate adjustment. Thus, in its response to questions from the Panel it argued that the remedy proposed by some of the Commissioners provided insufficient relief to facilitate adjustment.[167] In its First Written Submission, the United States objected to Australia and New Zealand's complaints about the remedy, claiming that the complainants wished "to leave the U.S. lamb industry in the deteriorated state in which the USITC found it."[168] By comparison, the remedy is designed to return the industry to profitability.[169]

6.14 This focus away from preventing serious injury to facilitating adjustment is revealing. It emphasises that the problems facing the domestic industry are adjustment problems arising out of domestic factors, and not a response to a threat imposed by imports. Rather, controlling imports is the mechanism chosen for dealing with domestic adjustment problems.

6.15 In short, the failure of the United States in this case is to choose a remedy that is proportional to the alleged threat that has been found. Or, in other words, that is "applied only to the extent necessary to *prevent* serious injury and facilitate adjustment." Instead, the United States has sought to craft a remedy that will return the industry to profitability regardless of the nature of the threat. It seeks to improve the position of an industry that has not been found to be seriously injured. It is for that reason that the remedy does not limit itself to hold imports at the 1998 levels, the alleged level of the threat. Instead, the remedy has as its objective to recapture for the industry the losses it has suffered as a result of the removal of the Wool Act subsidies. And those losses are to be recaptured from imports of lamb meat. Indeed, in effect, what the United States is doing in this case is replacing a subsidy on wool with a tariff on imports of lamb meat.

VII. MFN

7.1 In its First Written Submission, New Zealand argued that the United States inclusion of the imports of certain countries in its injury determination, but its exclusion of those imports from the application of the safeguard measure, was contrary to its obligation under Article 2.2 of the Safeguards Agreement to apply a safeguard measure to imported products irrespective of source.[170] As a consequence, the United States was also in violation of its obligations under the GATT 1994.[171] The United States response was that it was perfectly justified in failing to apply the measure to members of a free trade area, but that it did not in fact take the imports of Mexico, Canada and Israel into account in its determination of the threat of serious injury.[172]

7.2 New Zealand does not take issue with the right of a member of a free trade area to exclude its free trade area partners from the application of safeguard measures. Indeed, New Zealand does so under its Closer Economic Relations Agreement with Australia. What New Zealand does object to is the *inclusion* of the products of a free trade area partner in making the injury determination and then the *exclusion* of those products from the application of the measure. The United States claims that the USITC did not do this. However, in doing so it cites the USITC's elimination of the imports of Canada and Israel from its causation analysis, and ignores the fact that those imports were included in the USITC's threat of serious injury determination.

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[167] United States Responses to Questions by the Panel, para 126.
[168] United States First Written Submission, para 176.
[169] United States Responses to Questions by the Panel, para 134.
[170] New Zealand's First Written Submission, para 7.113.
[171] New Zealand's First Written Submission, para 7.114.
[172] United States First Written Submission, paras 247 and 254 to 257.

7.3 In short, the USITC did in this case precisely what the Appellate Body said in *Argentina – Footwear* should not be done. As the European Communities pointed out in its Oral Statement to the Panel, the "principle of parallelism" set out in *Argentina – Footwear* applies in this case as well. Imports that are included in a safeguards investigation for the purpose of determining serious injury or threat of serious injury must also be subjected to the safeguard measure that is ultimately adopted. In failing to do this, the United States is in violation of its obligations under Article 2.2 of the Safeguards Agreement and Article I of the GATT 1994.

VIII. CONCLUSION

8.1 New Zealand has established that the actions of the United States in imposing the safeguard measure on imports of lamb meat from New Zealand were not in accordance with the terms of the Safeguards Agreement or of the GATT 1994. The United States attempts to show that the USITC did in fact base its determination on the existence of unforeseen developments involves in effect writing the concept of unforeseen developments out of its WTO safeguards obligations. The United States definition of the "domestic industry" has no basis in WTO law and the United States attempts to establish that the USITC reached a reasoned determination that its domestic industry was threatened with serious injury constitute nothing more than a supposition that if imports increase the domestic industry will suffer. The United States did not demonstrate that any threat to its domestic industry was caused by imports. Furthermore, the United States attributed injury caused by other factors to increased imports, ignoring the obligation imposed by Article 4.2(b) of the Safeguards Agreement not to do this. Finally, the United States failed to apply a remedy only to the extent necessary to prevent serious injury and facilitate adjustment, and did not apply the remedy to all of the imports which allegedly contributed to the threat of serious injury facing its domestic industry.

8.2 There is a further issue that New Zealand wishes to advert to. In addition to the arguments the United States has made in an attempt to support the actions of the USITC, the United States argued in its Oral Statement to the Panel that if Members did not have confidence that they could take temporary action to assist their industries where import surges seriously injure or threaten to injure their domestic industries they would resort to "grey-area" measures, such as voluntary restraint arrangements.[173]

8.3 But the real issue of confidence raised in this and in other WTO disputes is the confidence that all WTO Members should have that the rights and obligations provided for in the WTO Agreement will be effectively upheld, including through the mechanisms in place to call to account any Members who act inconsistently with such rights and obligations. Accordingly, the spectre the United States seeks to conjure up of unlawful "grey-area" measures being resorted to by Members whose desire to use safeguard measures that do not conform to their WTO obligations has been thwarted, should be ignored. The task of the Panel is clear. It is to apply the terms of the Safeguards Agreement in accordance with the well-established principles for the interpretation of the WTO agreements. The flexibility to which members are entitled in the imposition of safeguards is no more and no less than what is permitted under those agreements. Members are not entitled to have the agreements interpreted in a way that ignores the actual words used in order to validate approaches to safeguards that have existed traditionally in their laws and their practices. The fundamental integrity of the WTO safeguards system depends on Members complying with the obligations that they have agreed to under the Safeguards Agreement.

8.4 In light of the above, the United States is clearly in violation of its WTO obligations. Accordingly, New Zealand reaffirms its request to the Panel to recommend that the United States

[173] United States Oral Statement at the First Panel Hearing, paras 3 and 4.

bring its treatment of imports of lamb meat from New Zealand into conformity with its obligations under the Safeguards Agreement and the GATT 1994.

ANNEX 2-10

NEW ZEALAND'S ORAL STATEMENT
AT SECOND PANEL HEARING

(26 July 2000)

1. In this Statement today, New Zealand will not attempt to repeat what we have said in our previous written and oral submissions to the Panel. Rather, we will set out the key issues before the Panel and identify where we see the differences between ourselves and the United States on these issues. In this way we hope we may focus the issues in dispute in order to assist the Panel in its deliberations.

2. Before dealing with the substantive issues, I would like to make several preliminary comments. The first relates to burden of proof. On several occasions in this case the United States has argued that New Zealand has failed to meet the burden of proof. As a matter of law, we do not believe that there is any disagreement on the question of burden of proof. The basic principle set out in the *Woolshirts*[1] case applies. The burden is on the complainants to establish a *prima facie* case. Once they have done so, it is then for the respondent to rebut that case.

3. Nor, in the present case, do we believe that there is any substantive issue at stake over the discharging of the burden of proof. New Zealand has established a *prima facie* case of the United States violation of its obligations under the Safeguards Agreement and under the GATT 1994. It is for the United States to rebut that case. Thus, in New Zealand's view there is no question for the Panel to resolve over the issue of burden of proof.

4. The second preliminary point I wish to make, Mr Chairman, relates to the interpretation of the Safeguards Agreement. A fundamental issue before the Panel in this case is whether the Safeguards Agreement is to be interpreted in accordance with the Vienna Convention on the Law of Treaties - that is, in accordance with the ordinary meaning of the words in their context and in the light of the object and purpose of the Agreement. Or, alternatively, should its provisions be interpreted in a way that ignores the terms of the Agreement but accords with practices adopted by one Member? This question is a pervasive one in the present case, arising in respect of many of the differences between New Zealand and the United States.

5. What the United States seeks to do in this case is to qualify the interpretation of the Safeguards Agreement by introducing subsequent practice and negotiating history in circumstances where the ordinary meaning of the words is clear. But, as the International Court of Justice has said, "If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter".[2] Equally, the United States in this case invites the Panel to ignore decisions of the Appellate Body and prior GATT jurisprudence. As New Zealand will point out in this Statement, none of this is justified.

6. In this case, the obligation on the Panel to interpret the terms of the Safeguards Agreement in accordance with the basic rules of interpretation set out in the Vienna Convention is qualified only by

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[1] *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India* (WT/DS33/AB/R, 25 April 1997), pages 14 to 16.

[2] Advisory Opinion of 3 March 1950 on *Competence of the General Assembly for the Admission of a State to the United Nations* [1950] ICJ Reports p 4, at p 8. Quoted in the *Report of the International Law Commission on the Work of its Eighteenth Session*, Yearbook of the International Law Commission, 1966, vol II, p 221, attached to the United States Second Written Submission as US Exhibit 43.

what was said by the Appellate Body in *Argentina-Footwear*[3] when it noted that a safeguard action is "extraordinary". And, as the Appellate Body went on to say: "And when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account."[4] It is the Appellate Body's ruling that is the appropriate guidepost for the interpretation of the Safeguards Agreement and not the claims of the United States, which would ignore both the ordinary meaning of the words and the object and purpose of the Agreement.

7. My third preliminary comment relates to the standard that must be met by a Member before applying a safeguard measure and the standard of review for a panel in reviewing a Member's safeguard actions. In its Second Written Submission the United States claims that it has demonstrated that the findings and economic conclusions of the USITC were "carefully reasoned and amply articulated".[5] The standard of review for the Panel, as set out by the panel in *Korea - Dairy* is that:

> "an objective assessment entails an examination of whether the [competent authority] had examined all facts in its possession ... (including facts which might detract from an affirmative determination in accordance with the last sentence of Article 4.2 of the Agreement on Safeguards), whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the [Member's] international obligations."[6]

The USITC did not meet this standard. It did not examine all facts in its possession and it did not provide adequate and reasoned explanations of how the facts as a whole supported the determination made. The United States has attempted to construct reasoned conclusions for the USITC and to imply that analysis was done even though it was not. None of this alters the fact that the USITC did not do in this case what the panel in *Korea-Dairy* said must be done by a competent authority.

8. Throughout this case, the United States has sought to block proper review of the actions of the USITC by charges of *de novo* review. In its Second Written Submission the United States goes further and claims that "the fact that another finder of fact might reach a different conclusion does not establish that a country's competent authority violated the Safeguards Agreement".[7] In making this statement, which expresses a concept similar to that contained in Article 17.6 of the Antidumping Agreement, the United States appears to be seeking to introduce into the Safeguards Agreement a standard of review that is unique to the Antidumping Agreement and which was not incorporated into the Safeguards Agreement. As the Appellate Body said in the *United States - Steel Products* case, the Article 17.6 standard applies only to the Antidumping Agreement and not to disputes arising under other covered agreements.[8]

9. Mr Chairman, in any challenge made to actions taken under the Safeguards Agreement, a panel has to be satisfied that the competent authority examined all the facts in its possession, undertook adequate analysis and provided reasoned conclusions of how the facts as a whole supported the determination made. A panel has to be able to undertake an investigation that will allow it to determine whether this has been done. It cannot be thwarted by claims of *de novo* review or spurious claims about the standard of review under the Safeguards Agreement.

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[3] *Argentina - Safeguards Measures on Imports of Footwear* (WT/DS121/AB/R, 14 December 1999), para 94.

[4] Para 94.

[5] United States Second Written Submission, para 1.

[6] *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products* (WT/DS98/R, 21 June 1999), para 7.30.

[7] United States Second Written Submission, para 31.

[8] *United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (WT/DS138/AB/R, 10 May 2000), para 50.

10. My final preliminary point, Mr Chairman, is that the essence of this case is an attempt by the United States to find a scapegoat for economic declines in its live lamb and lamb meat industries. As the USITC recognised, these industries have been in a long-term decline, due to domestic market factors.[9] They were then further affected by the removal of a considerable source of income that went to live lamb producers from subsidies under the Wool Act. That loss of income led to a significant number of producers leaving the industry with a resulting decline in production. A drop in domestic production had a flow-through effect. It meant a contraction in the supply to producers of lamb meat which obviously had a negative effect on their incomes. It also meant that unfulfilled domestic demand was taken up by imports and led to an increase in imports of lamb meat.

11. The fundamental issue in this case concerns the appropriate use of safeguard measures. Can a Member pass on to imports costs incurred by its domestic industry as a result of factors within its domestic market? Specifically, in this case, can a Member impose on imports the costs to the producers of live lambs resulting from the removal of the Wool Act subsidies? Or as we put it in our Second Written Submission, can the United States replace its subsidies on the production of wool with a tax on the importation of lamb meat?[10] In this sense, as we have said, this case is about the integrity of the safeguards regime under the WTO agreements.[11]

Unforeseen Developments

12. Mr Chairman, much has been said and written in this case about the issue of "unforeseen developments", with the result that a simple and straightforward issue is becoming quite unnecessarily complicated. GATT Article XIX prefaces the right of a Member to take safeguard measures in the following way: "If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement…" and then goes on, products are being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury, then safeguard measures may be taken. Although the Safeguards Agreement makes no reference to "unforeseen developments", the Appellate Body said in *Argentina - Footwear* that the existence of "unforeseen developments" was a "*circumstance* 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."[12] The Appellate Body also made clear that it was for the competent authorities of the Member to make such a demonstration.[13]

13. The United States approach to this, as evidenced in its Second Written Submission, is to deny that there is any need to make a "finding" of the existence of unforeseen circumstances.[14] In doing so, the United States appears to be making nothing more than the rather trivial point that there is a distinction between "finding" the existence of unforeseen developments and "demonstrating" the existence of unforeseen developments, which is what the Appellate Body has said must be done. If there is a point of substance here, it escapes us. For its part, New Zealand is quite happy with the Appellate Body's formulation that the existence of unforeseen developments must be "demonstrated". Hence, the United States arguments about the term "finding" simply have no point.

14. In demonstrating the existence of unforeseen developments, it is not necessary to show, in the words of the Appellate Body, that the developments be "unforeseeable" or "incapable of being foreseen or anticipated".[15] A Member does not have to prove that subjectively it could not have foreseen a given development occurring after it incurred obligations under the GATT 1994. Rather,

[9] USITC Report, I-17.
[10] New Zealand's Second Written Submission, para 6.15.
[11] New Zealand's Second Written Submission, para 8.3.
[12] Para 92 (emphasis in original).
[13] Para 98.
[14] United States Second Written Submission, paras 3 and 4.
[15] *Argentina - Footwear*, para 91.

according to the Appellate Body, a Member has to demonstrate that the increased imports and the conditions under which they are imported are the result of unforeseen developments. In other words there has to be an *objective* demonstration that the developments were unforeseen or unexpected. Contrary to the United States claim that there is no need for any "finding", this does not mean that the requirement of unforeseen developments need not be demonstrated.

15. The United States arguments also mask a more profound attack on the "unforeseen developments" requirement. In order to make this attack the United States finds it necessary to go into what it refers to as "subsequent practice" to aid in the interpretation of the requirement of "unforeseen developments".[16] However, when investigated, the subsequent practice on which the United States relies is practice before the conclusion of the WTO agreements, not really subsequent practice at all. Thus, it is not used in the way that subsequent practice is meant to be used, that is as explained by the International Law Commission, as *objective* evidence of the *understanding* of the parties as to the meaning of the treaty.[17] Although the United States referred to this statement of the ILC in its Second Written Submission, it omitted the further discussion of the ILC which pointed to the use of subsequent practice to resolve ambiguities or to confirm a meaning.[18] Nowhere did the ILC mandate the use of subsequent practice to contradict the ordinary meaning of words.

16. In any event, even on its own merits the "subsequent practice" referred to by the United States does not demonstrate what the United States claims. The alleged subsequent practice shows only that in making its notification of a safeguard measure, New Zealand did not make any reference to unforeseen developments.[19] And, in any event, in the 1973 Note by the Secretariat cited by the United States in its Second Written Submission, the GATT Secretariat concludes in fact that unforeseen developments *must* be shown.[20]

17. In fact, the arguments on "subsequent practice" made by the United States are nothing more than an attempt by the United States to contradict the decision of the Appellate Body in *Argentina-Footwear*. In short, the United States continues to fight a battle that it has already lost in the Appellate Body.

18. Two examples illustrate this. First, the United States refers to a statement by a United States negotiator of the ITO Charter and of the GATT 1947, who said: "Therefore, the reference to 'unforeseen developments' in GATT was meaningless as far as the United States obligations were concerned".[21] And second, the United States sums up its discussion of the requirement of unforeseen developments with the statement, "there is no reason to conclude that Article XIX should be interpreted in a manner today that would require an 'unforeseen developments' finding as a precondition for the imposition of a safeguard measure."[22]

19. Mr Chairman, in New Zealand's view, these two statements by the United States effectively encapsulate the issue before the Panel on the question of unforeseen developments. Should the Panel do what the Appellate Body has stipulated and require that unforeseen developments be demonstrated in this case, or should it do what the United States wishes and make the requirement of unforeseen developments "meaningless as far as United States obligations are concerned"? In New Zealand's view, the question answers itself.

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[16] United States Second Written Submission, paras 5 to 10.

[17] *Report of the International Law Commission on the Work of its Eighteenth Session*, Yearbook of the International Law Commission, 1966, vol II, p 221, attached to the United States Second Written Submission as US Exhibit 43.

[18] *Report of the International Law Commission on the Work of its Eighteenth Session*, Yearbook of the International Law Commission, 1966, vol II, p 222, attached as Annex NZ21.

[19] United States Second Written Submission, paras 8 and 9.

[20] United States Second Written Submission, para 6.

[21] United States Second Written Submission, para 10.

[22] United States Second Written Submission, para 13.

20. As a fall-back position, the United States also argues that "unforeseen developments" can be found if one searches through the pages of the USITC Report and that it does not matter that the USITC did not demonstrate their existence.[23] As long as some unforeseen developments happen to be there, in the United States view, Article XIX has been complied with. But that is not what the Appellate Body said in *Argentina-Footwear*. It did not say that if a Panel can glean unforeseen circumstances from the facts before the competent authority of the Member taking the safeguard measure then Article XIX has been complied with, regardless of what the competent authority says or decides. The Appellate Body said that the existence of unforeseen circumstances must be *demonstrated*, and it made clear that it was for the competent authority to do that.[24]

21. Indeed, the United States goes as far as saying that the USITC made "uncontested findings" on the existence of unforeseen developments, making all of its prior arguments about the lack of any legal requirement to make such findings irrelevant.[25] But, of course, those alleged findings are nothing more than findings about the existence of increased imports which the United States contorts in this case to be "uncontested findings" about "unforeseen developments". As New Zealand has argued in earlier submissions, a finding of increased imports is a separate requirement from the demonstration of unforeseen developments.[26]

22. The United States also argues that its contentions about the so-called unforeseen developments are not contested by New Zealand.[27] And, of course New Zealand does not contest that there were increased imports during the period of investigation. But to assert the existence of a factor that cannot in law constitute unforeseen developments, and then argue that the existence of unforeseen developments is not contested because that factor has not been denied is simply a pointless exercise. For the reasons set out in our Oral Statement at the First Panel Hearing and in our Second Written Submission, New Zealand contests the United States view that the alleged unforeseen developments can constitute unforeseen developments within the meaning of Article XIX of the GATT.[28] Thus, in its claims that facts have not been challenged, the United States has proved nothing.

23. On this aspect, then, there are two questions for the Panel. Can the failure of the competent authority to demonstrate the existence of unforeseen developments be remedied by the United States before this Panel by a reconstruction of the USITC's report? And, if so, can a finding of increased imports be a substitute for a finding of unforeseen developments? As New Zealand has shown, the answer to both of these questions is "no".

Domestic Industry

24. On the question of the "domestic industry" in this case, the issue is quite straightforward. Should the United States be required to apply the terms of the Safeguards Agreement in defining the domestic industry, or should it be permitted to adopt a definition of its own making, a definition which the United States itself admits it uses only in the case of agricultural products?[29] The United States would have the Panel write the words "continuous line of production" and "coincidence of economic interests" into the Safeguards Agreement. But there is no legal basis for doing so. The approach that the United States seeks to apply to the determination of domestic industry is one that

[23] United States First Written Submission, paras 50 to 60 and Second Written Submission, paras 14 to 19.

[24] *Argentina - Footwear*, paras 92 and 98.

[25] United States Second Written Submission, para 16.

[26] New Zealand's Oral Statement at the First Panel Hearing, paras 19 and 20, and New Zealand's Second Written Submission, para 2.11.

[27] United States Second Written Submission, paras 14 to 18.

[28] New Zealand's Oral Statement at the First Panel Hearing, paras 19 and 20, and New Zealand's Second Written Submission, para 2.11.

[29] United States Responses to Questions from the Panel, para 28.

has been consistently rejected by GATT panels. Furthermore, were we to resort to the United States approach of looking to the negotiating history, we would find a rejection of the idea that upstream and downstream producers be included in the concept of "domestic industry" for the purposes of the Safeguards Agreement.[30]

25. Again, the United States seeks to bolster its position with *non sequiturs* and irrelevant arguments. New Zealand is said not to contest the factual basis of the United States argument relating to "continuous line of production" and "vertical integration" theories.[31] But what is there to contest when there is simply no legal basis for asserting the relevance of these theories? As New Zealand has pointed out on several occasions, the terms of the Safeguards Agreement define the domestic industry by reference to the producers of like or directly competitive products.[32] Growers and feeders produce live lambs, packers and breakers produce lamb meat. Live lambs and lamb meat are not like or directly competitive products. The United States does not even seek to deny that. Nor does it attempt to show that its approach to the determination of the domestic industry in the case of agricultural products fits within the terms of the Safeguards Agreement. In fact, the strongest argument it makes is that such an interpretation may be "permitted" by the Agreement.[33] However, it never tries to reconcile its approach with the actual terms of the Safeguards Agreement.

26. Furthermore, in its Second Written Submission, the United States overstates what New Zealand does not contest. For example, the United States says that New Zealand does not allege that there is no "vertical integration" throughout the four segments of the industry.[34] However, the United States argument on vertical integration shows linkages between growers and feeders and linkages between packers and breakers. Except for isolated examples, it does not show any integration between the producers of live lambs, that is, growers and feeders, and the producers of lamb meat, that is, packers and breakers - the two industries that the USITC has improperly linked in this case.

27. In short, there is simply no basis under the Safeguards Agreement on which the United States approach to the determination of domestic industry in this case can be upheld.

Threat of Serious Injury

28. Mr Chairman, it is important to remember that this is a case about threat of serious injury and not about serious injury itself. The error of the USITC was that it investigated the question of the existence of serious injury, then, having failed to find actual serious injury, it assumed that there must be a threat of serious injury. In that way it ignored Article 4.1(b) of the Safeguards Agreement, which provides that a threat determination must be based on serious injury that is *clearly imminent*, and that the determination must be based on facts and not on allegation, conjecture or remote possibility.

29. The substance of the United States argument on threat of serious injury is that an increase in imports at a time when the domestic industry was in decline meant that there was a threat of serious injury. In short, both the threat determination and the causation determination of the USITC were based on an assumption about causation.

30. This is illustrated in a number of ways. In seeking to support the USITC's conclusions on threat, the United States focuses its analysis, in a way the USITC did not do, on the period 1997 and

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[30] *Negotiating Group on Safeguards, Synopsis of Proposals, Note by the Secretariat*, MTN.GNG/NG9/W/21 (31 October 1998), Heading C, para 19.

[31] United States Second Written Submission, para 22.

[32] New Zealand's First Written Submission, para 7.41 and New Zealand's Second Written Submission, paras 3.1 to 3.12.

[33] United States First Written Submission, para 70.

[34] United States Second Written Submission, para 23.

interim 1998. But there was nothing remarkable about that period as far as the domestic industry was concerned. What the United States focuses on during that period was an increase in imports (although, as New Zealand has pointed out, the increase was not as significant as the United States claims),[35] and a decline in prices. This increase in imports becomes the basis for the United States argument that there was a threat of serious injury. But that, of course, assumes what had to be proved in respect of both the serious injury and the causation determinations - that there was a relationship between imports and domestic price declines, that an increase in imports would cause serious injury, and that such injury was clearly imminent.

31. The United States conflation of threat and causation is also evident in its discussion of Annex NZ13 attached to New Zealand's First Oral Statement. That annex showed that, contrary to the claims of the United States, economic analysis could be used to distinguish injury caused by domestic factors from injury caused by increased imports. The United States claims that the annex "fails as a challenge to the USITC's threat of injury determination".[36] But, of course, it was not introduced as a challenge to the USITC's threat of injury determination. The United States sees it as such a challenge because it does not distinguish causation from threat. Moreover, the United States linking of the analysis in Annex NZ13 with its arguments on the threat of serious injury is an implicit admission by the United States that if the USITC's assumption about causation cannot stand, then its conclusion on threat falls to the ground as well. That is, the USITC's determination on threat is based on nothing more than an assumption about causation.

32. I would like to make one additional comment at this stage. The United States objects to New Zealand's characterisation in Annex NZ13 and elsewhere that what occurred was nothing more than a normal fluctuation in agricultural trade, claiming that New Zealand is seeking to make safeguard measures unavailable for agricultural products.[37] That, of course, is not correct. But consider the implications of the United States claim. If a one-year period is sufficient to determine a trend on which to base a threat determination, then an industry which over a five-year period has experienced a strong positive price trend could have a safeguard measure imposed simply because of a short-term price drop in the sixth year. That cannot be the purpose of the safeguards disciplines under the WTO.

33. Mr Chairman, turning to the specific arguments made on the question of threat, the Panel is confronted with two quite separate views of what occurred in this case. On the one hand, you have the picture the United States paints of a "surge" in imports in 1997 and interim 1998 at the same time as a drop in domestic prices for lamb meat. According to this view, lamb meat consumption was stable in 1997 and interim 1998 and imported lamb meat, through increases in fresh and chilled product and its larger size, increasingly competed with domestic production. Under this theory, a continuation of imports at prices lower than domestic prices would lead to further depressed prices. On this basis, the United States claims that it can justify the USITC's determination of threat.

34. On the other hand, New Zealand has shown that what in fact occurred was quite different. The termination of the Wool Act payments led to a contraction in the supply of lamb meat and an increase in domestic prices; the lower supply encouraged imports onto the market; much of these imports went to supply new demand or went to meet latent demand in the market; there was little direct competition between domestic and imported product; the drop in domestic prices in 1997 and interim 1998 occurred as a result of the drop in prices in competing meats; domestic prices rose again in the last three months of the period of investigation at a time of higher imports; and consumption increased at the same time, absorbing the rise in imports.

[35] New Zealand's Oral Statement at the First Panel Hearing, para 38.
[36] United States Second Written Submission, para 45.
[37] United States Second Written Submission, para 58.

35. How can two accounts, each based on the same investigation of a competent authority, be so different? The answer lies, as we have suggested before, in the USITC Report itself. It also lies in a comparison between what the USITC actually found and what the United States now, in an attempt to reinterpret the USITC's Report, has said that the USITC found. New Zealand has previously referred to the inconsistencies between the United States description of the USITC Report and what was actually said in that Report.[38] In addition, the USITC Report itself also contains inherent inconsistencies.

36. For example, the USITC found evidence of the larger size of imported product.[39] At the same time, it found evidence of differences between imported and domestic product,[40] including considerable differences in size.[41] Which is correct? The facts set out in the USITC Report show that it is the latter. Similarly, the USITC stated that in 1997 imports displaced domestic product.[42] It also said that many imports supplied new demand.[43] The evidence before the USITC points clearly to the second statement being correct. Let me take another example. The USITC said that consumption of lamb meat was stable after 1996.[44] However, it also said that the market was somewhat sensitive to price.[45] The drop in the competing price of other meats at the same time as the decline in lamb prices supports the latter statement. The USITC also referred to prices remaining "depressed" to the end of the period of investigation.[46] But in contrast, the information collected by the USITC shows that interim 1998 prices were higher than those at the beginning of the period of investigation.[47] Finally, the USITC said that imported prices for several of the products surveyed were 20 percent or more below comparable quarters in 1996 and early 1997,[48] which was used by the United States to justify its allegations of 20 percent underselling of domestic product by imported product.[49] However, the actual evidence points to meaningful comparisons being possible for only three of the eight products surveyed, and in one of those the domestic product actually oversold the imported product.[50]

37. Faced with such differences, both within the USITC Report and between what the USITC actually found and what it is alleged by the United States to have found, the task of the Panel is to determine whether the competent authority came to reasoned conclusions based on the evidence before it. As the United States itself admits in its Second Written Submission, the question before the Panel is the *adequacy* of the USITC's determination as it was made at the time.[51] The Panel should examine the analysis performed by the competent authority on the basis of the determinations made by that authority and on the basis of the evidence it has collected or should have collected.

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[38] New Zealand's Oral Statement at the First Panel Hearing, paras 6 to 9.

[39] USITC Report, I-22.

[40] USITC Report, I-23.

[41] USITC Report, II-8. See also II-37, where the increase in size of Australian imported product noted by the USITC is shown to be a rise of only 2 pounds in average carcass weight over a period of three years.

[42] USITC Report, I-24.

[43] USITC Report, I-32. In addition, Table 5 at II-17 shows that in interim 1998 the increase in imports was matched by a slight rise in domestic shipments, suggesting that there was no displacement of domestic product by imports.

[44] USITC Report, I-22.

[45] USITC Report, I-22.

[46] USITC Report, I-20.

[47] USITC Report, II-55. The USITC also noted that interim 1998 prices were above the average for the full period of investigation.

[48] USITC Report, I-20. The footnote to this statement refers to frozen product categories and carcasses for which there are very limited domestic sales.

[49] United States First Written Submission, para 87.

[50] United States Exhibit 41, Tables 38 to 43, attached to the United States Responses to Questions from the Panel.

[51] United States Second Written Submission, para 48.

38. Such an examination will show that if a short period of just over one year was used in order to determine that a threat of serious injury was clearly imminent, then no proper analysis of threat could have been undertaken. A determination of a threat of serious injury depends upon a prediction of future trends based on an analysis of past trends. There has to be an *analysis* of past trends, and not just a "snap-shot" of what occurred on a particular occasion. The United States tries to justify its approach on the basis of the Appellate Body's focus in *Argentina-Footwear* on the most recent period.[52] But, of course, *Argentina-Footwear* was a case involving actual serious injury, and looking at the most recent period is appropriate if the enquiry is to determine whether the industry in question is suffering actual injury. But, how can one predict what will happen in the future on the basis of only a brief period in the past? Analysis of trends over a representative period *is* a basis for determining what will happen in the future. Glancing at a brief occurrence is not.

39. In addition, even during that short unrepresentative period on which the United States now focuses, nothing happened that did not happen during the longer period of investigation. Prices had risen and fallen during the period of investigation, and they had risen in the beginning of 1997 and then fallen again during the course of that year. Imports had increased during the period of investigation, and they had increased in 1997 and 1998. What the United States seeks to do is to make an assumption that that increase in imports was linked to the falling prices. The United States determination of threat is, therefore, a determination based on an assumption of causation, that is, an assumption that if imports continued to increase, there would be serious injury. As New Zealand has said, a safeguard determination must be based on a threat of serious injury, not on a threat of increased imports.[53]

40. The United States approach illustrates precisely why it is a mistake to base future prediction on short-term occurrences rather than on longer-term trends. The assumption of a relationship between the fall in prices in 1997 and an increase in imports ignores the fact that prior to 1997 there had been a fall in domestic production due to growers, who had been rendered uneconomic as a result of the loss of the wool subsidy, leaving the industry. Imports increased in response to a resulting unfulfilled domestic demand. At the same time growers remaining in the industry needed increased prices in order to try to recoup losses resulting from the termination of the Wool Act subsidy. But by mid-1997, given the downward trend in competing meat prices, a correction had to take place and consequently lamb prices fell.

41. Thus, by focusing only on the period from mid-1997 and in interim 1998, the United States is able to make assumptions that are unwarranted and to reach conclusions about causation and threat that are neither reasoned nor founded on analysis. The "snap-shot" approach to determining threat advocated by the United States is totally at variance with the requirement of the Safeguards Agreement that threat determinations are not to be based on conjecture or remote possibility.

42. The new United States argument that a determination of threat can be made on the basis of packers and breakers alone also cannot be sustained.[54] The United States cannot justify a decision of its competent authority on a basis that was not even considered by that competent authority. Nor can it seek to support a decision of the competent authority on the basis of claims that are contrary to the facts as found by that authority. As New Zealand demonstrated in its Second Written Submission, the facts before the USITC showed that far from being faced with a clearly imminent threat of serious injury, packers and breakers saw improved economic conditions over the period of investigation.[55] There is simply nothing to this rather desperate attempt by the United States to support the decision of the USITC on threat of serious injury.

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[52] United States Second Written Submission, para 32.
[53] New Zealand's Second Written Submission, para 4.2.
[54] United States Oral Statement at the First Panel Hearing, para 16.
[55] New Zealand's Second Written Submission, paras 4.20 to 4.26.

43. Thus, Mr Chairman, the issue before the Panel on the question of threat of serious injury is whether the competent authority of a Member is required to make a determination of the existence of a threat of serious injury on the basis of facts and on a reasoned determination that significant overall impairment is clearly imminent as required by Article 4.1(b) of the Safeguards Agreement, or whether it is entitled to base such a determination on a "snap-shot" of events and to conclude that serious injury is threatened on the basis of an assumption of causation. Again, in New Zealand's view, the answer is clear.

Causation

44. Mr Chairman, as in the case of the issue of "unforeseen developments", the question of causation is becoming mired in obfuscation. The words of the Safeguards Agreement on causation are clear. They revolve around two propositions. First, a safeguard measure can be applied only if the alleged threat of serious injury was caused by imports.[56] Second, where factors other than increased imports are causing injury to the industry in question, that injury shall not be attributed to increased imports.[57] There is a simple corollary from these two propositions. If, when the threat of injury from these other factors is excluded, there is no threat of serious injury, then there is no threat of serious injury to attribute to imports. In those circumstances, there is no basis for taking a safeguard measure.

45. The United States seeks to avoid the consequences of these propositions in a number of ways. For example, it embarks on an excursus into the concept of "sole cause".[58] But its argument on this point is simply irrelevant. Of course there can be many causes of injury or of threat. Article 4.2(b) itself recognises that. But that does not justify attributing to increased imports the injury or threat caused by other factors. Article 4.2(b) specifically proscribes that. A competent authority cannot attribute serious injury to increased imports where increased imports cause only injury, but increased imports together with other factors cause serious injury.

46. Equally, the United States theory of the prohibition of "import isolation", to the extent that it has any meaning at all, seems to suggest that it is permissible to attribute to increased imports injury caused by other factors.[59] However, this is clearly not correct.

47. In its Second Written Submission, the United States has sought to support its position by extensive reference to the negotiating history of the Safeguards Agreement.[60] However, this is a curious use of negotiating history. Article 32 of the Vienna Convention on the Law of Treaties permits recourse to negotiating history as a supplementary means of interpretation in order to confirm a meaning already reached by the application of the basic rule of interpretation set out in Article 31 or where there is ambiguity. As the International Court of Justice has said: "there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself."[61] The United States has not argued that there is any ambiguity, thus its recourse to negotiating history must be to confirm an existing meaning. But that is not what the United States is doing at all. Rather, the United States is seeking to use negotiating history to contradict the ordinary meaning of the words of the Safeguards Agreement. This is exactly what Article 32 of the Vienna Convention on the Law of Treaties does not permit.

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[56] Safeguards Agreement, Article 2.1.
[57] Safeguards Agreement, Article 4.2(b).
[58] United States Second Written Submission, paras 63 to 86.
[59] United States Second Written Submission, paras 87 to 89.
[60] United States Second Written Submission, paras 64 to 80.
[61] Advisory Opinion of 28 May 1948 on *Admission of a State to the United Nations* [1948] ICJ Reports, p 57 at p 63. Quoted in the *Report of the International Law Commission on the Work of its Eighteenth Session*, Yearbook of the International Law Commission, 1966, vol II, p 223, attached as Annex NZ21.

48. In any event, in its setting out of the negotiating history of the Safeguards Agreement, at most the United States has succeeded in showing that there were varying views amongst the negotiators as to the meaning of the words they were using. That is to be expected, and it is precisely why a treaty interpreter is required by the Vienna Convention to search for intent in the words finally used in the treaty and not to seek intent from the expressions of differing motives and intent of the parties during their negotiations. The United States arguments in this case demonstrate the wisdom of that rule. Moreover, it is an irony of the United States reference to the negotiating history in respect of the test for causation that the one thing that does become clear from that history and from the final text agreed on is that, having been discussed and considered, the "substantial cause" test advocated by the United States in this case, was rejected by the Safeguards Negotiating Group.[62]

49. Throughout its arguments about "sole cause" and "import isolation", and its recourse to negotiating history, the United States leaves one thing completely obscure. That is, what is the meaning of the second sentence of Article 4.2(b)? In its First Written Submission, the United States came close to admitting that the sentence means precisely what it says – in other words, its ordinary meaning. It said that the second sentence of Article 4.2(b) "instructs Members not to blame increased imports for any injury caused by other factors."[63] In its Second Written Submission, the United States again leans towards this approach, stating that the sentence "requires Members to ensure that they distinguish between different causes of injury rather than simply making the assumption that increased imports are responsible for all of the injury that the industry has experienced."[64] We agree.

50. However, as if it then realised the implications of this statement, the United States restated its position in a way that bears no relationship to what was just said and appears even to contradict it. "Stated otherwise," the United States says, "the second sentence instructs Members that they should not jump from the establishment of the 'causal link' between increased imports and serious injury to the conclusion that the sole source of the industry's injury is attributable to those imports."[65] But, Mr Chairman, if increased imports have in themselves caused serious injury, it does not matter whether there are other causes as well. In those circumstances, the admonition that the United States reads into the second sentence of Article 4.2(b), not to jump from a conclusion of causation to a conclusion of sole causation, is simply meaningless. And if that is all that the second sentence of Article 4.2(b) means, then the United States has effectively written it out of the Safeguards Agreement.

51. At the end of the day, the United States cannot escape from the simple, ordinary, literal meaning of the second sentence of Article 4.2(b). In determining whether the threat of serious injury that it had found was attributable to increased imports, the United States could not attribute to increased imports injury caused by other factors. However, that is exactly what the USITC did. It determined that its domestic industry was being threatened with injury from a variety of factors. Collectively, this amounted, in the USITC's view, to a threat of serious injury. And, since none of the factors causing the threat of injury was a greater cause than increased imports, then the collective serious injury was attributed by the USITC to increased imports. As a result, a determination of causation was made by attributing to increased imports injury caused by other factors – which is precisely what the second sentence of Article 4.2(b) says cannot be done.

52. Mr Chairman, I would now like to turn very briefly to Annex NZ13.[66] The United States has raised a number of objections about its admissibility. They argue that it constitutes an invitation to undertake a *de novo* review.[67] They argue that it would be admissible only if it had been originally

[62] As illustrated by the *Negotiating Group on Safeguards, Draft Text*, MTN.GNG/NG9/W/25/Rev.3, 31 October 1990.
[63] United States First Written Submission, para 119.
[64] United States Second Written Submission, para 79.
[65] United States Second Written Submission, para 79.
[66] Attached to New Zealand's Oral Statement at the First Panel Hearing.
[67] United States Second Written Submission, para 79.

placed before the USITC.[68] But these United States arguments avoid the issue. Annex NZ13 was not presented as evidence of how the USITC should have decided the case. It was not presented in order to invite the Panel to engage in a *de novo* review. It was presented in response to the contention of the United States that causation could not be demonstrated with any degree of precision - that in a sense, causation can be nothing more than an impressionistic response to circumstances by experienced Commssioners on the USITC.

53. Annex NZ13 shows that the question of whether injury or threat is caused by increased imports or by domestic factors *is* capable of being determined on the basis of objective analysis – that it is possible to demonstrate the causal link between increased imports and the threat of serious injury on the basis of objective evidence as Article 4.2(b) of the Safeguards Agreement requires. Equally, Annex NZ13 shows that it is possible to determine when factors other than increased imports cause the threat of serious injury in question. The United States objections to Annex NZ13 do not deny that point.

54. Moreover, all of the United States arguments criticising Annex NZ13 fail to undermine its essential point. That is, in order to be able to argue that serious injury threatening lamb meat producers was caused by imports, it would have to be shown that domestic prices on the United States market were declining and that they were being forced down by lower-priced imports. This was not shown by the USITC, nor could it be.

55. Furthermore, the basic conclusion of Annex NZ13 would not have altered had there been a breakdown between frozen and chilled lamb meat as the United States alleges.[69] The price of frozen lamb meat increased significantly over the period 1993 to 1998.[70] Thus the increase in the aggregate price of imports was not just the result of the increase in the proportion of chilled lamb meat as the United States would have the Panel believe.[71]

56. Therefore, in relation to causation, Mr Chairman, the issue for the Panel is whether the second sentence of Article 4.2(b), which requires that injury caused by other factors not be attributed to increased imports, should be given any content. New Zealand has demonstrated not only that the ordinary meaning of the second sentence of Article 4.2(b) provides that content, but also that the distinctions required by the application of that provision can be drawn. The United States, by contrast, wishes to have the freedom to attribute to increased imports injury that is caused by other factors, and in doing so, to deny any content to Article 4.2(b). Such an approach cannot be justified under the Safeguards Agreement.

Necessity

57. Mr Chairman, the essential question in respect of Article 5.1 of the Safeguards Agreement is: what is the nature of the obligation that is cast upon a Member in applying a safeguard measure? Article 5.1 provides that the measure is to be applied "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment". New Zealand has argued this means that in choosing a remedy, a Member must choose one that is proportionate to the objective sought to be achieved; it must be the least trade restrictive of those remedies that are capable of achieving the objectives of preventing serious injury and facilitating adjustment. And, since the plurality of the USITC Commissioners proposed a remedy that is less trade restrictive than that applied by the United States Administration, then it is incumbent on the United States to explain why it is not in violation of Article 5.1.

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[68] United States Second Written Submission, paras 46, 51 and 52.

[69] United States Second Written Submission, paras 53 to 56.

[70] Meat and Livestock Australia's Pre-injury Hearing Submission, Exhibits 8 and 12, attached to the Australian First Written Submission as Exhibit AUS-28.

[71] United States Second Written Submission, para 55.

58. The United States continues to challenge the use of the term "least trade restrictive".[72] Apparently the representatives of the United States in this case have not had the opportunity to speak with the United States Trade Representative who, as we pointed out in our Second Written Submission, agrees that the objective in choosing a safeguard measure is to choose the measure that is least trade restrictive.[73]

59. Nor do the United States arguments based on the interpretative provisions of the Vienna Convention afford it any support. It claims that words are being imported from other areas,[74] and ignores that the interpretative function is to give meaning to the words in the treaty. For this is precisely where the United States arguments fall down. It objects to the New Zealand interpretation of Article 5.1, but fails to offer any alternative interpretation of that provision. What obligation, according to the United States, does Article 5.1 impose on a Member in taking a safeguard measure?

60. The United States comes close to offering its views on Article 5.1 when it says that the provision "calls for an examination of whether the measure a Member has chosen to apply is appropriately gauged to the specific injury and causation findings that the competent authorities have made".[75] But this leaves the central question unanswered. How does one determine whether a measure is "appropriately gauged"? Rather than throwing light on the issue, the United States approach simply turns the enquiry right back to the debate over the meaning of "only to the extent necessary".

61. Some impression of the real approach of the United States can be gleaned from its criticisms of New Zealand's views in its Second Written Submission.[76] It says of its characterisation of the New Zealand approach that "That degree of scientific perfection is simply unachievable", and goes on to say that "identifying an appropriate safeguard measure is an inherently uncertain enterprise."[77] In these two statements, the United States reveals an approach that is found in its arguments on other aspects of this case: there cannot be disciplines placed on Members taking safeguard measures - the whole area is to be left to the subjectivities of each Member. In effect, Article 5.1 should not be given any content.

62. In this regard, the United States arguments on burden of proof are simply a smokescreen to cover the fact that the United States wishes to avoid articulating a standard under Article 5.1 and showing how it meets that standard. It posits a burden that could never be met. And, of course, it does so in order to prevent any comparison being made between the USITC plurality recommendation and the measure that the Administration adopted, because it cannot demonstrate that its chosen measure is applied only to the extent necessary to prevent serious injury and to facilitate adjustment. As New Zealand has pointed out, in many respects that measure goes well beyond the prevention of any threat or the facilitation of any necessary adjustment.

63. To this end, the United States resorts to arguments such as claiming that a three year measure is *ipso facto* less trade restrictive than a four year measure *regardless of the content of that measure*.[78] That simply does not make sense. It is rivalled only by the claim that a 40 per cent out of quota tariff is equivalent to a 20 per cent out of quota tariff![79] These, Mr Chairman, are the arguments of the desperate. Furthermore, an analysis of the United States past safeguard practice reveals that 80 per

[72] United States Second Written Submission, paras 98 to 101.
[73] New Zealand's Second Written Submission, para 6.2.
[74] United States Second Written Submission, para 100.
[75] United States Second Written Submission, para 110.
[76] United States Second Written Submission, paras 102 to 110.
[77] United States Second Written Submission, para 105.
[78] United States Second Written Submission, fn 90.
[79] United States Second Written Submission, fn 90.

cent of United States safeguard measures were for a duration of four years or more.[80] This makes a nonsense of United States arguments that the likelihood of the safeguard in this case being extended "is conjectural at best".[81]

64. New Zealand has clearly demonstrated that the measure adopted by the United States does not meet the requirements of Article 5.1. First, no serious injury was found at existing levels of imports, yet the in and out of quota tariff rates were set at levels designed to *reduce* imports to levels below those in 1998. Thus, the measure was applied to an extent greater than necessary to prevent a threat of serious injury. It was, as the United States itself claims, designed to *improve* the position of the domestic industry.[82] It was not designed to *prevent* serious injury to that industry. Second, in its causation findings, the USITC found other factors to be causing injury and the measure imposed addresses these elements of the USITC's findings. Indeed, specific measures were adopted to address these other causation factors. Clearly, therefore, the safeguard measure adopted by the United States goes beyond the extent necessary to prevent the serious injury or facilitate adjustment resulting from the threat of serious injury attributable to increased imports.

MFN

65. Mr Chairman, the issue surrounding the United States violation of Article I of the GATT 1994 and Article 2.2 of the Safeguards Agreement is quite simple. The USITC included the imports of certain countries, notably Canada, Mexico and Israel, in its determination of threat, but excluded the imports of those countries from the application of its safeguard measure.

66. In its First Written Submission, the United States sought to argue that this had not occurred.[83] In its Second Written Submission the United States appeared to concede that it had occurred and argued that it was entitled, indeed obliged, to do this.[84] Neither argument can be sustained. What the United States is seeking to do in this case is have the Panel incorporate a special causation rule into the Safeguards Agreement for dealing with free trade areas. However, the principle of "parallelism" set out in *Argentina-Footwear* stands in the way of the United States arguments in this case.[85] In New Zealand's view the *Argentina-Footwear* principle clearly applies.

Conclusion

67. By way of conclusion, Mr Chairman, I would like to make the following brief comments. In this case the Panel is faced with a stark choice. Should it apply the provisions of the Safeguards Agreement and the GATT 1994 in accordance with their terms, or should it rewrite the relevant provisions of those agreements along the lines advocated by the United States? In New Zealand's view, to follow the United States approach would be wrong both as a matter of policy and as a matter of legal interpretation.

68. As a matter of policy, what the United States is essentially advocating is that little more than a one year price drop for a given agricultural product should be sufficient to take safeguard action. If that is so, then a large part of world agricultural trade could time and again be blocked by safeguard measures. Clearly, the option of using safeguards must be available for agricultural products. However, a determination of a threat of serious injury triggering safeguard action cannot result from

[80] *Guide to GATT Law and Practice*, (1995) vol I, pages 539 to 559 (Analytical Index). An examination of the Analytical Index discloses that the average length of time for United States safeguard measures is six years.

[81] United States Second Written Submission, fn 90.

[82] United States First Written Submission, para 175, 198, and 204.

[83] United States First Written Submission, paras 254 to 257.

[84] United States Second Written Submission, paras 118 to 123.

[85] *Argentina - Footwear*, para 113.

changes in market conditions that are no more than price fluctuations that are to be expected in agricultural trade. The Safeguards Agreement cannot be applied in a way that would obliterate any distinction between measures taken under the Safeguards Agreement and measures taken under the special safeguards provisions of the Agreement on Agriculture.

69. As a matter of policy, too, the causation requirement of the Safeguards Agreement cannot be applied so as to ignore any distinction between injury or threat caused by increased imports and injury or threat caused by domestic factors. Members cannot be permitted to place on imports the burden of economic decline due to domestic factors.

70. As a matter of legal interpretation, as we have shown, the United States arguments cannot be supported. They involve denuding the concept of "unforeseen developments" of any content; rewriting the concept of domestic industry to exclude the defining factor of "like or directly competitive products" and replacing it with concepts of "continuous line of production" and "coincidence of economic interests"; eliminating the requirement that a determination of a threat of serious injury be based on facts and not on allegation, conjecture or remote possibility; permitting the attribution to increased imports of injury caused by other factors; and eviscerating the requirement that a measure be applied only to the extent necessary to prevent injury and to facilitate adjustment of any procedural or substantive content. Finally, the United States is asking the Panel to provide a new rule for the application of safeguard measures to free trade areas.

71. In New Zealand's view, Mr Chairman, all of this has to be rejected.

72. I would like finally to reaffirm all of the arguments made by New Zealand in our earlier written and oral pleadings, and to respectfully request the Panel to find the United States in violation of its obligations under the Safeguards Agreement and the GATT 1994 and to recommend that the United States bring its treatment of imports of lamb meat from New Zealand into conformity with its obligations under those agreements.

ANNEX 3-1

LETTER FROM THE UNITED STATES
REQUESTING PRELIMINARY RULINGS

(5 May 2000)

Pursuant to paragraph 13 of the Panel's Working Procedures, and having reviewed the submissions of Australia and New Zealand in the present dispute, the United States hereby requests preliminary rulings on the following issues.

A. Insufficiency of Panel Request

1. The panel requests of Australia and New Zealand were insufficient as a matter of law to satisfy the requirement of Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") that such requests "shall identify the specific measures at issue and provide a brief summary of the legal basis for the complaint sufficient to present the problem clearly." The complaining parties failed to provide any indication of the legal basis for their claims. Australia's panel request and corrigendum in document WT/DS178/4 and WT/DS178/4/Corr.1 merely provide one paragraph identifying the US safeguard measure on lamb, note that consultations took place, and state that:

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

Similarly, in its panel request in document WT/DS177/4, New Zealand provides one paragraph identifying the US safeguard measure on lamb, states that

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

and then notes that consultations took place. Nothing in either of these panel requests provides any other information that would in itself further clarify exactly which of the obligations in these named articles is alleged to be infringed.

2. In the recent appellate proceeding on *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, the Appellate Body examined a panel request by the EC closely resembling the panel requests in the present dispute. The Appellate Body noted its earlier decision in the *Bananas* case that "it was sufficient for the Complaining Parties to list the provisions alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements." (*Bananas* at fn. 13, ¶141). However, the Appellate Body then clarified that in the *Bananas* case it first had restated the reasons why precision is necessary in a request for a panel; then had stressed that claims, not detailed arguments, are what need to be set out with sufficient clarity; and third, had found that the listing of articles in

that case satisfied the *minimum* requirements of the DSU, and the EC had not been misled as to what claims were in fact being asserted against it. (*Korea- Dairy*, ¶123).

3. The Appellate Body then noted that "[i]dentification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint claim is to be presented at all." The Appellate Body went on to note that there would be circumstances where the "simple listing of the articles of the agreement or agreements involved" would be sufficient to meet the standard of *clarity* in the legal basis of the complaint, and there would be situations when such a listing would *not* satisfy the standard of Article 6.2, "for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2." (*Id.* at ¶124) The Appellate Body then found that this issue must be examined on a case-by-case basis, taking into account "whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated." (*Id* at ¶127.)

4. The Appellate Body then went on to examine the EC panel request in the *Korea Dairy* case. It found that GATT Article XIX and Articles 2, 4, 5 and 12 of the Agreement on Safeguards ("Agreement") – all of which are at issue in this dispute – each have multiple paragraphs, most of which have at least one distinct obligation. (*Id*., at ¶129) It found that the *Korea Dairy* panel's "perfunctory" examination of the DSU Article 6.2 issue raised by the EC was not satisfactory. (*Id.* at ¶130) It determined that the EC panel request - which contained exactly the same elements as the panel requests in the present case - should have been more detailed. The Appellate Body denied Korea's appeal solely because Korea failed to demonstrate to the Appellate Body that the mere listing of the articles had prejudiced its ability to defend itself in the course of the panel proceedings. While Korea had asserted it had sustained prejudice, Korea had not offered any supporting particulars. (*Id.* at ¶131) The Appellate Body noted the desirability of resolving such issues through preliminary rulings. The United States seeks such a preliminary ruling.

5. Every legal provision cited in both Australia and New Zealand's panel requests contains multiple obligations, yet neither request identifies the specific obligations at issue. Neither the listing of articles nor any other material in the panel requests clarifies which of the multiple obligations potentially at issue is actually implicated. Thus, these requests are insufficient under DSU Article 6.2.

6. The United States does not assert substantial prejudice to the United States with respect to the claims of the complainants under Articles I, II and XIX of the GATT 1994 and Articles 5, 11 and 12 of the Agreement, as it was possible for us to discern those subprovisions that would be implicated on the basis of the context of this proceeding. However, the mere listing of Articles 2, 3 and 4 of the Agreement, without any elucidation of the actual claims at issue, fails to meet the standard of DSU Article 6.2 and has substantially prejudiced the United States by compromising its ability to respond to the claims of the complaining parties.

7. Both the Australia and New Zealand submissions raise multiple claims under each of the cited articles of the Agreement, in particular Article 4 of the Agreement, that were not and could not have been known to the United States based on the panel requests and corrigendum. For example, with respect to the obligations listed in Article 4 of the Safeguards Agreement, it was unclear whether Australia and/or New Zealand were stating a claim with respect to the United States' finding with respect to (1) threat of serious injury as that term is defined in Article 4.1(b); (2) domestic industry as that term is defined in Article 4.1(c); (3) any or all of the economic factors to be evaluated that are set out in Article 4.2(a), each of which represents an independent obligation; (4) causation (Article 4.2(b)); or (5) the published analysis of the case required by Article 4.2(c). Even the complainants' submissions are unclear in many instances as to which provisions are claimed to be violated and why,

for instance concerning the injury determination under Article 3. The United States can only conclude that the claims in this case will continue to evolve, and that this evolution will be uncontrolled by the terms of reference because of the vagueness of the panel requests.

8. Because of the inadequacy of the panel requests, it was not until Australia and New Zealand filed their first written submissions that the United States was able to know their actual legal claims. Yet, while both complaining parties have had a number of months to prepare their legal arguments, the United States was given only three weeks to respond. Moreover, notwithstanding the long period of time Australia and New Zealand had to prepare their first written submissions, both complaining parties, during the organizational process for this panel proceeding, requested and were given *even more time*, six more days, to prepare their submissions than had been proposed in the draft timetable. Yet the United States was only provided one additional day in which to respond.

9. The insufficiency of the Panel requests has seriously prejudiced the United States in the preparation of its defense. It prevented the United States from knowing the true nature of the claims being made against the US measure and placed the United States in the position of merely guessing which of the many obligations in these several articles might be at issue in this review. This severely limited the ability of the United States to begin the task of preparing its defense. The dispute resolution process is intended to be a relatively speedy process. Central to such a speedy process is the requirement that claims be clearly stated at the required time. The failure of a complaining party to do so prejudices the responding party and undercuts the fairness of the entire process. It effectively stacks the deck against the responding party.

10. The failure of the complainants to comply with Article 6.2 has also compromised the ability of other Members to know what issues are at stake in this proceeding so that they could determine whether to intervene as interested third parties concerning their interest in those issues. The true scope of this case will only be apparent to other Members after the panel report is circulated, at which point it will be too late to reserve third party rights. The failure to comply with the transparency and due process obligations expressed in Article 6.2 therefore nullifies important values in the WTO dispute settlement system. This prejudice to the rights of third parties cannot be cured by merely adjusting the timetable of this proceeding.

11. Accordingly, the United States requests that the Panel rule that the panel requests fail to comply with Article 6.2. Because a valid panel request is a legal prerequisite for a panel proceeding under the DSU, to the extent that the panel requests fail to meet Article 6.2, this panel proceeding lacks a legal basis and cannot go forward.

12. As the Appellate Body has noted (*Bananas* fn. 13 at ¶144; *Korea Dairy* fn. 81 at ¶130), provision of preliminary rulings by panels provides a means of dealing with Article 6.2 compliance problems without causing prejudice or unfairness to any party or third party. Indeed, the United States seeks a preliminary ruling in this instance to prevent such prejudice and unfairness. If the Panel rules that these panel requests fail to comply with Article 6.2, Australia and New Zealand can cure this problem by seeking panel establishment anew on the basis of new panel requests. This would provide the notice, transparency and due process required by the DSU, and permit all Members to know whether they should reserve rights as third parties in this case. Such expeditious action by the Panel would also facilitate resolution of this dispute with the least time added to the entire process. In the case of *Guatemala - Cement*, Mexico's failure to comply with procedural prerequisites led to the Appellate Body finding that the panel in that case never should have considered Mexico's complaint. After sustaining a reversal in the Appellate Body, Mexico has pursued the same measure on the basis of an amended panel request, but with the loss of substantial time and resources for the parties and for the WTO dispute settlement system. It would have been better for all concerned if the panel in that case had resolved the same issue by a preliminary ruling.

13. Although the United States considers that dismissal of this proceeding in its entirety is the most appropriate remedy, if the Panel decides not to do so, the United States requests that the Panel rule that the panel requests fail to comply with Article 6.2 in respect of the claims made under Articles 2, 3 and 4 of the Agreement on Safeguards. If the Panel so rules, then because those claims do not have a legal basis under Article 6.2, they cannot be considered in a proceeding based on the panel requests at issue. Australia and New Zealand can then each decide whether to go forward with the present panel proceeding or whether to expeditiously start again with a legally proper panel request.

14. If the Panel decides to proceed and to consider the claims made under Articles 2, 3 and/or 4 of the Agreement on Safeguards notwithstanding the inadequacy of the panel requests, the United States requests that the Panel extend the time given to the United States to respond to the claims and arguments based thereon set out in the First Written Submissions of Australia and New Zealand. While an extension of time will not cure the defects in the panel request, additional time will mitigate in part the prejudice to the United States resulting from the inadequate request. The United States requests that the Panel grant the United States at least two extra weeks to file its first written submission.

15. The United States further requests an immediate ruling from the Panel postponing the deadline for the first written submission of the United States until it has ruled on the above requests.

B. Exclusion of US Statute from Panel Terms of Reference

16. In their respective panel requests, neither Australia nor New Zealand raises the claim that the US safeguard statute, on its face, is inconsistent with US obligations under the *Agreement on Safeguards*. However, New Zealand, but not Australia, makes that allegation in its First Written Submission. (*New Zealand First Submission* at ¶ ¶ 7.73 - 7.76)

17. It is the United States' view that the consistency of the US statute is not within the Panel's terms of reference, which merely authorize the Panel:

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

The panel requests identify the United States measure as follows.

18. Australia in WT/DS178/5 and /Corr.1 refers to "the definitive safeguard measure imposed by the United States of America (USA) on imports of lamb meat", referencing documents G/SG/N/10/USA/3-G/SG/N/11/USA/3, and G/SG/N/10/USA/3/Suppl.1-G/SG/N/11/USA/3/Suppl.1 and the relevant tariff items, and states that:

> Under the "Proclamation 7208 of 7 July 1999 – To Facilitate Positive Adjustment to Competition From Imports of Lamb Meat" and the "Memorandum of 7 July 1999 – Action Under Section 203 of the Trade Act of 1974 Concerning Lamb Meat" by the President of the United States of America, published in the Federal Register Vol. 64, No. 131, pp. 37389-37392 on 9 July 1999 and the Federal Register Vol. 64, No. 132, pp. 37393-37394 on 12 July 1999 respectively, the United States of America introduced a definitive safeguard measure in the form of a tariff-rate quota on imports of lamb meat effective as of 22 July 1999.3

> 3 Subsequently modified by the "Proclamation 7214 of 30 July 1999 – To Provide for the Efficient and Fair Administration of Action Taken With Regard to Imports of Lamb Meat and for Other Purposes" by the President of the United States of America published in the Federal Register Vol. 64, No. 149, pp. 42265-42267 on 4 August 1999.

There is no reference to the US statute.

19. New Zealand in WT/DS177/4 states that

> Under the "Proclamation 7208 of 7 July 1999 - To Facilitate Positive Adjustment to Competition From Imports of Lamb Meat" and the "Memorandum of 7 July 1999 - Action Under Section 203 of the Trade Act of 1974 Concerning Lamb Meat" by the President of the United States of America, published in the Federal Register Vol. 64, No. 131, pp. 37389 to 37392 on 9 July 1999 and the Federal Register Vol. 64, No. 132, pp. 37393 to 37394 on 12 July 1999 respectively, the United States of America imposed a definitive safeguard measure in the form of a tariff-rate quota on imports of fresh, chilled, or frozen lamb meat1 effective as of 22 July 1999.2
>
> 1 As provided for in subheadings 0204.10.00, 0204.22.20, 0204.23.20, 0204.30.00, 0204.42.20, and 0204.43.20 of the Harmonised Tariff Schedule of the United States.
>
> 2 Some of this information has also been contained in the United States Article 12.1(c) Notification to the Committee on Safeguards (G/SG/N/10/USA/3, G/SG/N/10/USA/3/Suppl.1, G/SG/N/11/USA/3 and G/SG/N/11/USA/3/Suppl.1).

Again, there is no reference to the US statute.

20. The United States therefore requests that the Panel rule that the consistency of the US statute with US obligations under the *Agreement on Safeguards* is not within the Panel's terms of reference and is thus outside the scope of this dispute.

C. Business Confidential Information (BCI)

21. The complaining parties have requested that the United States provide information that the US International Trade Commission ("USITC") has designated as business confidential information ("BCI"). This information was submitted to the USITC by both foreign and domestic producers under strict assurances of non-disclosure. The USITC is prohibited from disclosing the information absent consent from the submitting companies under Article 3.2 of the *Agreement on Safeguards*. That article, and section 202(a)(8) of the US Trade Act of 1974 (19 U.S.C. 2252(a)(8)), which is the provision of US law that implements Article 3.2, prohibit the USITC from disclosing BCI it receives in the course of a safeguard investigation without permission from the submitting parties.

22. We anticipate that the complainants will ask the Panel to seek this information from the United States. If so, Australia and New Zealand should be asked to specify what BCI they seek and why that information is relevant to the claims, if any, they have properly made within the Panel's terms of reference. Once that is known, the United States can then help the Panel develop procedures that will help persuade the firms that provided the BCI to the USITC to authorize disclosure of the BCI. Based on prior experience the United States believes that domestic producers are unlikely to provide such consent unless they are informed of the specific information requested, who will have access to the information, and the procedures that will be established to protect the information. The Panel should be aware that purchasers are not necessarily beneficiaries of the safeguard action and may not find it in their interest to respond promptly or to provide their consent.

23. Finally, with respect to BCI information provided to the USITC by New Zealand and Australian producers, the United States believes that the complaining parties are in the best position to obtain the necessary consent of these producers. Accordingly, if the Panel requests such information, we anticipate that Australia and New Zealand will aid the United States in obtaining consent from those producers.

ANNEX 3-2

FIRST WRITTEN SUBMISSION OF THE UNITED STATES

(15 May 2000)

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I. INTRODUCTION

1. In October 1998, the United States lamb meat industry petitioned the United States International Trade Commission ("USITC") to investigate whether a surge in lamb meat imports from Australia and New Zealand had depressed prices in the US market and eroded industry sales and profits to the point that the industry's financial health had been seriously compromised. The industry pointed to a dramatic increase in lamb meat imports beginning in 1996, which had continued to climb in 1997 and over the first nine months of 1998. The surge in imports, the industry claimed, had resulted in widespread commercial damage to US lamb meat producers and injury was continuing to accrue.

2. The USITC promptly launched an investigation, both to determine whether the US industry was seriously injured, or threatened with serious injury, as it claimed and, if so, whether increased lamb meat imports were responsible for the industry's condition. In the course of its investigation, the USITC held extensive hearings and solicited written views and commercial data from US, Australian, and New Zealand lamb meat producers, as well as US importers and consumers.

3. Based on their investigation, and as carefully detailed in a lengthy report they prepared, the six USITC Commissioners unanimously concluded that the US lamb meat industry: (1) was facing imminent serious injury; and (2) the threat of serious injury was due to a surge in highly competitive fresh and chilled lamb meat imports from Australia and New Zealand. During the course of its investigation the USITC closely examined other possible reasons for the industry's sudden downturn, but concluded that no explanation other than the major jump in lamb meat shipments from Australia and New Zealand was plausible.

4. As US law requires, the USITC then made recommendations to the President of the United States on an appropriate remedy. Here, the six USITC Commissioners could not agree, ultimately forwarding to the President three different recommendations. There were two common elements in each of these recommendations, however. All of the Commissioners suggested that the President impose four years of import relief and that he accompany that relief with a set of financial and other adjustment assistance measures.

5. In early July 1999, after careful deliberation, the President implemented a relief package aimed at the specific injury indicators that the USITC had reported. The relief -- which took the form of a "tariff-rate quota" (TRQ) -- was designed to return the US lamb meat industry to a minimal level of profitability for a temporary period and thus place the industry in a position to make needed investments and improve its competitiveness.

6. The relief package contained a substantial financial assistance element, as the USITC Commissioners had recommended. But the import relief the President imposed was limited to three years and one day, rather than the four years the USITC had proposed, reflecting a desire to limit the trade impact of the relief to the degree possible. At Australia's and New Zealand's request, the President: (1) allocated the TRQ between those two countries; (2) delayed implementation of the TRQ so that it would not apply to Australian or New Zealand lamb meat shipments in transit to the United States; and (3) agreed to implement the TRQ through an export licensing scheme that allows those Members to meter and control lamb meat exports to the United States.

7. The short period of limited import relief that the United States has provided to its lamb meat industry is just the sort of "safeguard" measure contemplated by Article XIX of the *GATT 1994* ("*GATT 1994*") and the WTO Agreement on Safeguards ("Safeguards Agreement"). Having undertaken a thorough, transparent, and public investigation, having determined that increased lamb meat imports had left US producers threatened with serious injury, and having amply explained the reasons for its findings on all pertinent issues of fact and law, the United States was fully entitled to give its lamb meat industry a brief respite from competitive import pressure sufficient to assist them in regaining competitiveness.

8. Australia and New Zealand have raised a long list of objections challenging both the USITC's investigation and its threat of serious injury determination, and the nature of the safeguard measure that the United States has imposed, and a series of purported procedural infirmities. As the United States explains in the following pages, each one of those many objections is unfounded.

II. PROCEDURAL BACKGROUND

9. On 16 July and 23 July 1999, respectively, New Zealand and Australia requested consultations with the United States pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII:1 of the *GATT 1994*, and Article 14 of the Safeguards Agreement. New Zealand's consultation request alleged that the US safeguard measure – embodied in Proclamation 7208, with an accompanying memorandum from the President – was inconsistent with Articles 2, 4, 5, 11 and 12 of the Safeguard Agreement, and Articles I and XIX of the *GATT 1994*. Australia considered that the US measure was inconsistent with Articles 2, 3, 4, 5, 8, 11 and 12 of the Safeguards Agreement, and Articles I, II and XIX of the *GATT 1994*.

10. By letter dated 23 July 1999, Australia asserted a substantial commercial interest in lamb meat, and it sought to be joined in the consultations requested by New Zealand. Similarly, on 2 August 1999, New Zealand requested to be joined in the consultations with Australia. The United States acceded to both requests.

11. Consultations were held in Geneva on 26 August 1999, but failed to settle the dispute.

12. On 14 October 1999, New Zealand requested the establishment of a panel pursuant to Article 6 of the DSU and Article 14 of the Safeguards Agreement to examine the US measure with the standard terms of reference as set out in Article 7 of the DSU. In identifying the legal claims under dispute, New Zealand merely listed the same articles of the Safeguards Agreement and the *GATT 1994* that it had identified in its consultation request without providing any elaboration as to the specific legal obligations at issue.

13. Australia also requested the establishment of a panel on 14 October 1999, pursuant to Article XXIII of the *GATT 1994*, Articles 4 and 6 of the DSU, and Article 14 of the Safeguards Agreement. Australia's panel request, like New Zealand's, listed the relevant articles of the Safeguards Agreement and the *GATT 1994* without specifying the specific provisions in dispute.

14. The Dispute Settlement Body established a single panel to review both Australia's and New Zealand's allegations on 19 November 1999. Australia (in respect of New Zealand's complaint) and New Zealand (in respect of Australia's complaint) reserved third party rights, as did Canada, the European Communities, Iceland, and Japan.

III. STATEMENT OF FACTS

15. Following the filing of a petition on 7 October 1998, by representatives of the domestic lamb meat industry, the USITC, after extensive investigation, found that the industry was threatened with serious injury due to increased imports. The USITC collected copious information through a variety of methods -- including questionnaires sent to foreign and domestic producers, purchasers and importers; official statistics; other public sources; briefs from parties, including foreign and domestic producers; and hearings on injury and remedy. All of the business confidential information the USITC collected from these entities was made available under "protective order" (a legally binding limitation on further disclosure) to representatives of interested parties participating in the proceeding.

16. On 5 April 1999, the USITC transmitted to the President a report containing its findings and conclusions and recommending that the President provide relief to the US lamb meat industry.

17. The USITC report explains findings and conclusions at length and describes the investigation that it conducted. Those findings address each factor enumerated in Article 4 of the Safeguards Agreement and survey other factors affecting the US lamb meat industry. The following discussion summarizes some key facets of the USITC report, particularly those that the First Submissions of Australia and New Zealand ("complainants") tended to obscure.

18. The USITC found the relevant domestic industry to consist of the firms that are part of the continuous line of lamb meat production.[1] As the USITC found, growers and feeders contribute approximately 88 per cent of the wholesale cost of lamb meat. Packers, who slaughter the lambs, and breakers, who cut whole carcasses into smaller parts, act as "finishers" of lamb meat products. Many operations are vertically integrated, and finishers are heavily dependent on growers and feeders for the volume and condition of the lambs they purchase. As the USITC determined, firms in the various segments of the lamb meat industry have interdependent economic interests evidenced by the congruent impact of low prices on all sectors.[2]

19. The USITC found the lamb meat industry to be threatened with serious injury and established the causal link to increased imports in keeping with Article 4.2 of the Safeguards Agreement. The USITC obtained information on the developments in the industry by examining an extended period, 1993 through the first nine months of 1998 ("interim 1998"). Its threat finding was based in large measure on a significant, and unforeseen, change that occurred in the latter part of the period. The USITC found that before 1996 the US industry was affected by two major adverse factors -- the phasing out, largely during 1994 and 1995, of Wool Act payments to growers and feeders, and falling demand. While it considered that the effects of withdrawal of the wool support programme had diminished but not entirely disappeared by 1997, the USITC concluded that the industry had experienced some recovery since the programme terminated in 1996.[3] Similarly, the USITC concluded that demand for lamb meat, which had been falling over an extended period, had begun to stabilize at about the same time.[4]

[1] USITC Report at I-13.
[2] USITC Report at I-13-14.
[3] USITC Report at I-24-25.
[4] USITC Report at I-22.

20. The year 1997, however, turned out to be the zenith of the industry's recovery, as low-priced imports soared and the indices of the industry's financial health began to deteriorate.[5] Prior to 1996, the volume of imports had been relatively constant, falling from 41.0 million pounds in 1993 to 38.7 million pounds in 1994, and then increasing to 43.3 million pounds in 1995. Thereafter, however, imports rose, increasing to 50.7 million pounds in 1996 and 60.4 million pounds in 1997. Comparing the first nine months of 1997 with the same period of 1998, imports jumped from 46.1 million pounds to 55.1 million pounds.[6]

21. The USITC found that this rise corresponded to a change in the nature of imports. Between 1995 and 1997, imports changed substantially. Historically, almost all US lamb meat had been sold in fresh or chilled form, while almost all imported lamb meat was shipped in a frozen state.[7] The volume of imported lamb in chilled form increased by more than 100 per cent from 1995 to 1997, while imports of frozen lamb meat rose by only 11 per cent. In addition, the USITC found that imported lamb meat was increasingly being sold in larger cuts, putting it in more direct competition with US product.[8]

22. The USITC found that as these changes in the character of imports put them increasingly in head-to-head competition with domestic lamb meat products, imports captured substantial market share from US firms. That conclusion was supported by the fact that the 9.7 million pound growth in imports in 1997 was mirrored by an 8.4 million pound decrease in US shipments.[9] As the USITC found, during the end-of-period surge in imports the unit value of US, Australian and New Zealand lamb meat all fell, reflecting the effects of increased supply on domestic prices.[10]

23. During 1997 and interim 1998, all segments of the domestic industry suffered deteriorating financial performance. Operating income for most packers and processors reached its lowest point in that period. After having operated at a profit in 1995 and 1996, feeders operated at a loss in 1997 and at a sharper loss in interim 1998. While net sales value enjoyed by growers trended upward during 1993-97, it fell by 19 per cent in interim 1998. The USITC found grower profits at a diminished level in 1997. [11]

24. The USITC determined that increases in import volume were likely to have further negative effects on the domestic industry's prices, shipment volumes, and financial condition in the imminent future.[12] It found that Australian and New Zealand producers projected that their shipments to the United States in 1999 would be 21 per cent over 1998 levels, with the major proportion in the form of fresh and chilled lamb meat.[13] Because growers and feeders cannot reduce production in the short run, increased imports had already caused a decline in prices and any further increases would cause additional downward price pressure in the US market.[14] Since imports in 1997 had already captured market share directly from the US industry, the USITC found that additional increased imports, in the form in which the US industry markets its product, would likely have a negative impact on the industry's shipments.[15] The USITC determined that these negative effects would adversely impact the US industry's already damaged financial performance.[16] After examining each other cause of injury

[5] USITC Report at I-18.
[6] USITC Report at I-15.
[7] USITC Report at I-22.
[8] USITC Report at I-22-23.
[9] USITC Report at I-22.
[10] USITC Report at I-22.
[11] USITC Report at I-19-20
[12] USITC Report at I-23.
[13] USITC Report at I-23.
[14] USITC Report at I-24.
[15] USITC Report at I-24-25.
[16] USITC Report at I-24.

proposed by Australian and New Zealand producers and US lamb meat importers ("respondents"), the USITC reaffirmed that there was a high degree of likelihood that increased imports would have a substantial negative effect on volume or prices, or both, of the US industry's lamb meat sales.[17]

25. Under United States law, when the USITC makes an affirmative determination, USITC Commissioners provide recommendations to the President on appropriate remedies. In this case, the six USITC Commissioners made three different recommendations, each recommending four years of import relief and a package of adjustment assistance measures. The recommendations differed substantially in other respects. Although the safeguard measure applied by the President drew on certain elements of these suggestions, the President did not adopt any recommendation completely.

26. On 7 July 1999, to address the threat of injury found by the USITC, the President proclaimed[18] a TRQ on imported lamb meat for three years and one day, with the quota threshold set at 31,851,151 kilograms in the first year (the level of US lamb meat imports during calendar year 1998), increasing by an additional 857,342 kilograms in each of the two succeeding years. Above-quota imports were made subject to tariffs of 40 per cent, 32 per cent, and 24 per cent *ad valorem* over the successive years of the measure. Below-quota imports were made subject to additional duties of nine, six and three per cent *ad valorem* over the same period. The President also provided US$100 million in funding for various adjustment assistance measures to, among other things, assist the industry with market promotion, productivity and product improvements and scientific research.

27. The President concurred with the USITC finding that imports of lamb meat produced in Canada and Mexico did not account for a substantial share of total US imports of lamb meat and were not contributing importantly to the threat of serious injury. The USITC had found that imports from these sources during its period of investigation were negligible. As required by statute in such situations, the President excluded lamb meat from Canada and Mexico from the safeguard measure. The President also did not apply the TRQ to imports of lamb meat from Israel, beneficiary countries under the Caribbean Basin Economic Recovery Act and the Andean Trade Preference Act, and from other developing countries that accounted for a minor share of lamb meat imports.

IV. NOTIFICATIONS AND CONSULTATIONS

28. The United States has complied with the procedural requirements set out in Article 12 of the Safeguards Agreement in respect of the USITC's lamb meat investigation and the application of a safeguard measure on lamb meat imports. Pursuant to Article 12.1(a), the United States notified the Safeguards Committee on 30 October 1998 of the investigation the USITC had initiated to examine the domestic industry's serious injury claim.[19]

29. On 9 February 1999, the USITC voted unanimously that lamb meat was being imported into the United States in such increased quantities as to be a substantial cause of threat of serious injury to the domestic industry. The United States provided a 12.1(b) notification on 17 February 1999 informing the Committee on Safeguards and WTO Members of the unanimous vote.[20] The USITC published its report and remedy recommendation on 5 April 1999, and the United States provided a copy of the report to the Committee, as part of the United States revised Article 12.1(b) notification, on 13 April 1999.[21]

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[17] USITC Report at I-26.

[18] Proclamation 7208 of 7 July 1999, To Facilitate Positive Adjustment to Competition from Imports of Lamb Meat ("Proclamation"), attached hereto as US Exhibit 2.

[19] G/SG/N/6/USA/5 (circulated 5 November 1998). Attached hereto as US Exhibit 3.

[20] G/SG/N/8/USA/3 (circulated 18 February 1999); G/SG/N/8/USA/3/Corr.1 (circulated 22 February 1999); G/SG/N/8/USA/3/Corr.2 (circulated 25 February 1999). Attached hereto as US Exhibit 4.

[21] G/SG/N/8/USA/3/Rev.1 (circulated 15 April 1999). Attached hereto as US Exhibit 5.

30. The United States applied a safeguard measure with respect to lamb meat exported on or after 22 July 1999, and provided notification to the Committee on 9 July 1999, and 13 August 1999, pursuant to Article 12.1(c) and Article 9 of the Safeguards Agreement.[22]

31. The United States also satisfied its consultation obligations under the Safeguards Agreement. On 28 April 1999 and 4 May 1999, respectively, the United States consulted with Australia and New Zealand in Geneva regarding the USITC lamb meat report. On 14 July 1999, the United States again consulted with both parties in Washington, D.C. regarding the proposed US lamb meat safeguard measure..[23]

V. LEGAL ARGUMENT

32. Australia and New Zealand raise legal claims under both the Safeguards Agreement and the *GATT 1994*. The United States respectfully submits that both Members' claims are unfounded that, accordingly, the Panel should reject them.

33. The United States' submission begins with a discussion of certain general legal issues arising from the other parties' submissions.[24] First, the United States articulates the burden of proof that complainants must meet. Second, the United States sets forth the applicable standard of review. Third, the United States describes how the safeguards action it adopted was a valid response to "unforeseen developments," which were fully examined and addressed in the USITC report and were clearly demonstrated as a matter of fact consistent with Article XIX of *GATT 1994*.

34. Next, the United States addresses the complainants' specific legal claims under the Safeguards Agreement. First, the United States demonstrates that Australia's and New Zealand's claims under Articles 2 and 4 are without merit because the USITC investigation and report satisfy the requirements of the Safeguards Agreement. Second, the United States addresses Australia's and New Zealand's erroneous claims that the US safeguard measure is inconsistent with Article 5.1. Third, the United States explains that its safeguard measure did not need to be justified under Article 3.1. Fourth, the United States explains why its remedy properly excluded imports from Canada, Mexico, Israel, and developing countries. Fifth, the United States describes how the actions it has taken fulfill the requirements of Articles 8 and 12.

35. Finally, the United States explains that the safeguard measure is not inconsistent with US obligations under Article II of the *GATT 1994* or Article 2.2 of the Safeguards Agreement.

A. THE BURDEN OF PROOF IN DISPUTES UNDER THE SAFEGUARDS AGREEMENT

36. Australia and New Zealand fail to meet their burden of making a *prima facie* case with respect to their asserted claims. Instead, in large measure Australia and New Zealand rely on unfounded assertions advanced without supporting evidence or legal grounding.

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[22] G/SG/N/10/USA/3, G/SG/N/11/USA/3 (circulated 12 July 1999). Attached hereto as US Exhibit 6. The United States issued a supplemental notification informing the Safeguards Committee that the measure would become effective with respect to goods *exported* on or after 22 July 1999. *See* G/SG/N/10/8SA/3/Suppl. 1, G/SG/N/11/USA/3/Suppl. 1. Attached hereto as US Exhibit 7.

[23] *See* US Article 12.5 notification. G/L/313,G/SG/19 (circulated 23 July 1999). Attached hereto as US Exhibit 8.

[24] In its submission of May 5, 2000, the United States presented the Panel with its objections to the panel requests by both complainants, as well as its response to complainants' requests for confidential information.

37. In *United States -- Measures Affecting Imports of Woven Wool Shirts and Blouses from India,* the Appellate Body noted that "a party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim."[25] The *Korea--Dairy* panel also had occasion to address questions on the burden of proof, and it found that "[a]s a matter of law the burden of proof rests with the European Communities, as complainant, and does not shift during the panel process."[26]

38. Moreover, the *Dairy* Panel noted that it was for the EC, as the complainant, to submit a *prima facie* case of violation of the Safeguards Agreement.[27] The *Dairy* Panel interpreted this to mean that it was for Korea – as the defending party – to rebut the EC's evidence and arguments, once the EC had made its prima facie case, by submitting its own evidence and arguments in support of its assertion that it had respected the requirements of the Safeguards Agreement at the time of its determination.[28] The *Dairy* Panel then concluded that "[a]t the end of this process, it is for the Panel to weigh and assess the evidence and arguments submitted by both parties in order to reach conclusions on whether the EC claims are well-founded."[29] The Appellate Body affirmed the Panel's application of the burden of proof.[30]

39. As will be discussed below, Australia and New Zealand fail to offer legally sufficient evidence and arguments to establish their *prima facie* case. To the extent that the complainants offer any claims that are both legally germane and accompanied by sufficient argumentation, the United States rebuts those claims.

B. THE STANDARD OF REVIEW TO BE APPLIED IN THIS DISPUTE

40. The standard of review to be applied in safeguards cases is well-established. In the two previously decided safeguards cases, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* (*"Korea -- Dairy")* and *Argentina -- Safeguard Measures on Imports of Footwear* (*"Argentina -- Footwear"),* the panels specifically rejected the notion that panels may review *de novo* the determination made by the domestic investigating authority.[31] Rather, as articulated by the panel in *Argentina – Footwear,*

> our review will be limited to an objective assessment, pursuant to Article 11 of the DSU, of whether the domestic authority has considered all relevant facts, including an examination of each factor listed in Article 4.2(a), of whether the published report on the investigation contains adequate explanation of how the facts support the determination made, and consequently of whether the determination made is consistent with Argentina's obligations under the Safeguards Agreement.[32]

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[25] United States -- Measures Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R, Report of the Appellate Body adopted 25 April 1997, at ¶ IV ("US -- Woven Wool Shirts").

[26] Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, WT/DS98/R, 21 June 1999, at ¶ 7.24 ("Korea -- Dairy").

[27] *Korea -- Dairy* at ¶ 7.24. As the Appellate Body has noted, a *prima facie* case is "one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the prima facie case." *European Communities -- Measures Concerning Meat and Meat Products,* WT/DS26 and 48/AB/R, Report of the Appellate Body adopted 13 February 1998, at ¶ 104.

[28] *Korea – Dairy* at ¶ 7.24.

[29] Korea – Dairy at ¶ 7.24.

[30] *Korea -- Definitive Safeguard Measure on Imports of Certain Dairy Products,* WT/DS98/AB/R, Report of the Appellate Body adopted 14 December 1999, at ¶ 150 (Appellate Body Report, *Korea–Dairy*).

[31] Korea – Dairy at ¶ 7.30 ("Korea -- Dairy "); Argentina -- Safeguard Measures on Imports of Footwear, WT/DS121/R, 25 June 1999, at ¶ 8.117 ("Argentina -- Footwear").

[32] *Argentina -- Footwear* at ¶ 8.124. Similarly, the *Korea – Dairy* Panel (at ¶ 7.30) concluded that:

> the Panel's function is to assess objectively the review conducted by the national investigating authority, . . . an objective assessment entails an examination of whether the [Korean national authority] had

41. In *Argentina–Footwear*, the Appellate Body reviewed the panel's articulation of the standard of review and concluded that the panel had stated the standard "correctly." As the Appellate Body explained,

> 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.*[33]

42. The United States respectfully submits that the above-quoted standard is the appropriate standard of review to be applied under Article XIX and the relevant provisions of the Safeguards Agreement in this dispute. As to the determinations to be made by the competent authority pursuant to Articles 3 and 4 of the Safeguards Agreement, the nature of the Panel's review is delineated by the obligations under those articles. Specifically, Article 3 requires "reasoned conclusions on all pertinent issues of fact and law," and Article 4 requires "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined." Accordingly, the authority's conclusions satisfy the Agreement if they are reasoned conclusions based on the information obtained in the investigation and if the authority's analysis demonstrates the relevance of the factors it examined. That a Panel might have reasoned to different conclusions if viewing the evidence *de novo* does not establish a violation of the Agreement if the authority's conclusions are reasoned and based on demonstratively relevant factors. As to other determinations to be made on the basis of the competent authority's report, the question is whether the report reasonably demonstrates the facts to be examined even where a specific legal conclusion is not required.

43. The Appellate Body's admonition that panels must avoid conducting a *de novo* review of the evidence applies equally to a panel's examination of whether a Member has applied safeguard measures only to the extent necessary to prevent or remedy serious injury and facilitate adjustment in conformity with Article 5.1. The United States has set out at ¶ 210 below the sort of inquiry that it considers would be appropriate under Article 5.1. Such an inquiry would based on an examination of the relationship between the serious injury, or threat of serious injury, identified by the Member's competent authority, on the one hand, and the nature, duration and extent of the safeguard measures the Member applied, on the other.

44. To a substantial degree, New Zealand's and Australia's arguments in this proceeding are inconsistent with the standard of review articulated above. As will be discussed at length below, a great deal of their argumentation simply seeks to present another view of the facts, rather than show that the findings made by the authorities in any way violated the Agreements. Such argumentation improperly seeks to have the Panel make its own *de novo* interpretation of the record.

45. Moreover, in at least three instances, New Zealand and Australia appear to go further and present to the Panel evidence that was not before the USITC in order to seek to refute the USITC's findings. In ¶¶ 7.85 and 7.86 of its first written submission, New Zealand presents "Figure 5: Indexes of real import and domestic wholesale US lamb prices" and "Figure 6: Indexes of real (CPI deflated)

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examined all facts in its possession or which it should have obtained in accordance with Article 4 of the Safeguards Agreement (including facts which might detract from an affirmative determination in accordance with the last sentence of Article 4.2 of the Safeguards Agreement), whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of Korea.

[33] *Argentina -- Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, Report of the Appellate Body adopted 14 December 1999, at ¶120 (Appellate Body Report, *Argentina -- Footwear*).

prices for lamb on US market." The sources of both indexes are said to include the *USDA/AMS Red Meat Yearbook: "Livestock, Dairy and Poultry" 1997-1999*. New Zealand does not show how the *Yearbook* was part of the USITC's record at the time it made its threat determination. Similarly, in ¶ 48 of its first written submission, Australia presents a graph entitled "US Lamb Price" and gives as its source the USDA. Australia does not state where in the USITC's record this information can be found or even allege that it was part of the USITC's record at the time the USITC made its threat determination. To the extent these documents were not part of the USITC's record, Australia and New Zealand are trying to persuade this Panel to engage in a *de novo* review of the underlying facts and to substitute its judgment for that of the national investigating authority. By urging this approach, Australia and New Zealand effectively repudiate the standard of review they claim to endorse.

46. The *Korea - Dairy* Panel emphasized that "the Panel should examine the analysis performed by the national authorities *at the time of the investigation* on the basis of the various national authorities' determinations and the evidence it has collected."[34] The Panel should strike any new evidence that Australia and New Zealand seek to put before it, along with arguments based on that evidence.

C. THE USITC REPORT DOES NOT FAIL TO DEMONSTRATE THE EXISTENCE OF "UNFORESEEN DEVELOPMENTS"

47. Australia and New Zealand both claim that the US safeguard measure fails to comply with Article XIX of *GATT 1994* because it allegedly was not a response to "unforeseen developments." For the following reasons, Australia's and New Zealand's arguments are without merit and should be rejected.

48. As the Appellate Body recognized in *Argentina--Footwear*, Article XIX of the *GATT 1994* does not establish "independent conditions" for the application of a safeguard measure, but rather "describes certain circumstances which must be demonstrated as a matter of fact in order for a safeguard measure to be applied."[35] In *Argentina--Footwear*, the Appellate Body held that the "unforeseen developments" requirement of Article XIX remains in force despite the fact that it was not included in the Safeguards Agreement. The USITC's report amply demonstrated the existence of such developments.

49. The introductory language in Article XIX was intended to ensure that any increase in imports that may result in serious injury or threat of serious injury to a domestic industry is not simply the result of (1) negotiated tariff reductions; or (2) factors of which the negotiating WTO Member was unaware at the time of the tariff concession. Thus, unforeseen developments would include significant, unexpected changes in the marketplace as compared to the situation that pertained at the time of the tariff concession. The developments summarized below, which resulted in a surge of low-priced lamb meat into the United States after 1995, were not foreseen by the United States at the time the tariff concession on lamb was negotiated as part of the Uruguay Round.[36]

50. The USITC lamb meat report concluded that " [t]he conditions of competition in both the domestic and world lamb markets have changed in several important respects during the past several years. As a result of these changes . . . processors will have to adjust to a market with increased competition from imported fresh lamb meat."[37] These changes in market conditions could not have been anticipated from prior market conditions. The report fully describes prior market conditions. It

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[34] *Korea-Dairy*, at ¶ 7.55.

[35] Appellate Body Report, *Argentina -- Footwear*, at ¶ 92.

[36] The United States submitted its first tariff reduction offer on lamb meat on March 5, 1992. Substantive tariff negotiations ended on 15 December 1993. The transmittal letter for the US offer is attached hereto as US Exhibit 9.

[37] USITC Report at I-32.

describes how, in a 1981 countervailing duty investigation involving *Lamb Meat from New Zealand* , the USITC found the same like product but acknowledged that, unlike today, "most imported lamb at that time was shipped frozen and virtually all domestic lamb was fresh or chilled."[38]

51. Similarly, in a 1995 study of competitive conditions affecting US and foreign lamb industries, the USITC had found that imports did little to displace US-produced lamb or to suppress its price, and that imports were imperfect substitutes.[39]

52. The study reported US Commerce Department statistics that showed from 1990 to 1994 the proportion of imports consisting of fresh or chilled lamb meat never exceeded 31 per cent and declined to only 20 per cent in 1994.[40] Thus, the historical pattern of importation and trends up to 1994 gave the United States no reason to foresee a relative increase in imports in fresh or chilled form.

53. By the time of the USITC's 1999 determination, it found that, while most US lamb meat traditionally had been sold as fresh or chilled and imported lamb meat was sold frozen, imported lamb meat was increasingly entering the United States in fresh or chilled form.[41] By 1998, foreign exporters as a whole anticipated that the majority of their 1999 increase would be fresh and chilled lamb meat.[42]

54. In short, the pattern of competition that pertained up to 1995 reversed abruptly thereafter.

55. The USITC record shows that imported and domestic products in fact became more similar during the period of investigation.[43] Not only did New Zealand and Australian imports increasingly shift from frozen to fresh or chilled products, but imported cuts became larger in size and more comparable to domestic cuts.[44]

56. The USITC recounts, in detail, how the US market for lamb meat suddenly and unexpectedly changed after 1995. Between 1993 and 1994 imports of lamb meat from Australia and New Zealand declined.[45] In contrast, imports of lamb meat from New Zealand and Australia rose dramatically over the latter half of the period of investigation.[46] As the USITC found, between 1995 and 1997 in particular, imports of fresh or chilled lamb meat increased 101 per cent, while imports of frozen lamb meat increased only by 11 per cent during this same period.[47] The USITC also found the overall increase in lamb meat imports since 1997 resulted in a higher market share for importers.[48] Moreover, foreign exporters projected that the major portion of their 1999 increase would be in the form of fresh and chilled lamb meat.[49]

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[38] USITC Report at I-10.

[39] USITC Report at II-72, citing at n.173, *USITC, Lamb Meat: Competitive Conditions Affecting the US and Foreign Lamb Industries* , USITC Inv. No. 332-357, Pub. 2915, Aug. 1995, at 5-42-43, attached hereto as US Exhibit 10.

[40] *Id*., Table 2-14 at 2-51.

[41] USITC Report at I-11.

[42] USITC Report at I-22.

[43] USITC Report at I-22.

[44] USITC Report at I-23, n.114.

[45] USITC Report at II-19, Table 6.

[46] The period of investigation ran from 1 January 1993 through 30 September 1998. USITC Report at I-7 and II-18-19. During 1993-1997, the quantity of imports of lamb meat increased by 47 per cent while the value of such imports increased by 131 per cent. The quantity and value of imports from interim 1997 to interim 1998 increased by 19 per cent and 8 per cent, respectively. USITC Report at II-18.

[47] USITC Report at I-31.

[48] USITC Report at I-31.

[49] USITC Report at I-22, n. 113, *citing*, Tables 24-25, 29-30, II-40, II-47-48.

57. This dramatic change in the pattern of importation is reflected in the USITC data on Australian and New Zealand imports. The USITC specifically found that "[u]p through 1995, the majority of lamb meat imported from Australia was frozen. Since 1996, however, about half of the imports from Australia had been fresh lamb meat."[50] The USITC found that fresh or chilled bone-in cuts from Australia increased from 4.6 million pounds in 1993 to 8.6 million pounds in 1997, and fresh or chilled boneless cuts rose sharply from 674,000 pounds in 1993 to 6.2 million pounds in 1997.[51] Exports of fresh or chilled Australian lamb meat to the United States increased between 1993 and 1997 and were projected to increase by 27 per cent in 1998 and by 16 per cent in 1999.[52]

58. Similarly, New Zealand's exports of lamb meat to the United States increased from 17 million pounds in 1993 to 26 million pounds in 1997[53], and the USITC concluded that "an increasing share of US lamb meat imports from New Zealand consists of fresh product."[54] Fresh or chilled bone-in cuts accounted for 19 per cent of the quantity imported in 1997, up from 10 per cent in 1993.[55] Fresh or chilled boneless cuts increased as a share of total imports from 5 per cent in 1993 to 11 per cent in 1997.[56] Conversely, imports of frozen bone-in cuts declined from 64 per cent to 58 per cent during the period and imports of frozen boneless cuts dropped from 19 per cent to 10 per cent.[57]

59. In sum, the USITC studies up to 1995 showed that lamb meat imported up to that time competed only to a limited extent with US products. The USITC's 1999 safeguards report recognizes that conditions changed significantly, and unexpectedly, after 1995. The changing nature of lamb meat imports indicates they are coming increasingly into competition with US product and eroding US industry market share. That development will only worsen in the imminent future.[58]

60. The USITC's findings demonstrate, as a matter of fact, circumstances constituting unforeseen developments, and Australia's and New Zealand's claims that the US safeguard measure fails to comply with the "unforeseen developments" provision of Article XIX:1(a) therefore are groundless.

D. AUSTRALIA'S AND NEW ZEALAND'S CLAIMS UNDER THE SAFEGUARDS AGREEMENT

1. The USITC properly found the domestic industry to consist of firms with mutual economic interests in a continuous line of production

(a) The Complainant's arguments misconstrue the basis for the USITC's definition of the domestic industry

61. Australia and New Zealand are incorrect in arguing that the USITC improperly found that the domestic industry producing lamb meat includes growers and feeders of live lambs, as well as packers and processors ("breakers") of lamb meat.[59] First, a majority of USITC Commissioners defined the "like" product to be lamb meat. Although two USITC Commissioners found the like or directly

[50] USITC Report at I-31 and I-32.
[51] USITC Report at II-20.
[52] USITC Report at II-40, n. 124, *citing* the October 1998 issue of *Australian Meat & Livestock Review*, which stated: "The last three months have been spectacular for lamb imports to the United States. During September, 1,683 tons of lamb were exported, the highest monthly export figure on record." . . . The November 1998 issue of *Australian Meat and Livestock Review* reported that Australia's exports of lamb to North America "were up a stunning 41.4 per cent over the level of October 1997."
[53] USITC Report at II-43, n. 138, citing official US Commerce Department statistics.
[54] USITC Report at II-43.
[55] USITC Report at II-43.
[56] USITC Report at II-43.
[57] USITC Report at II-43, *citing* US Commerce Department statistics.
[58] USITC Report at I-22.
[59] USITC Report at I-13.

competitive product to include live lambs, the majority's industry definition – which is the subject of the complainants' objections – was not based on such a finding. Thus, Australia's and New Zealand's extensive arguments that live lambs are not "like or directly competitive" with lamb meat[60] are simply inapposite.

62. The USITC majority considered whether to include live lamb growers and feeders as part of the industry based on the traditional USITC approach in defining industries that produce processed products such as lamb meat. That approach is to examine whether (1) there is a continuous line of production from the raw to the processed product, and (2) there is substantial coincidence of economic interest between the growers and processors.[61] In this case, the majority found that the domestic lamb meat industry included growers and feeders of live lambs as well as packers and breakers of lamb meat.[62]

63. Thus, the relevant issue is not whether live lambs are "like or directly competitive" with lamb meat, but whether the USITC majority correctly found that growers, feeders, packers and breakers constitute the US industry that produces lamb meat. Before addressing the legal question of whether the USITC correctly identified the various segments of the lamb industry ("producers as a whole" as Article 4.1(c) puts it), it is worth examining the Commissioners' factual analysis, which complainants' arguments obscure.

64. The evidence clearly established a continuous line of production from a raw product, live lambs, to the processed product, lamb meat.[63] Notably, in the United States, "most" sheep and lambs are meat-type animals kept primarily for the production of lambs for meat.[64] "Most," as will be discussed further below, was a considerable understatement. The USITC found that, except for lambs held for breeding purposes, virtually all meat-type lambs are shipped to feeders in the fall, who feed them for between 30 and 120 days and then ship them to lamb packers for slaughter.[65] Packers then either further process the lamb into primal, subprimal or retail cuts, or ship the carcasses to breakers who perform a similar processing function.[66] The cuts are then sold to nonbreaker wholesalers or retail outlets.[67] The Commission explicitly noted that this line of production yields only one principal end-product, lamb meat.[68]

65. In determining the domestic industry, the USITC also found evidence of a coincidence of economic interests between lamb growers and processors. The value-added by lamb growers and feeders (*i.e.*, the value of slaughter-ready live lambs) accounted for nearly 88 per cent of the ultimate wholesale cost of lamb meat.[69] Consequently, packers and breakers could be viewed largely as finishers of products for which the vast majority of value had already been created by growers and feeders. Packers' and breakers' operations therefore would be highly affected by the supply and quality of the live lambs produced by growers and feeders.[70]

66. The USITC found that the vertical integration of the industry also supported a finding of a coincidence of economic interests between different industry segments.[71] For example, there are

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[60] New Zealand's First Written Submission at ¶¶ 7.41-52; Australia's First Written Submission at ¶¶ 108-118.

[61] USITC Report at I-12.

[62] USITC Report at I-13.

[63] USITC Report at I-13.

[64] USITC Report at II-4.

[65] USITC Report at I-13.

[66] USITC Report at I-13 and II-14.

[67] USITC Report at I-13 and II-15.

[68] USITC Report at I-13 n. 44 and II-15.

[69] USITC Report at I-8, I-9 and II-12.

[70] USITC Report at I-13.

[71] USITC Report at I-13.

growers who process lamb meat. These growers both feed and slaughter lambs.[72] In addition, one major lamb packer also owns a lamb feeder.[73] In addition, some lamb producers retain title to their lambs in feedlots, by having them be fed for a fee or having some type of partnership with the feedlot owner.[74] Thus, lamb producers have a direct interest in slaughter operations as estimates indicate that 70 to 80 per cent of lambs slaughtered are in feedlots.[75] No representatives in any of the four industry segments testified before the USITC that the economic interests of packers and breakers diverged from those of growers and feeders.[76] Moreover, the price of lamb meat affects all four industry segments similarly.[77]

67. The USITC found this to mean that, when processors did well, growers and feeders also benefitted, but when processors confronted lower prices, they passed the lower prices back to feeders and then growers, and all suffered to some extent.[78] Price changes at retail are transmitted back down the production chain[79], and the price of lamb meat affects all four industry segments similarly.[80] In this case, all four segments were negatively impacted financially, and all experienced significant declines in the unit value of their sales at the end of the period.[81] For example, one rancher testified before the Commission that lower import prices forced processors to reduce prices for the carcasses they bought from the packers, who in turn had to reduce the prices they paid to feedlots for live lambs.[82] This rancher stated that because feedlot operators sold their lambs in the spring of 1998 for less than they paid for them in the fall of 1997, they had to reduce the price they could pay for lambs in the fall of 1998. Thus, lower import prices "forced the entire US lamb meat industry in successive waves to substantially reduce the prices they could pay for their lamb."[83]

(b) A definition of "Producer" that encompasses those firms with consistent economic interests along a continuous line of production is in keeping with the safeguards

68. The United States submits that, when the product at issue is a processed product, the undefined term "producer" as used in Article 4.1(c) of the Safeguards Agreement may be properly read to include growers/feeders where there is such a continuous line of production and coincidence of interest. The Safeguards Agreement, Art. 4.1(c) states:

> 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.

69. Where such an integral relationship exists between growers of a raw product and the finishers of that product, it is in keeping with both the context of this provision and the object and purpose of the Safeguards Agreement to regard both as producers of the finished product.[84] Article 4's definition

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[72] USITC Report at II-12.
[73] USITC Report at I-14.
[74] USITC Report at II-12.
[75] USITC Report at II-24.
[76] USITC Report at I-14.
[77] USITC Report at I-14.
[78] USITC Report at I-14.
[79] USITC Report at II-66.
[80] USITC Report at I-13.
[81] USITC Report at I-14.
[82] USITC Report at I-14 n. 50.
[83] USITC Report at I-14 n. 50.
[84] *See Argentina -- Footwear* at ¶ 93 (interpreting the term " increased imports" in view of the use of the term "emergency" in the title of Article XIX).

of "producer" provides a basis for the injury analysis contemplated by that article. The term "producer" must therefore be understood within the context within which the required injury analysis may be performed. The Agreement presupposes that an authority will be able to consider "all relevant factors" bearing on the situation of an industry.[85] Limiting the definition of "producer" to those who contribute only limited value-added toward the final stages of a process that operates as a continuous line of production would create an artificially defined "domestic industry" and necessarily impede such analysis. This is particularly so when, as here, extensive integration exists between firms at different stages in that continuous line of production.

70. Moreover, not including those with consistent interests in a continuous line of production would defeat the Agreement's express purposes of facilitating adjustment and assuring that safeguard measures do not escape control of the multilateral regime. When such integration and unity of interest exists, the full impact of imports will be felt at all levels of the line of production and measures benefitting the finishers of the product also will benefit those at the earlier stages of production. To permit such benefits to accrue to firms at earlier stages without including their operations in the injury analysis would both allow Members to use safeguard measures to facilitate adjustment outside the control of the Safeguards Agreement and artificially delimit the actual effects of increases in imports. Conversely, remedial measures that addressed only the effects of imports on one aspect of a continuous line of production would be inadequate to "prevent or remedy serious injury and to facilitate adjustment" under Article 5.1, since adjustments made by only one segment of the line of production would not insulate it from the effects of increased imports on other segments. While the United States does not claim that the Agreement necessarily requires such an analysis, it submits that such an analysis is certainly permitted by the Agreement's use of the undefined term "producer."

71. The USITC's determination of the domestic industry is also consistent with GATT precedent. The determination of domestic industry under Article VI of the *General Agreement on Tariffs and Trade* was the subject of a *GATT* panel report in *New Zealand -- Imports of Electrical Transformers from Finland.*[86] In that report, the Panel rejected New Zealand's argument that the domestic industry consisted of four distinguishable ranges of transformers which, for purposes of the injury determination, should be considered separately.[87] The Panel concluded, to the contrary, that this was an invalid argument and "it was the overall state of the health of the New Zealand transformer industry which must provide the basis for a judgement whether injury was caused by dumped imports."[88] The definition of industry in the Safeguards Agreement may be interpreted similarly as being applicable to the type of vertical relationships that exists among the four industry sectors that together produce US lamb meat. Particularly persuasive to the Panel in *New Zealand -- Electrical Transformers* was that "each segment of the industry's operation made a contribution to the overall viability and profitability of a producer of transformers..[89] The same analysis applies in this case, since the USITC explicitly found a continuous line of production in the lamb industry from the raw to the processed product, each segment of which made a contribution to the principal end-product, lamb meat.[90] The Panel found that, to decide otherwise, would:

> allow the possibility to grant relief through antidumping duties to individual lines of production of a particular industry or company -- a notion which could clearly be at variance with the concept of industry in Article VI in a case like the present one where both the

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[85] Safeguards Agreement, Art. 4.2(a).

[86] New Zealand - Imports of Electrical Transformers from Finland, L/5814, BISD 32S/55 (adopted 18 July 1985) ("New Zealand -- Electrical Transformers").

[87] New Zealand -- Electrical Transformers at ¶ 4:6.

[88] New Zealand -- Electrical Transformers at ¶ 4:6.

[89] New Zealand -- Electrical Transformers at ¶ 4:6.

[90] USITC Report at I-13 n. 44 and II-15.

> Finnish exporter and the New Zealand industry were engaged in the manufacture and distribution of power transformers.[91]

72. The unadopted GATT Panel Report in *Canada -- Imposition of Countervailing Duties on Imports of Manufacturing Beef From the EEC* on which New Zealand relies is inapposite because it was never adopted by the Contracting Parties and thus cannot be regarded as part of the body of case law which the Members of the WTO contemplated would be considered in proceedings under the DSU.[92] Moreover, the factors considered by the *Canada-Manufacturing Beef* panel stand in sharp contrast to those present here. The Panel found :

> In Canada there is little vertical integration between suppliers of cattle and the firms which perform slaughterhouse and boning operations. Processing operations are sometimes performed by integrated firms while in other cases the slaughtering and boning operations are performed by separate firms. The Canadian firms engaged in processing operations were not parties to the countervailing duty proceeding and took no position on the question of material injury.[93]

73. In contrast, firms representing all four segments of the domestic industry joined in the petition and supported the request for relief in the safeguards investigation. Moreover, the US lamb meat industry is vertically integrated in such a way that it is virtually impossible to analyze each segment of the domestic industry producing lamb meat by focusing on only one, discrete sector. For example, growers engage in more than one sheep producing activity, such as feeding and sometimes slaughtering lambs.[94] A major US packer also owns both a breaker operation and Superior Farms, which is a lamb feeder.[95] Some lamb producers retain title to their lambs in feedlots by having them fed for a fee or having some type of partnership with the feedlot owner.[96] As a result, grower/feeder operations could not be separately categorized as either one.[97] These facts show the industry is so highly integrated it is not possible to focus on only one respective sector of the production process. The inability to disaggregate the respective sectors producing the like product, lamb meat, requires that the definition of the domestic industry include all four of the sectors contributing to the production of the like product.

74. New Zealand's reliance on *United States -- Definition of Industry Concerning Wine and Grape Products*[98], which involved an examination of the definition of domestic industry under the Article 6:5 of the Subsidies Code, is similarly misplaced. In that case, the Panel found that wine and grapes were not "like" products, and that producers of grapes were not part of the same domestic industry as producers of wine. The Panel considered that, even if there was a close relationship between grape and wine production, there were in fact two separate industries existing in the United States.[99] The Panel relied on the fact that in a previous countervailing duty investigation on wine imports, the USITC had found it inappropriate to include grape growers within the scope of the

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[91] New Zealand -- Electrical Transformers at ¶ 4:6.

[92] *Japan -- Taxes on Alcoholic Beverages*, WT/DS8/DS10/DS11/R, 11 July 1996, at ¶ 6.18. The Panel noted that an unadopted Panel report need not be taken into account; it does not constitute "subsequent practice."

[93] Canada-Manufacturing Beef at ¶ 2.6.

[94] USITC Report at I-14 n. 46 and II-12.

[95] USITC Report at I-14 n. 47.

[96] USITC Report at II-12.

[97] USITC Report at II-29, n. 89.

[98] United States -- Definition of Industry Concerning Wine and Grape Products, BISD 39S/436 (adopted 28 April 1992) ("Wine-Grape").

[99] *Wine-Grape* at ¶ 4.3.

domestic industry.[100] The USITC had declined to include the growers because only 42-55 per cent of wine grapes were used in the production of wine, and there were other major markets for wine grapes (e.g., table grapes and raisins).[101] In contrast, meat-type lambs are almost wholly devoted to the production of lamb meat[102], which remains substantially the same during processing and is never transformed into a different article.

75. As the USITC found, although some dual-use breeds are kept for both the production of wool and meat, lambs are overwhelmingly raised for meat rather than for wool.[103] In 1997, the ratio of net sales/revenue for slaughter and feeder lambs in comparison to net sales/revenues obtained by US lamb growers from any other item including wool was 84.6 per cent in 1997; 86.8 per cent in interim 1997; and 88.9 per cent in interim 1998.[104] Such ratios indicate that, in contrast to the situation that obtained in *Wine-Grape*, the US lamb industry is almost completely devoted to the production of lambs for meat.

76. In short, the facts found not to be present in *Canada-Manufacturing Beef* and *Wine-Grape* are precisely those present in the current case. The USITC's industry definition is based on pertinent factors and provides for a realistic definition of the pertinent industry consistent with the express purpose of the Safeguards Agreement and prior cases.

2. The USITC's threat of serious injury determination fully accords with the requirements of Article 4 of the Safeguards Agreement

(a) Because they do not address the USITC's findings, complainants fail to make a *prima facie* showing that the USITC's determination violated any WTO requirements

77. In keeping with Article 4.2(a) of the Agreement, the USITC evaluated "all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry." Its determination clearly demonstrates why the USITC found, in keeping with Article 4.2(b), "on the basis of objective evidence, the existence of a causal link between increased imports of the product concerned and [threat of] serious injury." In their arguments concerning that conclusion, however, New Zealand and Australia fail to make out a *prima facie* case for finding that the USITC's determination violated these provisions. They ignore the findings that the USITC actually made and ignore the Appellate Body's decisions about the necessary elements of an injury analysis under the Safeguards Agreement.

78. Unlike the briefs of the complaining Members, the findings of the competent authority here are consistent with the recent Appellate Body holding in *Argentina – Footwear*, that recent data are the most probative of the question of whether a product "is being imported" in such increased quantities as to cause or threaten serious injury.[105] The essence of the USITC's threat determination rests on evidence in the USITC record supporting four principal findings:

79. First, imports of lamb meat from Australia and New Zealand surged late in the period of investigation and this surge was projected to continue past the period of investigation into 1999.

80. Second, the mix of such lamb meat imports shifted during the investigation, from frozen lamb meat to fresh/chilled lamb meat and from smaller cuts to larger cuts, the form and cut size of lamb

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[100] *Wine-Grape* at ¶ 4.4.

[101] *Certain Table Wine From France and Italy*, Inv. Nos. 701-TA-210 and 211 (Preliminary) USITC Pub. No. 1502 (March 1984), at 9, attached hereto as US Exhibit 11.

[102] USITC Report at II-4.

[103] USITC Report at II-4.

[104] USITC Report at II-26.

[105] Argentina – Footwear at ¶ 130-131.

meat most similar to that produced and marketed by domestic lamb meat producers. This trend, which placed imports in increasingly direct competition with domestic production, was projected to continue into 1999.

81. Third, this surge in imports, and the change in mix of the imported product, led to falling domestic prices for lamb meat. The fact that US demand for lamb had stabilized since 1996 and domestic growers and producers were unable in the short run to reduce production meant that increased supply caused prices to fall in the short run. Lamb meat prices fell sharply in 1997 and interim 1998 and, as the USITC found, these trends would continue into the future.

82. Fourth, economic indicators relating to the health of the domestic industry had stabilized by 1996 after termination of the US Wool Act. However, those indicators sharply deteriorated in 1997 and 1998, when imports surged, and this deterioration was projected to continue into 1999. In particular, industry profitability fell sharply in 1997 and interim 1998.

83. The written submissions of Australia and New Zealand leave this core account unchallenged. These findings led the USITC to conclude that the domestic lamb meat industry was threatened with serious injury caused by increased imports, and that serious injury was imminent. As this summary shows, although the USITC examined imports and the condition of the domestic industry during the period 1993-97 and the interim period January-September 1998, its determination focused on the most recent data, data for 1997 and interim 1998. The arguments of the complaining Members focus instead on what they regard was the primary reason for the industry's troubles in the whole period, 1993 to interim 1998, and leave unmentioned the changes in import effects on which the USITC relied. Such an analysis, if adopted by an administering authority, might well be impermissible under the Agreement, in view of the *Argentina -- Footwear* Appellate Body decision's admonition that an injury analysis must examine sudden, recent developments. In any event, the alternative analyses that New Zealand and Australia propose can hardly be required.

84. The data of record showed, as the USITC found, a surge in imports in 1997 and interim 1998, relative to the earlier years in the period of investigation. The USITC found that imports increased by 19 per cent in 1997 from the same period a year earlier, and found imports increased by 19 per cent in the first nine months of 1998, as compared with the year earlier period.[106] The increases in 1997 and 1998 were in marked contrast to import levels in 1993-95 when import levels were relatively steady. Imports in fact declined between 1993 and 1994.[107] The USITC found that the share of the domestic market held by imports more than doubled during the period of investigation, with most of this increase occurring in 1997 and 1998.[108] The share of the US market held by imports (measured in quantity) ranged between 11.2 per cent and 16.6 per cent during 1993-96, and then increased sharply to 19.7 per cent in 1997 and 23.3 per cent in interim 1998.[109] Thus, imports of lamb meat into the United States and the share of the US market held by imports increased sharply in 1997, by 19 per cent, and again, in interim 1998, also by 19 per cent (as compared with interim 1997). Australian and New Zealand firms projected that their export surges to the US would continue through 1999 and their exports of lamb meat to the United States in 1999 would exceed the 1998 level by 21 per cent[110], a level nearly twice the level entered in 1995. Australia and New Zealand contest none of these findings.

85. Although they seek to portray a marketplace in which their producers serve a customer base different from that of the domestic producers, Australia and New Zealand likewise do not contest the findings that led the USITC to find an increasing convergence in the US market of domestic and

[106] USITC Report at I-15, I-23.
[107] USITC Report at I-15.
[108] USITC Report at I-24.
[109] USITC Report at I-18.
[110] USITC Report at I-23.

imported products. As the USITC found, traditionally, virtually all domestic lamb meat sold in the US market was fresh or chilled, and most imported lamb meat was frozen.[111] However, the USITC found that the mix of imported lamb meat changed during the period of investigation, from frozen to fresh or chilled lamb, and to larger cuts, with the result that imported and domestic lamb meat products became more similar.[112] The USITC found that much of the increase in imports between 1995 and 1997 was in fresh or chilled lamb meat, which increased by 101 per cent during that period, as compared to 11 per cent for imports of frozen lamb meat.[113] The USITC report showed that since 1996, the majority of lamb meat imported from Australia has been fresh or chilled[114]; it also showed that an increasing share of imports of lamb meat from New Zealand were fresh or chilled.[115] Moreover, foreign exporters told the USITC that the major portion of their 1999 increase would be in fresh or chilled lamb meat.[116] In addition, the USITC found that, whereas domestic lamb carcasses and the cuts derived from them were typically larger than imported cuts[117], imported lamb meat cuts became larger in size and more comparable to domestic cuts during the period of investigation.[118]

86. Australia and New Zealand likewise leave almost unmentioned the USITC's findings concerning the recent and likely price depressing effects of imports. Although they contend that the US industry has been in a long-term decline due to falling demand for lamb meat, they do not contest the USITC's finding that demand has leveled off since 1996. They likewise do not disagree that in the short term domestic growers and feeders cannot reduce production. This condition of competition reflects characteristics specific to the lamb industry – in particular, that the relatively long growth cycle of lambs limits the ability of domestic growers and feeders to reduce production in the short run; that meat-type lambs have one principal use, meat production, and cannot be diverted to other uses; and that a lamb must go to slaughter within a short time after reaching maturity regardless of market price.[119] Australia and New Zealand do not dispute the premise that in these conditions increases in supply are likely to put downward pressure on US prices.

87. Australia and New Zealand confirm[120], rather than dispute, that prices fell in the period of import surge. The USITC found that prices for various lamb meat products declined sharply beginning in mid-1997. During the second half of 1997 and during interim 1998, prices for several products were 20 per cent or more below comparable quarters in 1996 and early 1997.[121] The USITC determination also made apparent the correlation between this fall in prices and the price pressure from increased imports. As the USITC found, even though the cuts of imported lamb meat grew in size and were shipped increasingly as fresh or chilled meat, the unit values as well as price of New Zealand and Australian imports fell from interim 1997 to interim 1998. Unit values and prices for domestic products fell as well.[122] Pricing data gathered by the USITC for individual cuts showed that imports undersold the domestic products by wide margins in most quarters, often by more than 20 per cent.[123]

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[111] USITC Report at I-22.
[112] USITC Report at I-22.
[113] USITC Report at I-22.
[114] USITC Report at II-16.
[115] USITC Report at II-43.
[116] USITC Report at I-22.
[117] USITC Report at II-8.
[118] USITC Report at I-22-23.
[119] USITC Report at I-22.
[120] New Zealand's First Written Submission at ¶ 7.87 ("In 1998 both domestic wholesale and import lamb meat prices declined.") Import prices declined by 12 per cent between 1997 and 1998. *See also* Australia's First Written Submission at ¶ 48 and Graph 2.
[121] USITC Report at I-20.
[122] USITC Report at I-24.
[123] USITC Report at II-74-76.

88. The USITC also found that financial performance across all industry segments deteriorated sharply in 1997 and interim 1998, and attributed this decline largely to falling prices caused by increased imports.[124] It found that the operating income for most packers and breakers fell to the lowest point of the period of investigation in 1997 and interim 1998.[125] It found that feeders, after having operated at a profit in 1995 and 1996, operated at a loss in 1997 and at a substantial loss in the first nine months of 1998.[126] It found that growers as a whole operated at a diminished level of profitability in 1997 and interim 1998, and that a significant number of individual growers operated at a loss during that period.[127]

89. Consistent with the worsening condition of the domestic industry, the USITC noted that a number of firms in the industry reported difficulties in generating adequate capital to finance plant and equipment modernization. Firms in the packer and breaker segments reported difficulties in recouping new investments in plant and equipment and in repaying loans.[128] Growers and feeders reported cancellation or rejection of expansion plans, reductions in the size of capital investments, bank rejection of loans, reduced credit ratings, and difficulty in repaying loans.[129] Australia and New Zealand do not appear to contest that these conditions existed, but instead assert that decisions to go forward with investments undercut the argument that the industry was threatened with serious injury, since the investments must have been made with the expectation of financial returns. At some points, the complainants' criticisms reflect a puzzlement that the USITC did not find the industry not already to be suffering some injury.

90. Although Australia and New Zealand would have the Panel give great weight to the effects of the termination of Wool Act support payments to lamb growers and feeders, they do not contest the USITC's basis for not finding the termination of those payments to have much influence on events after 1996. The USITC found that the support payments were phased out principally in 1994 and 1995, and terminated in 1996.[130] *before* the surge in imports and sharp deterioration in the condition of the domestic lamb meat industry in 1997 and interim 1998. Moreover, the USITC found that the payments had gone only to part of the industry, to lamb growers and feeders; *the packer and breaker segments of the domestic industry never received payments under the Wool Act.*[131] In addition, the USITC found that in the intervening period between the phase out of the payments and the surge in imports the grower and feeder segments of the industry had experienced recovery and that any lingering residual effect of termination of the payments after 1996 was receding by the month.[132] In short, the USITC found that the termination of Wool Act payments could not explain the rapid deterioration in the industry in 1997 and interim 1998 and threat of serious injury at the time of the USITC's injury determination. Thus, the complainants' extensive arguments about the effects of the termination of Wool Act payments over the entire period 1993 - interim 1998 are both irrelevant, since they do not address the period of import surge and the USITC's finding of serious injury in the imminent future, and misleading, since they ignore the fact that the payments were not made to the packer and breaker segments of the domestic industry.

91. The USITC found no evidence that any other alleged factors, including competition from other meat products such as beef, pork, and poultry, might have significantly affected the condition of the domestic industry in 1997 and interim 1998. For example, with respect to competition from other meat products, the USITC specifically noted that per capita US consumption of lamb meat had

[124] USITC Report at I-20.
[125] USITC Report at I-19.
[126] USITC Report at I-19.
[127] USITC Report at I-20.
[128] USITC Report at I-21.
[129] USITC Report at I-21.
[130] USITC Report at I-24.
[131] USITC Report at I-25.
[132] USITC Report at I-24-25.

remained relatively steady since 1995.[133] Although complainants argue that the USITC should have examined further the effect of competition from other meat products on the lamb meat market, they neither contest this finding on the evidence nor explain why it is not a sufficient finding under the Agreement.

(b) The fact that complainants can point to other factors that in the long run have adversely affected the US industry is irrelevant to whether the industry is threatened with serious injury caused by increased imports

92. Much of complainants' briefs is devoted to drawing alternative pictures of what has been happening to the US lamb meat industry other than the view that the USITC adopted. Most of those arguments, as will be seen, are not supported by the record evidence or are not relevant to the analysis required by the Safeguards Agreement. However, even if the complainants' alternative views were permissible interpretations of the record, the possibility of those alternatives would not establish a violation of the Safeguards Agreement. As has been discussed previously, the standard of review does not ask the Panel to decide whether it would have come to the same conclusion as the USITC.

(i) New Zealand's long-run analysis of the effect of imports ignores the significant change in trends that occurred after 1996

93. Because they simply miss the point of the competent authority's determination, none of the factual arguments that complainants have made are capable of raising a *prima facie* case that the determination violated the Safeguards Agreement. For example, New Zealand's claim[134] that increased imports could not have caused the threat of serious injury because, over the period of the USITC's investigation, imports increased less than domestic production declined ignores the USITC's focus on the recent period of import surge and invites the kind of long-term analysis that the Appellate Body in *Argentina – Footwear* sought to discourage. As has been seen, the USITC based its finding on what occurred in 1997 and interim 1998, when imports of lamb meat surged, and what was likely to occur in the imminent future, not on what happened in the four years prior to the surge in imports. The USITC found that the 1997 increase in imports of 9.7 million pounds was mirrored by a decline in US lamb shipments of 8.4 million pounds.[135]

94. New Zealand is correct that the USITC report shows that domestic production also fell in earlier years. New Zealand neglects to mention, however, that the USITC report also shows that domestic consumption of lamb meat fell by almost the same amount during those years but did not fall in 1997-98.[136] Moreover, contrary to what happened in 1997 and interim 1998, increasing imports were not a factor during this earlier period. Imports were relatively steady, falling in 1994 and then rising modestly in 1995 and 1996.[137] In short, New Zealand' s focus on long-term trends obscures, rather than clarifies, the question of what will occur in the imminent future.

95. In particular, New Zealand overlooks the very significant fact that domestic production and consumption trends *diverged for the first time during the period of investigation in 1997*, the year in which the surge in low priced imports began.[138] Consumption rose for the first time in 1997, yet domestic shipments continued to fall in 1997 and remained at the lower 1997 level (on an annualized

[133] USITC Report at I-25.
[134] New Zealand's First Written Submission at ¶ 7.79.
[135] USITC Report at I-24.
[136] USITC Report at II-17.
[137] USITC Report at II-17.
[138] USITC Report at II-17.

basis) in interim 1998.[139] On the other hand, imports rose by 19 per cent (in quantity) in 1997, and by a further 19 per cent in interim 1998.[140]

96. New Zealand also fails to mention, and does not contest, that the mix in imported products shifted during the period of investigation, particularly in 1997 and interim 1998, from frozen lamb meat to fresh or chilled lamb meat, and to larger cuts. Thus, over the period of investigation, the mix of imported products became more similar to those produced by the US industry and hence more likely to displace domestic lamb meat in the domestic market.

97. The complainants' submissions before this Panel, and their nationals' submissions before the USITC, in fact, leave no doubt that imports have displaced domestic lamb meat. Australia conceded[141] that about one third of the increase in lamb meat imports over the whole period of the investigation displaced domestic lamb meat. Since, as the USITC report reflected, such displacement tended to increase toward the end of the period, Australia's estimate reinforces the conclusion that in 1997-interim 1998 significant displacement occurred. During the USITC investigation, Australian and New Zealand respondents made a similar concession. In their update of a 1995 USITC model analysis that they furnished to the USITC during the investigation, Meat and Livestock Australia and Meat New Zealand conceded that "imports displace some amount of domestic lamb meat" in the domestic market. This statement is likely to have substantially understated conditions existing in 1997 and interim 1998 because the update was based on imports during the period 1961-1997, when the great majority of imported lamb meat was in frozen form.

(ii) Complainants' efforts to blame the industry's troubles on the termination of the Wool Act Support Payments ignores the USITC's findings that the industry had largely recovered from that termination by 1997

98. Like New Zealand's arguments about whether imports displaced domestic production, Australia's argument about the effects of termination of the Wool Act payments focuses on what happened long before the surge in imports in 1997 and interim 1998. For example, in ¶47 of its First Written Submission Australia cites to a long-term decline in the US sheep population since 1961. Most of this analysis is irrelevant and not probative of the issue at hand. What occurred before the mid-1990's has little if any relevance to what happened in 1997 and interim 1998, when the surge in imports occurred. The Wool Act and the downsizing that occurred during the long period preceding the import surge in 1997 were all past history. The competent authority, as has been seen, found that even those domestic producers who received the support payments had experienced some recovery by 1997, a finding Australia does not address. Australia does not contest the finding that in the imminent future any lingering effects of the termination of Wool Act payments will have an ever decreasing effect and thus could not explain the imminent worsening of the domestic industry's position that the authority foresaw.

99. Similarly, the fact that a higher percentage of the reporting growers said that they operated at a profit in 1998 than in 1993, or that live lamb slaughter prices were higher in 1997 and 1998 than in 1993, does not mean, as New Zealand claims[142], that the domestic industry could not have been threatened with serious injury in 1998. What the USITC found at the time of its decision was that, based on the surge in imports in 1997 and interim 1998 and the coinciding deterioration in the condition of the domestic industry, lamb meat "is being imported" in such increased quantities as to threaten to cause serious injury to the domestic industry. This is fully consistent with the Appellate Body's decision in *Argentina – Footwear* that the competent authority focus on the most recent

[139] USITC Report at II-17.
[140] USITC Report at II-17.
[141] Australia's First Written Submission at ¶ 146.
[142] New Zealand's First Written Submission at ¶¶7.59 and 7.62.

period. The USITC found that the domestic industry had largely adjusted by 1996 to conditions, such as the termination of the Wool Act, that may have earlier affected profitability.

100. The gravamen of such arguments appears to be that an industry that has, as Australia puts it, endured a "long-term secular decline" (¶62) cannot be threatened with serious injury by imports. Complainants, however, make no legal argument to support this implicit proposition, quite apart from failing to address the findings of the USITC that suggest that, apart from the effects of imports, the prior decline had largely come to an end by 1997. They quite rightly do not cite any support in the Safeguards Agreement for this premise, because no such support exists.

101. Nothing in the Safeguards Agreement says that a competent authority cannot find that increased imports are causing or threatening to cause serious injury just because the industry may have been injured at some earlier point in time by some other factor. All that the Agreement requires, and as was made clear by the Appellate Body in *Argentina – Footwear*, is that the competent authority find, at the time of its decision, that a product "is being imported" in such increased quantities as to threaten to cause serious injury to the domestic industry.

102. The definition of "serious injury" in Article 4.1(a) does not exclude the possibility that an industry may also be adversely affected by causes other than imports. It requires only "a significant overall impairment in the position of the domestic industry," meaning it only requires that the position of the industry, whatever it otherwise may be, be impaired.

103. Complainants' position seems to be that a man who has cancer may not suffer significant overall impairment if run over by a car. Nothing in the Agreement requires that conclusion. Indeed, Article 4.2(b) expressly assumes the opposite. It provides, "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."[143] This provision thus takes into account that the industry may be suffering from other causes of injury at the same time. It simply requires that an authority not attribute what those other factors caused to the increased imports.[144] It does not require that relief be denied if other factors caused injury prior to the increase in imports.

104. Moreover, on the facts, both Australia's and New Zealand's characterizations of pricing in the market seem to be contrary to their picture of the US industry as in a long-term, inexorable decline that would render shorter term effects a nullity. For example, Australia asserts that "[t]he subsequent cyclical drop in prices to the levels prevailing before the removal of the subsidies was a normal cycle."[145] Similarly, the only reason for the 1998 price decline offered by New Zealand is that prices had risen in earlier years and that "agriculture prices fluctuate."[146] Both of these statements are consistent with the view that prices in this market can fluctuate with changes in supply and demand. Neither Member contests the finding that demand -- contrary to the earlier long-term trend -- was stable after 1996. Thus, their characterizations of the market are consistent with the USITC's conclusion that a 19 per cent increase in imports in 1997 and a further increase of 19 per cent in interim 1998 over the interim 1997 level would cause price declines. The record before the USITC established that imports had declined in price and in most cases substantially undersold US product.

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[143] (Emphasis added).

[144] See United States -- Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, ADP87, 30 November 1992 (interpreting parallel provision of Tokyo Round Antidumping Code).

[145] Australia's First Written Submission at ¶62.

[146] New Zealand's First Written Submission at ¶7.87.

3. The terms in which the USITC expressed its conclusions are entirely consistent with the Safeguards Agreement

(a) New Zealand's theoretical attack on the US Statute provides no basis for challenging the determination at issue in this proceeding

105. As has been seen, the USITC found that other posited causes of injury to the US industry would be of negligible or diminishing importance in the imminent future. The termination of Wool Act payments has already been discussed. While the USITC found that other meat products, such as beef, pork, and poultry, appear to compete with lamb to a certain extent, it found that per capita domestic consumption of lamb meat had been relatively constant since 1995. Accordingly, it found no reason to believe that there would be a shift in demand in the imminent future.[147]

106. Likewise, the USITC found that there was no significant increase in input costs that explained the sharp decline in industry profits. It found that expenses for growers rose at a moderate rate and then fell in interim 1998, that expenses for feeders rose at a faster but not dramatic rate, and that expenses of packers and breakers rose moderately in line with production. No increase was predicted for the imminent future.[148] The USITC found that US Department of Agriculture data showed that the fat content of domestic lambs was lower in 1997 than in earlier years, and that "fat" lambs could have accounted for, at most, no more than a small percentage of domestic production.

107. With regard to packer concentration, the USITC noted information indicating that concentration had actually decreased, rather than increased. The USITC also found that packers, like other segments of the industry, experienced deteriorating profits, and found that an undue level of concentration would have suggested a greater ability to pass through lower prices to feeders and growers.[149] Similarly, while the USITC found that an effective marketing plan could have had an important impact on the industry, it did not find that the failure to implement such a plan was a more important cause of the threat of serious injury.[150]

108. It is clear from the USITC's findings that the USITC found that none of these other possible causes had a significant impact on the deterioration in the condition of the domestic industry that occurred in 1997 and interim 1998 or posed a threat of serious injury in the imminent future. Thus, the USITC found only one possible cause of a threat of serious injury – increased imports. The USITC's finding was clearly consistent with the requirement of Article 4.2(b) that injury caused by other factors not be attributed to increased imports. The USITC did not attribute the threat of serious injury to factors other than increased imports. Indeed, it could not have, since it did not find that there were any factors of significance, other than increased imports, that threatened to cause serious injury.

109. New Zealand (notably not joined by Australia) contends, however, that the USITC acted inconsistently with the Safeguards Agreement because it expressed its conclusions about the threat posed by increased imports in terms required by the US statute. The USITC concluded that increased imports of lamb meat were a "substantial cause" of threat of serious injury to the domestic industry. Under the US safeguard statute, "substantial cause" means "a cause that is important and not less than any other cause."[151]

110. New Zealand argues that the USITC's "substantial cause" analysis was inappropriate because, in New Zealand's view, it could lead the Commission impermissibly to "weigh" causation factors and to blame increased imports for causing a threat of serious injury that was in fact attributable to other

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[147] USITC Report at I-22.
[148] USITC Report at I-25.
[149] USITC Report at I-25.
[150] USITC Report at I-26.
[151] Section 202(b)(1)(B) of the Trade Act of 1974, as amended, attached hereto as US Exhibit 12.

factors. To the contrary, US law requires that the USITC be particularly diligent about not attributing injury from other factors to increased imports. US law expressly requires that the USITC examine factors other than imports which may be a cause of serious injury or threat of serious injury to the domestic industry.[152] As has been shown, the USITC found that factors other than increased imports played no significant role in causing the threat of injury that the Commission found. The USITC did not find increased imports to be one among several causes of lower prices and domestic industry sales volumes.[153] Thus, the question of whether it is permissible to weigh causation factors is a moot issue in this case, since increased imports were not one of a multiple number of causation factors and the USITC did not engage in weighing.

111. Thus, even if New Zealand's objections to the use of a "substantial cause" analysis are correct – which the United States disputes – they are irrelevant for purposes of this case. They cannot provide a basis for concluding that the USITC's threat of serious injury determination was inadequate. It is thus unnecessary for purposes of deciding this case for the Panel to address New Zealand's complaint on this subject.[154]

(b) The USITC satisfied the causation requirements of the Safeguards Agreement

112. In any event, New Zealand's objection to the "substantial cause" analysis is baseless. The "substantial cause" test has been embodied in US safeguards legislation for over 25 years. Similar language was included in US safeguards statutes dating back to 1955.[155]

113. New Zealand apparently considers that Article 2.1 can only be satisfied when increased imports are the exclusive cause of the injury or threat of injury that the industry has sustained, since it asserts that: "[T]here can be no serious injury attributable to imports at all if that serious injury is in fact attributable to other causes."[156] However, nothing in Article 2.1 suggests that is the case.

Article 2.1 provides:

> 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.

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[152] Section 202(c)(2)(B) of the Trade Act of 1974, as amended, attached hereto as US Exhibit 13.

[153] *See* USITC Report at I-26.

[154] *See United States -- Shirts and Blouses from India*, WT/DS33/AB/R, Report of the Appellate Body adopted 25 April 1997, at VI ("Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to 'make law' by interpreting existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. A panel need only address those claims that must be addressed in order to resolve the matter in issue in the dispute.") Moreover, New Zealand's contention amounts to an attack on the US statute itself, which as the United States pointed out in its in letter of May 5, 2000, is beyond the Panel's terms of reference.

[155] For example, Section 6(a) of the Trade Agreements Extension Act of 1955 provided that: "Increased imports, either actual of relative, shall be considered as the cause or threat of serious injury to the domestic industry producing like or directly competitive products when the Commission finds that such increased imports have contributed substantially towards causing or threatening serious injury to such industry." (emphasis added.) [Ch. 169, Pub. L. 86], attached hereto as US Exhibit 14.

[156] New Zealand's First Written Submission at ¶7.75.

114. While Article 2.1 plainly establishes a causation requirement, nothing in that provision specifies the *degree* of cause required before a safeguard measure can be imposed.[157] Neither GATT Article XIX:1 nor Article 2.1 of the Safeguards Agreement specifies that increased imports must be the exclusive cause of injury, or threat of injury, that the domestic industry has sustained. New Zealand argues otherwise, but points to Article 4.2 for the proposition that this limitation should be read into Article 2.1.

115. It is worth noting that Article 2.1 directs Members to make their injury and causation determinations "pursuant to the provisions set out below". Those provisions include Article 4.2, which addresses injury causation in detail. In considering the meaning of the causation language in Article 2.1, it is thus appropriate to look to the more specific language of Article 4.2(b).

116. Article 4.2(b), second sentence, suggests that increased imports may be understood to "cause" serious injury, or threat of serious injury, even when the injury that the industry has sustained is being caused by other factors as well. Article 4.2(b), second sentence, provides that:

> 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.

117. This sentence addresses situations in which injury to a domestic industry is attributable both to increased imports and other sources. By its own terms, the sentence recognizes that factors other than increased imports may be "causing" injury at the same time as increased imports.

118. If increased imports and other factors can be "causing" injury at the same time for purposes of Article 4.2(b), second sentence, New Zealand cannot be correct in asserting that Article 2.1 – which uses the nearly identical expression "to cause" – should be interpreted to require that increased imports must be the sole cause of serious injury or threat of injury. Moreover, if increased imports and other factors may be "causing" injury or threat of injury at the same time, a competent authority may appropriately consider the relative importance of those causes through the application of a "substantial cause" or similar causation standard.

119. Contrary to New Zealand's view, Article 4.2(b), second sentence, does not preclude Members from attributing serious injury, or threat of serious injury, to increased imports where other factors have also contributed to the conditions leading to the injury or threat. Rather, it instructs Members not to blame increased imports for any injury caused by other factors. The USITC fully complied with that requirement, as has been shown.

120. New Zealand is also wrong in its claim in ¶¶ 7.73-7.76 of its First Written Submission that the causation test in US law is a "less stringent" test than that required by the Agreement. If anything, the US law in fact embodies a *more stringent* test. Nothing on the face of the Agreement requires an authority to compare the extent of damage caused by different factors affecting an industry. Thus, the United States statute calls on its authority to make a more detailed analysis than the Agreement requires.

121. Likewise, New Zealand is wrong in its claim that the US test can be met even when increased imports "are one of many causes" of the serious injury or threat of serious injury.

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[157] *See* John Jackson, "The General Agreement on Tariffs and Trade," in *A Lawyer's Guide to International Business Transactions*, Pt. I, Surrey and Wallace, eds., 2d ed. 1977, at 66, attached hereto as US Exhibit 15. "Unlike US legislation, which generally has been more specific about the degree or quantity of cause required for the link between increased imports and serious injury before escape clause relief can be invoked, the GATT escape clause is very general. Arguably, any degree of cause between increased imports and serious injury to domestic producers will suffice." (footnote omitted)

Section 202(b)(1)(B) of the US Trade Act of 1974 defines the term "substantial cause" to mean "a cause which is important and not less than other cause." Thus, increased imports must be both an "important" cause of the serious injury or threat, and "not less than any other cause." The legislative history of the US provision makes it clear that a cause of injury would not be an "important" cause of injury, and thus not a "substantial" cause, when it was one of many such causes, even if it was equal to or greater than any other cause. The US Senate committee that drafted this particular provision stated "The [USITC] Commissioners will have to assure themselves that imports represent a substantial cause or threat of injury, and not just one of a multitude of equal causes or threats of injury."[158]

122. In sum, the "substantial cause" test represents a long established and well considered approach that fully implements the requirements of Article XIX and the Safeguards Agreement. In this case, it has led to a detailed analysis as to which New Zealand has no basis for complaint.

4. The alternative methodologies that complainants propose for evaluating the data are not required by the Safeguards Agreement

(a) The USITC determination concerned the industry as a whole and included each segment

123. In making its determination, the USITC considered all of the evidence with respect to each of the factors and concluded that the domestic industry, as defined to include growers, feeders, packers, and breakers, was threatened with serious injury. While the USITC gathered data with regard to the various economic factors for each of the four industry segments, the USITC did not make, and was not required to make, separate threat of injury determinations with respect to each of the segments. Nevertheless, as is shown above, the USITC found that many factors, including financial performance, deteriorated for all industry segments.

124. The data that the USITC obtained on each of the segments were sufficient to allow the USITC to make a determination that the industry as a whole was threatened with serious injury caused by increased imports. To the extent practical, the USITC obtained data on each of the economic factors for all four segments of the industry. The USITC viewed this as the most appropriate way to examine data to avoid double counting or the combining of data expressed in different forms (e.g., shipments vs. production).[159] This also provided the USITC with a safety check on data, because it gave the USITC the ability to compare trends in data for the various factors for each of the sectors, so as to determine whether the trends were similar and, if not, probe the reasons for any differences. In particular, it enhanced the USITC's ability to probe the validity of the data compiled from grower questionnaires, which reflected a much smaller sampling of producers than the data for other segments. The fact that the grower data showed trends that were for the most part similar to the data compiled for other industry segments, and that differences were explainable, suggested that they were objective and valid, even though the sample was small.

125. Australia argues[160] that, as a consequence of its definition of domestic industry, the USITC was obliged to prove that there would be a significant overall impairment in the position of the producers in each of the industry segments. In support, Australia cites generally to Article 4 of the Safeguards Agreement, but not to any specific paragraph or clause therein.

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[158] *Trade Reform Act of 1974, Report of the Committee on Finance . . . on H.R. 10710*, S. Rept. No. 93-1298, 93rd Cong., 2d Sess. 120-21 (1974), attached hereto as US Exhibit 16.

[159] USITC Report at I-16, note 61. In the two instances in which the collection of data was not practical (e.g., capacity and capacity utilization data for growers and feeders), the USITC explained why it was not practical to collect such data (e.g., no practical way to measure range capacity, varying time that lambs are kept in feedlots). USITC Report at I-20 n.96.

[160] Australia's First Written Submission at ¶157.

126. Australia does not find any specific support for its claim in Article 4 because none exists. Moreover, what Australia argues is contrary to the basic concepts in Article 4. Article 4.1(a) defines serious injury to mean "a significant impairment in the position of a *domestic industry*" (emphasis added). Article 4.1(c) defines domestic industry to mean "the producers *as a whole* of the like or directly products . . ." (emphasis added). Thus, Article 4 directs a competent authority to examine the condition of the producers as a whole, as opposed to different groups of producers. While this does not mean that a competent authority could not separately examine data with respect to producers in different segments of the industry, the finding must be made with respect to the condition of the domestic industry as a whole.

127. The USITC found that financial performance declined in all four segments in 1997 and interim 1998, during the period when the surge in imports occurred. Australia seeks to discount the significance of the decline in financial performance by arguing that some of the firms were still profitable, or that only a few more firms in a particular segment operated at a loss in 1998 than in 1997, or that the loss for feeders in interim 1998 was due to the $21.26 fall in the price per lamb of slaughter lambs, as compared to the fall of only $6.70 in the price per feeder lamb.[161]

128. As stated earlier, nothing in the Safeguards Agreement requires a finding that all firms in the industry are operating at a loss, or that the industry as a whole is operating at a loss. Indeed, the list of factors in Article 4.2(a) of the Agreement includes "*profits* and losses," which indicates that an industry may be seriously injured or threatened with serious injury even though the industry as a whole or individual firms are profitable. What is key in a threat case is that the economic position of the domestic industry is likely to deteriorate seriously as a result of increased imports. The USITC clearly found this to be the case as to the industry as a whole and as to each of its component sectors.

129. Moreover, the decline in slaughter and feeder prices that Australia references precisely illustrates what was happening in the domestic market and supports the USITC's finding. Imports of lamb meat compete head to head with domestically produced lamb meat. When low-priced imports increase and drive down the price of domestic lamb meat at the wholesale level, the price decline is then passed through to feeders and eventually to growers. The surge in imports should first adversely affect the price of slaughter lambs and then the price of feeder lambs. Australia refers to this as "a short run phenomenon, which would be expected to be corrected in future periods."[162] The "correction" that Australia refers to is that the lower prices caused by imports will be passed through to growers, a process that was clearly in progress in early 1999 when the USITC found that the domestic industry was threatened with serious injury. As the USITC noted, the growing of lambs is a relatively long process, and growers and feeders are unable to reduce production in the short run. When a lamb is mature, it must go to market, regardless of the market price. As Australia implicitly recognizes, this process means that lamb growers cannot in the short run protect themselves from effects of imports on lamb meat sales. In short, while the evidence showed that not all sectors would be impacted identically, all would suffer serious deterioration in their positions due to increased imports.

(b) The USITC properly considered each factor required by the Agreement and was not required to conduct an econometric analysis

130. The USITC conducted the appropriate analysis in determining that imports of lamb meat were in such increased quantities as to cause the threat of serious injury. The USITC considered the evidence with respect to each of the factors required by the Agreement and made its determination based on that evidence.

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[161] Australia's First Written Submission at ¶¶153-164.
[162] Australia's First Written Submission at ¶160.

131. New Zealand claims[163], without citing any basis in the Agreement, that the USITC should have performed an econometric analysis regarding the factors causing the threat of serious injury, since in 1995 the USITC performed a vector autoregression model analysis of the lamb meat market. This claim is without basis for two principal reasons. First, the Agreement does not require that a competent authority perform such an analysis. In fact, the Agreement does not prescribe *any specific methodology* that a competent authority must employ in demonstrating the link between increased imports and serious injury or the threat of serious injury. Second, because such analyses typically rely on relatively long data series, such analyses generally are not helpful in explaining what happened in the most recent period or in projecting what will happen in the imminent future. Because such models are more useful in showing the long-term trends, reliance on such analyses might well be inconsistent with the holding of the Appellate Body in *Argentina – Footwear*, that recent data are the most probative of whether a product "is being imported" in such increased quantities as to cause or threaten serious injury.

132. The USITC's 1995 model[164] was not developed for use in a safeguard investigation, but rather for use in a fact-finding investigation conducted under a different statutory authority. The model focused on competitive conditions characterizing the US *sheep markets at the farm level*, as opposed to the effects of imports of lamb meat on the lamb meat industry. Second, it assumed that the mix of imported and domestic lamb meat products would remain steady. Third, it covered the period 1961-1994, when the Wool Act was in effect. The update of this model provided by Australian and New Zealand respondents during the USITC investigation presented many of the same problems as the 1995 model. While it included three additional years of data (1995-97), it also covered the period back to 1961 and did not include the most recent period (interim 1998). Thus, both models focused on the *sheep markets at the farm level*, not the lamb market. Second, neither of the models considered the most recent data on which the USITC in part relied – data for interim 1998. Even the updated model presents average dynamic patterns for 1961-97 with which the variables have historically interacted. Third, the assumptions in both models for the product mix of imported lamb meat are in direct conflict with the USITC's finding in the 1999 safeguards case – that the mix of imported lamb meat products had shifted during 1997 and interim 1998 and, based on projections supplied by Australian and New Zealand producers, this shift would continue through 1999. Thus, the assumptions and results of the 1995 model run and the updated run were not valid for purposes of the 1999 safeguards investigation. Accordingly, the USITC did not rely on either of the model runs in making its determination in the safeguards investigation.

133. Contrary to New Zealand's implication, the USITC does not perform econometric analyses of the kind urged by New Zealand during the course of a safeguards investigation. Rather, consistent with Article 4.2, the USITC evaluates the evidence of an objective and factual nature with respect to each of the relevant factors and makes its findings and conclusions on the basis of that evaluation. New Zealand's insistence upon the value of such an analysis reflects its misconceived position, contrary to *Argentina – Footwear*, that a safeguards investigation should concern long-term trends, rather than a detailed analysis of the very recent developments that can create emergency conditions.

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[163] New Zealand's First Written Submission at ¶7.83.

[164] The model was included in a USITC fact finding report on conditions affecting the US and foreign lamb industries completed in 1995. The report consisted mostly of information about the domestic and foreign lamb industries and product trade. The model was not the focus of the report. The report was prepared by the USITC at the request of the US Trade Representative. *See* USITC, *Lamb Meat: Competitive Conditions Affecting the US and Foreign Lamb Industries, Investigation No. 332-357*, USITC Publication 2915, Aug. 1995, at 5-36 *et seq.* Attached hereto as US Exhibit 10.

(c) The USITC properly drew inferences about the imminent future from recent trends in industry indicators

134. Consistent with the Appellate Body decision in *Argentina – Footwear*, in making its determination the USITC focused on the most recent available data, data for full year 1997 and interim year 1998. The USITC also considered the level of imports and the shift in the mix of imports for that period and projections for full year 1998 and 1999 provided by Australian and New Zealand producers. It also considered the nature of the industry, including the inability of domestic growers and feeders to adjust their production in the short term. On the basis of these data, and the trends therein, the USITC drew inferences and concluded that serious injury was imminent. Consistent with the definition of "threat of serious injury" in Article 4.1(b), the USITC finding was "based on facts and not merely on allegation, conjecture, or remote possibility."

135. Accordingly, the USITC considered evidence of recent trends in industry performance to provide the most reliable basis for making inferences about the imminent future. The record provided no basis for concluding that such trends were not probative of the near term, and Australia provides no basis for believing that they were not. Australia[165] nevertheless contends that this was not enough, and claims that the USITC should have performed a "prospective analysis" for the industry. To assist itself in performing this analysis, Australia contends that the USITC should have gathered "forward looking data " from growers.[166] Australia does not state what kind of additional data the USITC should have gathered or define what such an analysis would entail, or explain why the analysis used by the USITC violates the Safeguards Agreement.

136. The USITC relied on projections provided by lamb meat producers in Australia and New Zealand about projected export levels and the mix of exports to the United States for full year 1998 and for 1999. Three of the USITC Commissioners expressed the additional view that they did not believe the exporters would have exaggerated their near-term future exports to the United States, since an overstatement would not likely have been in their interest.[167] The USITC also concluded that, in the short run, domestic growers and feeders would be unable to reduce production, demand would be unlikely to shift, and costs were not predicted to change significantly.[168] The USITC's findings therefore provided a sound, objective reason for concluding that recent trends in the effects of imports on the domestic industry would provide sound guidance for predicting the imminent future. As a result of this analysis, the USITC concluded that there was a "high" degree of likelihood that "the increased imports will have a substantial negative effect on the volume or prices, or both, of the US industry's lamb meat sales."[169] Australia again has not articulated a basis for finding a violation of the Agreement.

(d) Complainants Arguments that the USITC should have put more weight on certain evidence do not detract from the adequacy of the determination it reached

(i) The USITC accurately and objectively characterized the evidence on profitability

137. New Zealand's arguments concerning profitability evidence simply ask the Panel to recharacterize the evidence. New Zealand claims[170] that the USITC's statement that a significant portion of individual growers reported that they had operated at a loss was "misleading." Instead, New Zealand argues, the USITC should have said that a significant portion operated at a profit. This makes no sense. First, the USITC statement was absolutely true, and New Zealand's suggested

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[165] *See, e.g.*, Australia's First Written Submission at ¶139.
[166] Australia's First Written Submission at ¶133.
[167] USITC Report at I-23 n.23.
[168] USITC Report at I-22-24.
[169] USITC Report at I-26.
[170] New Zealand's First Written Submission at ¶7.59.

rephrasing of the statement clearly concedes that it was true. Second, and more importantly, the Safeguards Agreement nowhere requires that a competent authority find the domestic industry as a whole or every producer in the industry to be operating at a loss in order for the industry to be seriously injured or threatened with serious injury. What it does require is that the competent authority find that increased imports are causing or threatening serious injury to the domestic industry. This the USITC did in fact find, and the fact that a significant portion of growers reported that they had operated at a loss in the most recent period, at the time when imports were surging, was one of the facts supporting this finding.

138. New Zealand again complains[171] that the USITC was selective in its use of profitability data for feeders in that it drew conclusions based on data reported by different numbers of feeders – nine feeders for the full years 1993-97, seven feeders for interim 1997, and six feeders for interim 1998. There was nothing selective in what the USITC did. The USITC had a fully uniform data series for the five full years 1993-97, covering the same nine firms. The interim year data are most useful for comparing the most recent interim period with the previous interim period, as opposed to previous full year periods. At the USITC explained on page II-29 of its report, one of the feeder firms that reported data for interim 1997 went out of business in interim 1998. The USITC report stated that this contributed to the reduction in net sales quantity and value and total expenses when compared to interim 1997.[172] The USITC's findings accurately and objectively characterize the evidence concerning profitability.

(ii) The USITC reasonably did not place weight on growths in packer and breaker capacity in preference to other evidence of the industry's position

139. While not denying that the factors on which the USITC relied were relevant under Article 4.2 of the Agreement, Australia and New Zealand insist that the authority should have placed greater weight on other factors. These arguments do not make out a violation of the Agreement and invite the Panel to violate the standard of review by reweighing the evidence. Article 4.2(a) requires competent authorities to "evaluate" all relevant factors. It does not require that an authority give weight to each factor in each investigation, nor does it require that an authority find that each factor provide evidence that supports the conclusion it reached.

140. Thus, Australia's assertion[173] that the increase in capacity of US packers and breakers during the investigation does not support a finding of threat of serious injury does not state a proposition contrary to the conclusion that the USITC reached. The USITC did not rely on capacity information in making its affirmative finding of threat of serious injury. Rather, the USITC found such factors as worsening financial performance, declining sales, falling prices, and falling market share due to increased imports more indicative of whether the industry's position would deteriorate.[174]

141. Moreover, the reasons why the authority found such trends more probative are evident on the face of its determination. As the authority found, firms in the packer and breaker segments reported difficulties in recouping new investments in plant and equipment and in repaying loans.[175] Thus, the fact of past investment did not, as Australia posits, necessarily provide evidence of an expectation of profits in the future, when firms were having difficulty recouping that investment. Indeed, their failure to recoup investment was consistent with the effects of falling sales and market share due to increased imports.

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[171] New Zealand's First Written Submission at ¶7.60.
[172] USITC Report at II-29.
[173] Australia's First Written Submission at ¶¶151-152.
[174] USITC Report at I-24.
[175] USITC Report at I-21.

(iii) The USITC reasonably discounted the relevance of inventory data when the product at issue generally is not inventoried for long periods of time

142. Although the USITC found that inventories reported by US packers rose slightly over the period, the USITC did not give weight to that evidence as an indication of threat of injury. The USITC explained that inventory data are "not particularly relevant" because fresh lamb meat is perishable and can be inventoried for only a limited time.[176] This conclusion reflects that the authority did not simply accept every negative trend as suggestive of an affirmative determination, but rather carefully evaluated the value of each piece of evidence.

143. New Zealand does not explain why the USITC, having found inventories irrelevant, violated the Agreement when it did not make a specific finding about the decrease in inventories in interim 1998.[177] Under Article 4.2(c) of the Agreement, the authority was required to make a detailed analysis of the case and a demonstration of the relevance of the factors examined. By giving a precise explanation of the irrelevance of inventories, the USITC explained the reason why it found other factors more important and why a detailed analysis of the case did not require further findings on inventories.

144. Indeed, the USITC decision elsewhere gives yet another reason for not finding the interim 1998 fall in inventories particularly relevant. As the authority found, production fell in interim 1998.[178] In the circumstances, a decline in inventories is not necessarily indicative of a positive trend.

(e) Australia's other criticisms of the methodology of the USITC's decision make incorrect assumptions about the USITC's determination and fail to allege any violation of the Agreement

145. Contrary to Australia's claim, the USITC made no finding that the domestic industry was not experiencing serious injury.[179] In this case, the USITC found that lamb meat was being imported in such increased quantities as to cause a threat of serious injury to the domestic industry. It did not make a negative finding of present serious injury. Under Article 2.1 of the Agreement, a Member may impose a safeguard measure if it finds that the requisite conditions either cause or threaten to cause serious injury. The Agreement nowhere states that an authority in making such a determination must find that the other possible ground for taking a measure does not exist. Australia does not contend that the USITC should first have made a determination as to whether increased imports cause current serious injury, and that issue is not before this Panel.

146. Australia seems to further criticize the USITC for finding that the domestic industry was threatened with serious injury before it looked at causation issues[180], but cites no reason such an analysis is contrary to the Safeguards Agreement. In their written views, the USITC Commissioners addressed in sequential sections their reasons for concluding that the domestic industry was threatened with serious injury and their reasons for concluding that increased imports of lamb meat were causing the threat of serious injury. The Commissioners could, as they have in past determinations, found that the industry was threatened with serious injury, but that such a threat was not caused by increased imports. Thus, the fact that the Commissioners made a finding about whether the industry was in a threatened state in no way biased their consideration of causation.

147. Indeed, while the United States does not claim that such a division of findings is required by the Agreement, it notes that Article 4.2(b) requires a demonstration of "the existence of the causal link

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[176] USITC Report at I-20.
[177] New Zealand's First Written Submission at ¶7.61.
[178] USITC Report at I-18.
[179] Australia's First Written Submission at ¶187.
[180] Australia's First Written Submission at ¶188.

between increased imports of the product concerned and serious injury or threat thereof." This provision certainly suggests that the demonstration of a causal link may be a distinct conclusion from the establishment of a threat of serious injury.

5. The USITC based its determination on objective evidence in keeping with Article 4.2 of the Safeguards Agreement

148. Complainants' challenges to the objectivity of the evidence on which the USITC relied have no support in the Agreement or are based on prejudicial mischaracterizations of what the authority in fact did. As the United States shows herein, the United States examined all facts in its possession or which it should have obtained in accordance with Article 4.2 of the Safeguards Agreement, including facts that may have detracted from an affirmative determination.

149. The complaining Members' complaints about the data on which the USITC relied is similarly misplaced. The USITC conducted a massive investigation, which provided an objective basis for making the analysis required by the Safeguards Agreement. There is simply no merit to their claims[181] that the USITC was selective in its use of data in order to reach a particular result.

(a) In evaluating information on growers and feeders, the USITC conducted an objective evaluation by use of both official and questionnaire data

150. In evaluating the condition of the domestic industry, the USITC relied on data obtained from responses to USITC questionnaires and from the US Department of Agriculture ("USDA"). As the USITC noted, the USDA annually collects and publishes data on domestic lamb slaughter and the number of lamb-growing establishments, and such data were more comprehensive than those that it could develop in the course of its investigation. The USITC noted that the sheer size of the domestic industry – over 70,000 growers in 1997 – made it impossible for the USITC to canvass a large percentage of the industry or even to develop the kind of statistically valid sample used for smaller, less dispersed industries. Accordingly, in evaluating the various factors, the USITC relied on the more comprehensive USDA data when possible. In evaluating factors, such as financial conditions, for which there were no USDA data, the USITC relied on questionnaire response data.[182] Complainants have not suggested any reason why this approach constituted anything less than an objective evaluation of the evidence.

151. To obtain financial and other data on grower operations, the USITC sent questionnaires to 110 firms and individuals believed to be among the larger growers of lambs. It received data from 57 firms or individuals accounting for an estimated 6 per cent of domestic lamb production. In view of the relatively small coverage of these responses, the USITC did not place decisive weight on questionnaire data received from growers. Nevertheless, the USITC found it appropriate to take these data into account along with other data obtained in the investigation in evaluating the condition of the industry. The USITC drew three conclusions from its evaluation of the grower responses: First, that a comparison of the questionnaire data and USDA data suggested that questionnaire responses from domestic growers, if anything, reflected that those who responded were doing better than the industry as a whole; second, that the overall trends in grower questionnaire data did not differ markedly from the trends in the questionnaire data obtained from feeders, packers, and breakers, for which questionnaire coverage was significantly higher; and third, that none of the respondents argued that the data were biased, or that they inaccurately portrayed the condition of growers.[183]

152. The USITC identified the sources of the data on which it relied and carefully explained its reasons for doing so. The USITC relied on what it considered to be the most objective and

[181] New Zealand's First Written Submission at ¶7.58; Australia's First Written Submission at ¶122.
[182] USITC Report at I-16-17.
[183] USITC Report at I-17.

comprehensive data. Finally, the USITC was completely candid in noting any limitations in a particular data series and the weight that it was giving to such data.

153. For those factors for which the USITC was able to obtain data from both questionnaire responses and the USDA, the USITC carefully compared the respective data series for differences and sought to determine the reasons for any differences. For example, the USITC noted that USITC questionnaire data on production and shipments from all industry segments generally showed much more positive trends than USDA data. The USITC also noted that USDA data showed a loss of nearly 20,000 lamb-growing establishments over the period of investigation, while the questionnaire data show a slight increase in shipments, employment, and net sales over the period. Based on its evaluation of these data, the USITC concluded that the questionnaire data likely represented a set of entities that are performing better than the lamb meat industry as a whole. The USITC found that the main reason for this was that the questionnaire data had a "survivorship bias" in that the USITC did not obtain responses from the establishments that exited the market.[184] Thus, the USITC reasonably concluded that the USDA data were more representative of the industry as a whole.

154. Despite these extensive efforts and the care that the USITC took not to overstate the probative character of its evidence, Australia and New Zealand contend, in effect, that *no* conclusion could be drawn from the evidence gathered. Australia objects that the existence of a survivorship bias[185] in the questionnaire data should not have led the USITC to rely on USDA data on the issue of threat.[186] Australia's position on this question is somewhat puzzling, since it also seems to have argued that the USITC questionnaire data were so flawed that the USITC should not have relied on it at all. Australia's argument appears to amount to a contention that the USITC could neither rely on official data, because it included producers who had gone out of business, nor on questionnaire data, because the USITC was unable in the course of its investigation to conduct further questionnaire samples.

155. These arguments do not set forth a cogent reason why the USITC did not properly rely on USDA data. That data was, as no one contests, more comprehensive than any data the USITC would be able to collect during its investigation and, unlike the questionnaire data, unaffected by a survivorship bias. The fact that the USDA data included data from firms that had gone out of business did not make it less representative of the industry in the imminent future. The industry included firms that were both likely to survive in the future and likely to perish. Analyzing data that was representative of such dynamics in the recent past represented the best way of attempting to anticipate such dynamics in the future. Neither complaining Member has advanced any reason under the Agreement why the USITC could not properly rely on more comprehensive official data where it was available.

156. New Zealand and Australia, conversely, contend that the USITC should not have relied on questionnaire data at all because it ignores the USITC's finding concerning survivorship bias. Their assumption[187] that only injured firms answer questionnaires was, as the USITC found, the opposite of what the record in this case indicated. The available data suggested that those who answered were doing better than the industry as a whole.[188] This result suggested that responses are more likely to come from the less injured firms, which, in an industry with a multitude of small producers, are more likely to have the staff that can fill out the USITC's extensive questionnaire. Moreover, the healthier responding firms may be short term beneficiaries of the deteriorating conditions in the industry in that

[184] USITC Report at I-17.

[185] In this argument Australia appears to adopt the USITC's finding of a survivorship bias, although elsewhere Australia contests it.

[186] Australia's First Written Submission at ¶ 122.

[187] Australia's First Written Submission at ¶¶131, 154.

[188] For example, the 49 growers who furnished financial information were in business for the full five-year period of the investigation, whereas a significant contraction occurred in the number of growers during the five-year period.

they may be picking up business from the firms that have downsized or exited the industry. Firms in the most desperate condition, whose staffing has been cut to the bone as part of a struggle to survive, are less likely to have had the resources to fill out the questionnaire. Thus, to the limited extent that the USITC did rely on questionnaire data, neither New Zealand nor Australia has reason to complain about the result. To the extent that the questionnaire data fell short of being fully representative, it erred in favor of a finding of a lack of threat of serious injury.

157. Australia is absolutely wrong when it asserts that the USITC "did not attempt to obtain a valid picture" of the grower segment of the domestic industry.[189] Australia bases its complaint on the fact that the USITC sent out *only* 110 questionnaires to lamb growers, but does not allege any bias or imbalance in the USITC questionnaires or the choice of firms selected to receive questionnaires. Nor does Australia indicate what more the USITC should have done or what would constitute such a valid picture, or allege that the United States violated any specific article of the Safeguards Agreement in this regard.

158. To the contrary, the USITC undertook a vigorous effort to obtain data on grower operations and as a result had sufficient information at the time of its determination on which to draw a valid picture of what was happening in this sector. The USITC sent out a large number of questionnaires – 110 – to firms and individuals believed to be among the larger growers of lamb, more than it sends out in the course of a typical safeguard investigation. The USITC received usable data from more than half of the recipients, and in particular received usable financial data from 49 growers. This provided the USITC with a more than sufficient basis for drawing conclusions about the condition of the domestic industry. In addition, the USITC obtained more comprehensive data on grower operations compiled by the US Department of Agriculture to the extent such information was available, and received substantial additional information about grower operations from the parties in the investigation and from persons who testified at the public hearing. Finally, the USITC obtained a substantial body of comprehensive data on other industry segments, against which it was able to cross check grower data for purposes of confirming similarities or differences in trends.

159. None of the Australian and New Zealand respondents in the USITC investigation, who had access under administrative protective order to the individual confidential grower questionnaire responses, argued to the USITC that the data were biased or inaccurately portrayed the condition of growers. To the contrary, the New Zealand respondents in the USITC investigation argued that the financial data compiled by the USITC from grower questionnaires *supported* their position, in that they showed that domestic lamb growers "did remarkably well throughout the period of investigation."[190]

160. Australia's suggestion that the USITC should have compelled answers to questionnaires, or obtained a particular response rate or level, has no basis in the Safeguards Agreement.[191] The Agreement sets forth no specific standard of investigative thoroughness. Nor, contrary to Australia's assumptions, does the Agreement require that questionnaire data be scientifically valid in a statistical sense. Rather, it requires that a determination be made "on the basis of objective evidence."[192] Such a standard does not require a competent authority, as Australia suggests, to send repeated waves of questionnaires to additional firms if extensive sampling does not yield universal responses. Such a requirement would unduly prolong a proceeding whose pendency can have distortive trade effects and whose purpose is to address emergency situations.

161. Here the USITC conducted an extensive investigation. Its efforts were reasonably calculated to obtain data that were impartial and as comprehensive as practicable under the circumstances. It

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[189] Australia's First Written Submission at ¶127.
[190] USITC Report at I-17.
[191] Australia's First Written Submission at ¶140.
[192] Safeguards Agreement, Art. 4.2(b).

assured the objectivity of the evidence on which it relied by comparing results for different sources, where available, and evaluating the evidence for any indications of bias. It carefully drew only those inferences that the evidence objectively evaluated would allow and systematically relied on the most comprehensive data available. The Agreement requires no more.

(b) The USITC obtained objective evidence on domestic feeder, feeder/grower, and packer and breaker operations

162. The USITC obtained extensive and sufficient data on domestic feeder operations and these data support the USITC's finding that the domestic industry is threatened with serious injury. Australia's complaint[193] that the USITC report gives no basis for why its compilation of feeder data consists of nine feeders is easily answered: these were the firms that furnished the USITC with data. As explained in the USITC report, the USITC received responses from 18 feeder operations, some of which were also growers.[194]

163. Australia's claim that the USITC data series for feeder operations is deficient because the number of firms furnishing full year and interim year data was different is without merit. Interim data are not directly comparable to full year data, and are most useful for comparing data for the most recent interim (part-year) period with those for the same period in the prior year. Thus, the fact that the number of firms furnishing full year and interim year data was different does not undercut the usefulness of the interim period data. Moreover, the USITC did note in its report that one of the firms that supplied interim 1997 data went out of business in 1998, and that this contributed to the reduction in net sales quantity and value and total expenses for interim 1997.[195]

164. Australia complains that the USITC obtained data from only three grower/feeder operations, and that the USITC did not receive interim 1998 data from these firms that would have been relevant to a threat finding.[196] It is not clear what point Australia is trying to make here. In finding that the domestic industry was threatened with serious injury, the USITC based its decision in part on the deterioration in the condition of the industry during interim 1998. To the extent that the USITC did not have interim 1998 data on grower/feeder operations, it did not rely on such data. Moreover, Australia's complaint here understates the USITC's data collection efforts with respect to grower/feeder operations. As the USITC stated in its report, it received 10 questionnaire responses from firms that reported themselves to be grower/feeder operations. However, the USITC reclassified seven of them as growers because they indicated that they fed only their own lambs.[197] Furthermore, Australia's complaint here only serves to reinforce the fact that the USITC made every reasonable effort to collect data from each type of producer in order to obtain a complete picture of what was happening in the industry and exercised great care in evaluating the evidence it obtained.

165. The USITC obtained extensive and sufficient data on domestic packer, packer/breaker, and breaker operations, and these data support the USITC's finding that the domestic industry is threatened with serious injury. The USITC received data on lamb meat operations from packers, packer/breakers, and a breaker accounting for approximately 76 per cent of domestic lamb meat production.[198] This represented a very substantial share of overall domestic lamb meat packing and processing operations, and provided more than sufficient basis for the USITC to draw conclusions about those operations. Australia's claim[199] that the USITC should have obtained data from additional packing and processing operations assumes that such data were readily available to the

[193] Australia's First Written Submission at ¶¶137-38.
[194] USITC Report at II-13, and II-13 n.46.
[195] USITC Report at II-29.
[196] Australia's First Written Submission at ¶134.
[197] USITC Report at II-29 n.89.
[198] USITC Report at II-24.
[199] Australia's First Written Submission at ¶¶ 140-141.

USITC. As the authority's report indicates, many of the packers and breakers devote only a portion of their overall operations to the processing of lamb[200] and were unable to provide separate data on lamb meat operations.

166. In an industry as complex as the one at issue here, it will always be possible to point to gaps in the evidence an investigation obtains. This is why the Agreement does not mandate perfection in data collection and requires only objectivity. Neither Australia nor New Zealand has articulated any way in which the USITC's investigation transgressed the requirements of the Agreement.

(c) As to factors concerning which it was not practical to obtain objective information, the USITC objectively evaluated the record by placing no weight on those factors

167. The USITC found that it was not practical to collect data on capacity and capacity utilization from lamb growers and feeders. The USITC found that such data were not quantifiable. The USITC found that growers' range capacity would likely have varied from ranch to ranch depending on land conditions, and that feeder capacity also depended on a number of variables that are difficult to measure, including length of time that lambs are kept by the feeders, which may vary with market conditions.[201]

168. Australia notes that "capacity utilization" is one of the factors listed in Article 4.2(a) of the Safeguards Agreement that a competent authority must consider, and claims that the USITC's inability to gather such data violates the Safeguards Agreement.[202] However, Australia overlooks the fact that Article 4.2(a) requires that a competent authority evaluate all relevant factors of an "*objective and quantifiable nature*" (emphasis added) bearing on the situation of the industry. For the reasons stated in the USITC report, the USITC correctly concluded that it was unable to compile data on grower and feeder capacity utilization that would have been "objective and quantifiable" within the meaning of Article 4.2(a).

169. The USITC obtained data on employment from domestic lamb growers and feeders, which showed a modest increase in employment during the most recent period. The USITC also obtained data on personnel costs from packers and breakers. The line item for these data in the packer and breaker financial tables is in the confidential version of the USITC's report; the actual data are business confidential information. However, as a general matter, packers and breakers were unable to provide the USITC with usable data on the number of employees and hours worked because many firms use the same production workers to slaughter and/or process other meat animals and products. Thus, the USITC was able to obtain only limited "objective and quantifiable" data within the meaning of Article 4.2(a) on packer and breaker employment. Thus, contrary to Australia's claim[203], the USITC did obtain and present some employment-related data for lamb packing and processing operations. However, the USITC did not rely on employment data in making its affirmative determination.

170. The Agreement does not require an authority to give weight to each factor enumerated in Article 4.2(a). Rather, it only requires that the factors be evaluated, and then only when they afford objective and quantifiable evidence. The USITC's decision not to place weight on factors for which there were no reliable data was entirely consistent with the Agreement.

171. In summary, despite complainants' lengthy objections, their submissions to this Panel do not demonstrate that the USITC's investigation or determination can be said to have violated the Safeguards Agreement. As previous Panels have held, in making injury findings about industries as a

[200] USITC Report at II-15.
[201] USITC Report at I-20 n.96.
[202] Australia's First Written Submission at ¶225.
[203] Australia's First Written Submission at ¶¶170, 225.

whole, authorities may, but need not, make findings about segments, but in any case must analyze the significance of impacts on industries as a whole.[204]

6. Australia and New Zealand have failed to establish that the US safeguard measure is inconsistent with the requirement of Article 5.1

(a) Introduction

172. Based on a thorough and painstaking investigation, and after hearing from all interested parties, the USITC reached a unanimous determination that a surge in Australian and New Zealand lamb meat imports had left the domestic lamb industry in imminent peril of serious injury. In its findings, the USITC pointed to the variety of ways in which the domestic industry had been damaged under competitive pressure from increased shipments of Australian and New Zealand lamb meat into the US market during 1997-98. While the USITC found that the condition of the US lamb industry had not yet reached the point of significant overall impairment, the USITC plainly expected such impairment to occur very shortly if trends continued.

173. In these circumstances, the United States was entitled under Article XIX of *GATT 1994* and the Safeguards Agreement to modify its GATT tariff concessions to provide a limited period of relief to its lamb industry from import pressure, sufficient to prevent serious injury and facilitate the industry's adjustment to import competition. The relief that the United States provided was carefully and conservatively tailored to that purpose, consistent with the USITC's specific findings regarding the injury that the US lamb industry had experienced.

174. The relief package the United States put in place included a large component of financial assistance, in combination with domestic regulatory measures, aimed at enhancing industry competitiveness. The import element of the relief was limited in nature, designed to generate a modest increase in US lamb meat prices over three years and thus restore a minimal level of profitability to more efficient US lamb producers during that period. The relief sought to accomplish this result by effectively capping lamb imports at their high-water mark and introducing a limited increase in duties below that level, phased down over the three-year period.

175. Taken as a whole, the package represented minimal steps needed to give the US lamb meat producers a short period of breathing room to enhance productivity and regain competitiveness. The import component of the package is fully consistent with Article XIX and the Safeguards Agreement in that it provides a small degree of relief to US lamb meat producers over a limited time sufficient to assist them in responding to the challenge of import competition.

176. Australia and New Zealand nonetheless object to the import aspect of the relief package. While they each advance certain ill-founded criticisms of the remedy the United States applied, they fail to offer any systematic assessment of why it is inappropriate. Rather, the gist of their objections is that the import relief goes too far because it fails to leave the US lamb industry in the deteriorated state in which the USITC found it. That is, susceptible to imminent "serious injury." This is the conclusion to be drawn from Australia's and New Zealand's insistence that because the US lamb industry was merely under "threat" of serious injury the United States was foreclosed under Article 5.1 from applying any relief that might restrain lamb imports to below their highest levels during the 1997-98 surge period.

177. If this restrictive reading of Article 5.1 were to be credited it would undermine the remedial purpose of Article XIX and the Safeguards Agreement, which is to permit Members temporarily to suspend their GATT obligations, or modify their GATT concessions, in order to provide industries

[204] See Korea--Dairy at ¶ 7.58; Mexico -- Anti-dumping Investigation of High Fructose Corn Syrup (HFCS) From the United States, WT/DS132/R, 28 January 2000 at ¶ 7.147.

experiencing or threatened by serious injury, a brief respite from competitive pressure sufficient to assist those industries in regaining competitiveness.

178. Article XIX has long been understood to permit Members to modify their tariff concessions to the degree required to place industries in a position to restore their competitiveness. The 1951 Report of the Working Party on the "Withdrawal by the United States of a Tariff Concession under Article XIX" (Felt Hats) considered the time and extent to which the United States was permitted under Article XIX to suspend tariff concessions and concluded that the original tariff concessions should be wholly or partially restored:

> if and as soon as the United States industry is *in a position to compete with imported supplies* without the support of the higher rates of duty.[205]

179. The well-recognized remedial purpose of Article XIX was made explicit in Article 5.1, first sentence, of the Safeguards Agreement, which provides that safeguards measures may be applied both to prevent or remedy serious injury and to "facilitate adjustment." The articulation of this second purpose for import relief makes clear that Members are not required to limit their safeguard measures to those that merely preserve an industry in a deteriorated state just short of serious injury, but rather may apply import relief that will place the industry in a position to regain its competitiveness.

180. In short, Australia's and New Zealand's reading of Article 5.1 cannot be sustained if Article XIX and the Safeguards Agreement are to provide, as they were intended, an opportunity for Members to provide limited, temporary, but real import relief both for industries already experiencing serious injury and those in imminent peril of such injury.

(b) Article 5.1 does not establish a "least trade restrictive" standard

181. New Zealand grounds its argument under Article 5.1 against the US lamb meat safeguard measure on the premise that the first sentence of that provision required the United States to identify and apply the "least trade restrictive" safeguard measure available to prevent serious injury to the US lamb industry and facilitate its adjustment.

182. New Zealand has mischaracterized the requirement imposed by Article 5.1, first sentence, effectively rewriting the sentence to require Members to identify and apply the hypothetical single least trade restrictive safeguard measure conceivable.[206] That is a virtually impossible standard and is at variance with the straightforward manner in which Article 5.1, first sentence has been interpreted to date.

183. Article 5.1, first sentence, provides:

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[205] GATT/CP/106, report adopted on 22 October 1951, GATT/CP.6/SR.19, Sales No. GATT/1951-3, at 26, ¶ 38 (emphasis added).

[206] New Zealand also mischaracterizes past GATT jurisprudence and the Appellate Body report in *Gasoline*, which do not in fact refer to any "least trade restrictive" test. New Zealand is also in error in claiming that the term "necessary" wherever it appears in the WTO Agreement has some uniform meaning allegedly derived from the particular context of Article XX of the GATT 1994, an affirmative exception. Nor does New Zealand explain how its approach, which imputes to the term "necessary" a series of conditions not found in the text, can be reconciled with the fact that when the drafters of the WTO Agreement wished to adopt a "no more trade restrictive" test, they did so explicitly in the text. See e.g., Art. 5.6 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*.

> A Member shall apply safeguard measures only to the extent necessary to prevent or remedy the serious injury and to facilitate adjustment.

New Zealand reads this sentence as requiring the United States to ensure that its lamb meat safeguard measure is "necessary" to prevent or remedy the serious injury and to facilitate adjustment. The sentence does not say that the specific safeguard measure chosen must be "necessary", however. Rather the sentence says that a Member "shall *apply*" safeguard measures "only to the *extent* necessary".

184. The expression "only to the extent" in Article 5.1, first sentence, is plainly linked to the words "shall apply". Thus, Members "shall apply" safeguard measures only to a certain "extent". The term "necessary" modifies the word "extent", meaning that the "extent" of application of the measure must be "necessary". Taken as a whole, the sentence says that safeguard measures may be applied only to the degree required to prevent or remedy serious injury and facilitate adjustment.

185. By contrast, New Zealand's reading effectively rewrites the expression "apply safeguard measures only to the extent necessary" in Article 5.1, first sentence, to read "apply those safeguard measures that are necessary". New Zealand's construction ignores the fact that the word "extent" means "amount" or "degree" rather than "if" or "when".

186. Read in its context, Article 5.1, first sentence, addresses the degree to which measures may be applied to accomplish the objectives set out in that sentence; it cannot be read to mean that such measures must be justified as "necessary," much less "least trade restrictive". Article 5.1 expands on language in Article XIX:1(a) of *GATT 1994*, which permits a contracting party to suspend GATT obligations and modify its GATT commitments in response to increased imports of a particular product that are causing, or threatening to cause, serious injury to a contracting party's industry.

187. The relevant language of Article XIX:1(a) states that in such circumstances the contracting party:

> shall be free in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

188. In this passage, the term "necessary" plainly modifies the expression "to the extent", as it does in Article 5.1, first sentence. Moreover, the entire expression "to the extent . . . necessary" is linked to the phrase "to suspend the obligation . . . or modify the concession". The plain meaning of this passage is that a contracting party may depart from its GATT commitments and obligations to the degree (and for the time) required to prevent or remedy the injury. Although it too includes the term "necessary," the passage cannot be read as requiring a contracting party to adopt any particular measure, let alone a hypothetical single least trade restrictive alternative.

189. Article 5.1, first sentence, should be read along with the rest of Article 5 to amplify the relevant provisions of Article XIX:1(a), not to depart from them. Such a reading would be consistent with a principal object and purpose of the Safeguards Agreement, as articulated in its preamble, which is to clarify and reinforce the disciplines of Article XIX. The sentence should not be interpreted in such a restrictive fashion that it defeats the objective of Article XIX, which is to provide a meaningful opportunity for contracting parties (now Members) to provide to industries under siege from increased imports a meaningful opportunity to regain their competitiveness.

190. New Zealand suggests that the panel in the *Korea--Dairy* case accepted a "least trade restrictive" standard as the relevant test for interpreting a Member's compliance with Article 5.1. In fact, the panel stated that a Member seeking to comply with Article 5.1 ". . . must apply a measure

which in its totality is no more restrictive than is necessary to prevent or remedy the serious injury and facilitate adjustment." The panel did not refer to, or establish, a "least trade restrictive" test.[207] Rather, it said that the measure the Member selects should be examined as a whole to determine whether it is more restrictive than necessary to achieve its purpose. The Appellate Body affirmed that reading.[208]

191. As the Appellate Body has stated, Article 5.1 imposes an obligation on a Member to ensure that its safeguard measure "is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment."[209] Thus, Article 5.1 does not require a Member to select any particular measure, let alone identify and apply the "least trade restrictive" one. Rather, it says that the measure the Member does select should be designed to accomplish the twin goals of preventing or remedying serious injury and facilitating adjustment and should not go further than required to meet those objectives.

192. New Zealand has not demonstrated why the US lamb meat safeguard fails this test. New Zealand's principal argument is to point to the remedy that three of six USITC commissioners recommended, suggest that it represented a less trade restrictive alternative, and thereby conclude that the United States did not apply the "least trade restrictive" available safeguard measure. As noted above, however, Article 5.1, first sentence, did not compel the United States to adopt the "least trade restrictive" alternative. Article 5.1, first sentence, does not limit Members to a single choice, or set of choices, of safeguard measures.

193. New Zealand seeks to bolster its conclusion that the US lamb TRQ is not the least trade restrictive alternative by misreading the USITC report. New Zealand claims the USITC found that:

> the level of imports that existed during the period of investigation was not injurious. Rather, the threat the USITC identified came from potential future increases.

Based on this reading of the USITC report, New Zealand claims that the United States was foreclosed under Article 5.1, first sentence, from imposing a remedy that restricted lamb meat imports to levels below those during the period of investigation.

194. New Zealand is wrong. The USITC found that during 1997-98 increased lamb meat imports had caused considerable injury to the US lamb industry. The USITC report demonstrates very specifically both the debilitated condition of the industry and the link between that injury and import levels during 1997-98.[210]

195. While the USITC made no finding about whether the industry had reached the point of significant overall impairment – *i.e.*, "serious injury" -- the USITC did find that such injury was "imminent." It is plain that at least three of the six USITC commissioners rejected New Zealand's premise that the US industry would lapse into "serious injury" only if import levels exceeded those of 1998. Commissioners Miller and Hillman stated that:

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[207] If the framers of the Safeguards Agreement had intended to depart from Article XIX and impose a "least trade restrictive" test in Article 5.1, they would have included one explicitly. New Zealand's attempt to read words into Article 5.1 that are not there violates the fundamental rule of treaty interpretation that a treaty interpreter must "read and interpret the words actually used by the agreement under examination, and not words which the interpreter may feel should have been used." *European Communities - Measures Affecting Meat and Meat Products (Hormones)*, WT/DS26/AB/R, Report of the Appellate Body adopted 13 February 1998, at ¶ 181.

[208] Report of the Appellate Body, *Korea -- Dairy*, at ¶ 103.

[209] Report of the Appellate Body, *Korea -- Dairy*, at ¶ 96.

[210] USITC Report at I-18-21, I-23-26.

> It is our view that the industry would experience serious injury caused by imports if import levels and prices continue at now-existing levels, even if no further price declines occur.[211]

196. Commissioner Koplan found, similarly, that a remedy set at existing import levels "would not stave off the threatened serious injury, much less provide the industry with the opportunity to make a positive adjustment to prepare for the import competition."[212]

197. In summary, the USITC found that the US lamb meat industry was *already* in a deteriorated condition due to competition from imports at 1997-98 volumes and prices. There was every reason to believe that the industry was imminently susceptible of decline into "serious injury" even if imports were held to then-existing levels. It was thus entirely appropriate for the United States to apply a safeguard measure that would guard against that possibility.

198. Moreover, New Zealand's argument ignores the second purpose for safeguard measures stated in the first sentence of Article 5.1 -- namely, to allow a Member to apply safeguard measures to the extent required to facilitate the industry's adjustment to import competition. Under New Zealand's theory, a Member could impose safeguard measures sufficient only to preserve an industry in the same threatened condition its competent authority had found it in, with the result that on lifting the safeguard measure it would immediately be vulnerable to serious injury. That would increase the likelihood that the industry would, as soon as permissible, again seek import relief, leading to repeated impositions of safeguard measures, contrary to the purpose of the Agreement. Article 5.1, first sentence, makes clear that safeguard measures may be applied to the extent necessary to facilitate adjustment, an objective that would be frustrated by a reading of Article 5.1 that required a Member to do no more than keep its industry in a continuing state of distress.

199. Finally, New Zealand's specific argument that the US safeguard measure was not "necessary" to facilitate the industry's adjustment is baseless. New Zealand objects (at ¶ 7.107) that the US safeguard measure failed to include adjustment assistance and thus could not be "necessary" to promote industry adjustment. In fact, a principal element of the relief that the United States provided to the lamb meat industry was a package of adjustment assistance measures, as discussed below. New Zealand's further claim (at ¶ 7.108) that the US measure was incapable of facilitating adjustment because it would lower consumer demand for lamb meat ignores the fact that the USITC found the demand for lamb meat to be relatively inelastic, so that price changes would have little effect on demand.[213] In any event, as explained above, New Zealand's claim that the United States must demonstrate that its safeguard measure was "necessary" is based on a misinterpretation of Article 5.1, first sentence, and should be rejected.

(c) Australia has failed to establish a *prima facie* case of non-compliance with Article 5.1

200. Unlike New Zealand, Australia does not characterize Article 5.1, first sentence, as imposing a "least trade restrictive" remedy standard. Rather, Australia suggests that the US safeguard measure was excessive because, in Australia's view, it is more restrictive than the remedy three of the USITC commissioners recommended. Both the remedy recommended by the USITC plurality, and the measure ultimately adopted, take the form of a tariff-rate quota (TRQ). Australia objects to the fact that the US safeguard measure includes an "in-quota" tariff and a higher out-of-quota tariff than the plurality recommended.[214] In Australia's view, these differences mean the US safeguard measure

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[211] USITC Report at I-40.
[212] USITC Report at I-49.
[213] USITC Report at II-70.
[214] New Zealand makes a similar argument (at ¶ 7.102).

went beyond the extent "necessary" to prevent or remedy the serious injury and facilitate adjustment, and therefore the measure contravenes Article 5.1.

201. The initial flaw with Australia's theory is that its analysis is overly simplistic. Australia fails to note that the plurality recommendation, if implemented, would have imposed a four-year safeguard. By contrast, the lamb meat TRQ that the United States actually applied will terminate in three years and a day. In this sense, the US measure is clearly *less* restrictive, taken as a whole, than the remedy the plurality recommended.

202. Australia's citation of the difference in over-quota rates is a second example of the flaws in its reasoning. It is true that the USITC plurality recommended over-quota duty rates that were lower than those included in the US safeguard measure. However, contrary to Australia's assertion there is no difference in the trade restrictive effect of a 20 per cent *ad valorem* duty rate, which the USITC plurality recommended for the first year of the safeguard, and the 40 per cent *ad valorem* rate that the United States actually applied. Both the USITC plurality recommendation and the US safeguard set the quota at 1998 import levels. At those levels, the 20 per cent rate proposed by the USITC plurality was designed to be trade-preclusive[215], as was the 40 per cent rate included in the US measure. In fact, the only real difference between the plurality recommendation and the US measure in terms of the effect of out-of-quota duty rates is that under USITC recommendation the annual drop in duty rates, particularly in years three and four, provided for the possibility of limited imports beyond 1998 levels during those years.

203. Australia's additional argument that there was "no conceivable basis" for applying a tariff to in-quota imports is mistaken as well. The sole rationale for Australia's claim is that because the USITC unanimously found that the level of imports during 1997-1998 resulted in a threat of serious injury, and not present serious injury, applying an in-quota tariff went "well beyond" what was "necessary" to prevent serious injury. That is wrong.

204. The purpose of the in-quota tariff is modestly to increase prices for lamb meat in the United States and thereby generate additional revenue for the US lamb meat industry. The USITC threat of serious injury determination identified low prices as one of the principal reasons for the US industry's poor financial health.[216] It was perfectly appropriate for the United States to structure its measure in a manner that provides relief from low prices, thus making it possible for the industry to return to profitability. That objective is consistent with facilitating the industry's adjustment, as contemplated by Article 5.1, particularly in a case in which the US competent authority had found that the industry's financial performance had worsened largely due to falling prices[217] and that, as a result, firms in the industry had experienced difficulty in generating adequate capital to finance modernization of their domestic plants and equipment.[218]

205. The remainder of Australia's Article 5.1 complaints (at ¶¶ 75-80) are directed at the USITC plurality recommendation, rather than at the US measure itself. Inasmuch as the United States did not apply the plurality's suggested remedy, Australia's arguments are not legally germane in this proceeding and need not be addressed further.

206. At this point, the United States would like to turn to a broader criticism of Australia's position, a criticism that is relevant to New Zealand as well. Australia and New Zealand both rest much of their Article 5.1 arguments on the claim that the so-called "USITC recommended measure" was "less restrictive" than the actual US lamb meat safeguard. Their argument ignores, however, that the USITC actually issued three recommendations, not one. Under US law, the plurality

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[215] *See* USITC Report at I-34, I-37.
[216] USITC Report at I-23-24.
[217] USITC Report at I-20.
[218] USITC Report at I-21.

recommendation is deemed to be the USITC "remedy finding," but the President is not required to give it any greater weight than recommendations presented by commissioners, much less adopt it.

207. Moreover, the Safeguards Agreement placed the United States under no obligation to consider, or accord any weight to, the USITC plurality remedy recommendation (or any other proposed or hypothetical remedy recommendation). The Agreement does not seek to dictate the terms of a Member's remedy selection process. Article 5 is silent on the procedures that a Member may employ in choosing a remedy. Instead, it imposes disciplines on the end result of that process, the safeguard measure itself. Accordingly, Australia's and New Zealand's reliance on the USITC plurality recommendation as the touchstone for applying Article 5.1 is misplaced.

208. Six USITC Commissioners participated in the investigation and unanimously agreed that lamb meat was being imported in such increased quantities as to be a substantial cause of the threat of serious injury to the domestic industry. They all examined the same record of the investigation and yet recommended three different remedies. Three Commissioners recommended a tariff-rate quota – the form of remedy the United States ultimately employed. Two recommended a straight tariff. One recommended a quantitative restriction. Each advanced reasons that their recommendation was the minimum necessary for purposes of preventing serious injury and facilitating adjustment.

209. This difference of opinion illustrates that there may be a range of remedies from which to choose in any given case depending on how the deciding body weighs the evidence of injury or threat and considers how it can best be addressed. Members should not be held to root out and apply a single, optimum, or "least trade restrictive" remedy. Rather, in imposing a safeguard measure Members must ensure that the measure imposed – whatever form it takes – is appropriate for the purpose of preventing or remedying the serious injury and facilitating adjustment and is not applied beyond the time and extent necessary to accomplish those objectives. Australia and New Zealand have not established a *prima facie* case that the US lamb meat safeguard measure fails that test.

(d) The lamb meat safeguard measure the United States applied was consistent with the objectives of Article 5.1

210. The various complaints that New Zealand and Australia have lodged against the US safeguard measure do not substitute for a systematic examination of its nature, the context in which it was applied, and the degree to which it meets or exceeds the objectives mentioned in Article 5.1, first sentence. In the view of the United States, in order to decide whether the lamb meat safeguard measure is being applied to an extent inconsistent with Article 5.1, it would be necessary to undertake a multi-step inquiry, along the lines of the following:

(1) a review of the evidence of threat of serious injury that the USITC identified;

(2) an examination of the nature of the safeguard measure the United States imposed, including its product coverage, form, duration, and level;

(3) an analysis of how the measure both addresses the evidence of threat of serious injury the USITC identified and facilitates industry adjustment; and

(4) in light of the foregoing, an assessment of whether the measure, in its totality, is more restrictive than required both to prevent serious injury from occurring and to assist the industry in adjusting to import competition.

211. In their First Submissions, neither Australia nor New Zealand suggests any systematic analysis of this sort, much less demonstrates why such an analysis shows that the US lamb meat safeguard measure does not withstand scrutiny under Article 5.1.

212. While the United States is not required to defend its safeguard measure in the absence of a showing of *prima facie* inconsistency with Article 5.1, it is prepared for purposes of completing the factual record in the case to describe the basis on which it designed that measure and why the measure is appropriate in light of the objectives of that article. That discussion follows.

(i) Injury and threat indicators identified by the USITC

213. As discussed in depth above, the USITC identified a range of indices demonstrating that the condition of the US lamb industry had deteriorated significantly during 1997-98 as a result of increased lamb meat imports and suggesting that the industry was in imminent danger of declining still further into "serious injury." These indicators included the US industry's declining market share, drops in domestic production and shipments, declining industry profitability, and falling prices.[219] The USITC also found that the industry was encountering difficulties in generating adequate capital to finance modernization. The US safeguard measure was designed to address and ameliorate these difficulties, working in tandem with a financial assistance package and regulatory measures provided by the federal government.

(ii) Description of the US measure

214. The US measure was structured as a TRQ with a duration of three years and one day, and was accompanied by a sizeable industry assistance package. The nature of the TRQ is as follows:

> In the first year, a 9 per cent *ad valorem* tariff on imports up to 31,851,151 kilograms and a 40 per cent *ad valorem* tariff on imports in excess of that level;
>
> In the second year, a 6 per cent *ad valorem* tariff on imports up to 32,708,493 kilograms and a 32 per cent *ad valorem* tariff on imports in excess of that level; and
>
> In the third year, a 3 per cent *ad valorem* tariff on imports up to 33,565,835 kilograms and a 24 per cent *ad valorem* tariff on imports in excess of that level.

215. In addition, at their request, the TRQ provides separate quota allocations for Australia and New Zealand. Those allocations guarantee Australia and New Zealand approximately 99 per cent of the total imports under the TRQ.

(iii) The measure addresses the threat and injury identified by the USITC

216. The United States designed the measure so that it would address the specific financial and commercial difficulties that the USITC had identified as demonstrating that the US industry was threatened with serious injury, and then used an economic model to test various combinations of in-quota and out-of-quota tariffs in order to find the combination of variables that would address the injury without going beyond the extent necessary.[220]

217. The "in-quota" tariff component of the TRQ was meant to address the low prices and consequent declining profitability that the USITC had identified as a principal source of the threatened serious injury.[221] The economic model predicted that the in-quota tariff included in the

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[219] USITC Report at I-18-21.

[220] The model is a simple partial equilibrium model that measures the impact of implementing various types of remedies. The model shows the change to US sales, by quantity and value, given the implementation of the TRQ. The model is a supply and demand model that assumes that domestic and imported products are less than perfect substitutes. Such models, also known as Armington models, are relatively standard in applied trade policy analysis.

[221] *See* USITC Report at I-19-20.

safeguard measure would generate a modest price increase. At a level of 9 per cent *ad valorem* in the first year of the safeguard measure, the in-quota tariff was estimated to generate an increase in domestic product prices of 0.8 to 3.4 per cent.

218. The purpose of the out-of-quota tariff component of the TRQ was to address the increased imports themselves. The USITC investigation had concluded that the increased imports had directly captured market share from the domestic producers and were likely to have a negative impact on the industry's shipments, prices, and financial performance.[222] Three of the six Commissioners explicitly found that the US industry would suffer serious injury if imports and prices remained at 1998 levels, even if there were no further price declines.[223] The out-of-quota tariff ensured that imports could not exceed their 1998 level (the highest level imports had previously attained) in the first year of relief, and provided a measure of stability and predictability to the domestic industry with respect to the maximum amount of import competition over the second and third years as well.[224]

219. Based on a 9 per cent *ad valorem* in-quota tariff and a 40 per cent *ad valorem* out-of-quota tariff, the economic model suggested that the TRQ would generate a 4.4 to 11.9 per cent decline in total imports from 1998 levels in the first year of the remedy. The model estimated that, as a result, the domestic industry would be able to recapture a portion of its lost market share, and that domestic shipments would increase by 0.2 to 2.2 per cent. The combination of higher prices and higher US shipment volumes was expected to lead to a 1.2 to 5.2 per cent rise in US industry revenues, thereby modestly improving the industry's financial health. Greater US industry profitability, in turn, would assist the industry in generating new capital and in increasing its ability to borrow, modernize and adjust successfully to the changed conditions of trade.

220. As the foregoing suggests, the TRQ was structured to provide a minimal degree of relief to US lamb meat producers over a short period, sufficient to assist them in responding to the challenge of import competition without unduly restricting imports. In its first year, the TRQ was designed to leave lamb meat imports at levels higher than in any year but 1998. Import levels could be expected to increase in years two and three of the measure as the in-quota tariff rates decline and quota levels increase. In addition, by making the in-quota tariff rates degressive, the United States also ensured that the modest price increases in the first year of the measure would decline in years two and three.

221. Furthermore, while the six USITC Commissioners recommended leaving import relief in place for four years[225], the President proclaimed the TRQ for only three years and a day, thereby limiting the effect of the safeguard measure on Australian and New Zealand producers. In addition, the United States has implemented the TRQ through an export permit system. The United States took this approach at the request of Australia and New Zealand, who sought to ensure the orderly marketing export and marketing their producers' lamb meat products in the United States.

222. In addition, again at New Zealand's and Australia's request, the United States agreed to delay implementation of the measure so that it would not apply to lamb meat shipments then in transit to the United States. As originally proclaimed, the TRQ applied to lamb meat *entering* the United States on or after 22 July 1999. At the request of Australia and New Zealand, the President issued a modified proclamation changing the application of the TRQ to lamb meat *exported* on or after 22 July 1999. The effect of this change was to allow in excess of 1.5 million extra pounds of Australian and

[222] USITC Report at I-24.

[223] USITC Report at I-40, I-49.

[224] As discussed above, Commissioners Miller and Hillman believed that the domestic industry "would experience serious injury caused by imports if import levels and prices continue at now-existing levels, even if no further price declines occur." USITC Report at I-40. Commission Koplan found, similarly, that a remedy set at existing import levels "would not stave off the threatened serious injury, much less provide the industry with the opportunity to make a positive adjustment to prepare for the import competition." *Id*. at I-49.

[225] *See* USITC Report at I-29, I-39, I-47.

New Zealand lamb meat to enter the United States without being subject to the TRQ, thereby reducing further the effect of the measure on Australian and New Zealand producers.

223. Finally, the United States accompanied the safeguard measure with a substantial programme of federal financial and regulatory assistance, which was intended to facilitate the US industry's adjustment by providing up to $100 million to assist with market promotion; product and production improvements; basic sheep research; a scrapie eradication programme; and a lamb surplus removal programme. Half of the $100 million is being made available to the industry in the first year. By providing a substantial assistance package, the United States sought to minimize the import component of the relief to the degree possible.

224. In sum, the US measure was specifically tailored to address the factors that the USITC had identified as responsible for the threat of injury to the US industry and was carefully structured to assist the industry in its adjustment efforts over a relatively short period without restricting lamb meat imports during that time.

7. Australia and New Zealand have failed to establish that the US safeguard measure is inconsistent with the requirements of Article 3.1

225. Both Australia and New Zealand claim that the United States was obliged, under Article 3.1, to have published a report specifying the reasons that it imposed the safeguard measure that it did.[226] That claim is unfounded.

226. Article 3.1 of the Safeguards Agreement establishes procedures that a competent authority must observe when conducting an investigation to determine whether grounds exist to apply a safeguards measure. The third sentence of Article 3.1 states that "[t]he competent authorities shall publish a report setting forth their findings and reasoned conclusions on all pertinent issues of law and fact." New Zealand and Australia assert that by failing to publish the reasons for its safeguard measure, the United States has failed to meet this requirement.

227. In the *Korea–Dairy* case, the European Commission attempted to read such a reporting requirement into the Safeguards Agreement, based on a more plausible provision than New Zealand and Australia advance in this proceeding. The EC argued that Article 5.1, the provision of the Safeguards Agreement that specifically governs the application of safeguard measures, required Korea to justify its dairy safeguard measure in advance of the panel proceeding. The panel agreed, concluding that Members:

> are required, in their recommendations or determinations on the application of a safeguard measure, to explain how they considered the facts before them and why they concluded, at the time of the decision, that the measure to be applied was necessary to remedy the serious injury and facilitate the adjustment of the industry.[227]

228. On appeal, the Appellate Body reversed the panel's determination, explaining that "we do not see anything in Article 5.1 that establishes such an obligation for a safeguard measure *other* than a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years."[228]

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[226] Australia's First Written Submission at ¶ 67; New Zealand's First Written Submission at ¶ 7.110. Article 3.1 of the Safeguards Agreement states that the competent authorities conducting a safeguards *investigation* "shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law."

[227] Report of the Appellate Body, *Korea–Dairy*, at ¶ 100, *citing Korea–Dairy* at ¶ 7.109.

[228] Report of the Appellate Body, *Korea–Dairy*, at ¶ 99.

229. The lamb meat safeguard measure does not impose a quantitative restriction. Therefore, in line with the clear precedent of the Appellate Body, the United States was under no obligation under Article 5.1 to provide any justification for it.

230. Australia and New Zealand suggest that even if such a requirement cannot be found in Article 5 – which deals explicitly with safeguard remedies – it should be read into Article 3, which plainly does not. As an initial matter, the fact that Article 5.1 requires a justification for certain quantitative restrictions, but not for other safeguard measures, suggests that the Safeguards Agreement requires no justification for the latter. This is what the Appellate Body found in *Korea - Dairy*, and thus should lay to rest New Zealand's and Australia's claims to the contrary.

231. However, Article 3.1, even if read in isolation from Article 5, does not establish a requirement for a Member to provide findings and conclusions on the remedy it selected. Article 3 is entitled "Investigation." It governs the procedures that apply when a competent authority examines whether there are grounds for imposing a safeguard measure. It does not establish a requirement that a Member conduct a remedy investigation and publish "findings and reasoned conclusions on all pertinent issues of fact and law" for the remedy decision it ultimately reached.

232. In the first place, there is no reason that a Member's decision regarding whether to apply a safeguard and, if so, the nature and extent of such a measure, would necessarily be founded exclusively, or even primarily, on "issues of fact and law". Unlike a determination of serious injury or threat of serious injury, which under the Safeguards Agreement must be based on specific legal and factual determinations, the decision-making process for selecting a safeguard measure is not subject to disciplines governed by that Agreement.

233. While the ultimate measure a Member selects must conform to Article 5, for example, the process of selecting that measure -- or deciding whether to impose any measure at all -- is likely to be subject to a range of considerations. These may include, for example, arguments advanced by other Members, such as those Australia and New Zealand communicated to the United States regarding the advisability and structure of a possible safeguard measure while the remedy issue was pending before the President. Article 3.1 cannot be read to require a Member to publish its findings and reasoned conclusions on such matters.

234. Article 3.1 does specify that a competent authority must hear "views" on whether or not application of a safeguard measure would be "in the public interest". But this solely requires the competent authority to hear from interested parties on whether recourse to a safeguard measure would be appropriate. It does not establish a requirement to explain why the deciding authority reached the ultimate decision it did.

235. Indeed, nothing in the Safeguards Agreement suggests that the competent authority is required to have any role in selecting, applying, or explaining safeguard measures. References in the Agreement to the application of safeguard measures, for example in Articles 1, 5, 6, 7, and 8, refer to measures applied by "a Member" – not by a competent authority. These provisions do not condition application of a safeguard measure on any written explanation by the competent authority regarding the remedy selected. Appropriately, the "justification" referred to Article 5.1, second sentence, avoids any mention of the body that must provide it.

236. It is also worth noting that Article 3.1, on which New Zealand and Australia rely, requires competent authorities to publish reports containing "*their* findings and reasoned conclusions on all pertinent issues of fact and law." In countries like the United States that assign no role to their competent authorities in choosing or applying a safeguard remedy, they cannot be expected to have made their own findings and conclusions regarding the remedy their governments ultimately impose.

237. Finally, Article 4, which sets out the injury and causation factors a competent authority must consider in the course of its investigation, contains the following requirement, set out in paragraph 2(c):

> The competent authorities shall publish promptly, *in accordance with the provisions of Article 3,* a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.[229]

238. This explicit tie between the publication requirements in Articles 3 and 4 contrast sharply with the language of Article 5, which contains no such requirement. The absence of such a requirement in Article 5, together with its own, limited, requirement for a Member to justify certain quantitative safeguard measures, demonstrates that the United States was under no obligation to publish a report specifying the reasons that it imposed the safeguard measure that it did.

239. In sum, nothing in Article 3.1 compelled the USITC, or any other body in the United States, to provide an advance written justification for its lamb meat safeguard measure.

8. The United States properly excluded imports from developing countries, Canada, Mexico, and Israel from the safeguard measure

240. Australia and New Zealand complain that the United States has failed to include under the safeguard measure imports from beneficiary countries under the Caribbean Basin Economic Recovery Act (CBERA)[230] and the Andean Trade Preference Act (ATPA)[231], and well as from Mexico, Canada, and Israel. New Zealand and Australia stake their arguments on incorrect premises that Article 2.2 and Article I of *GATT 1994* required the United States to include these imports in the TRQ.

(a) CBERA and ATPA imports

241. New Zealand and Australia correctly observe that the US lamb meat TRQ excludes imports from the CBERA and ATPA beneficiary countries. These exclusions are entirely consistent with, and indeed are compelled by, Article 9.1 of the Safeguards Agreement, which addresses the application of safeguard measures to imports of developing country Members. Specifically, Article 9.1 provides that:

> Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for no more than 9 per cent of total imports of the product concerned.

242. This means the United States was required to exclude from its lamb meat safeguard measure imports from developing country Members whose import market shares were 3 per cent or below, and provided that their combined import shares did not exceed 9 per cent.

243. Each of the CBERA and ATPA beneficiary countries is a developing country Member.[232] Combined US lamb meat imports from all developing country Members during the period 1996-98 averaged well under 9 per cent of imports.[233]

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[229] Safeguards Agreement, Art. 4.2(c) (emphasis added).
[230] 19 U.S.C. 2701-2707.
[231] 19 U.S.C. 3201-3206.
[232] The CBERA beneficiary countries are Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Costa Rica, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Montserrat, Netherlands Antilles, Nicaragua, Panama, St. Kitts and Nevis, Saint Lucia, Saint Vincent

244. Lamb meat imports from the CBERA and ATPA countries, in particular, during the last three years of the period of investigation, 1996-98, were *zero*.[234] Consequently, pursuant to Article 9.1, the United States was required to exclude CBERA and ATPA imports -- to the extent there might be any -- from its lamb meat TRQ. Moreover, the United States would have been justified in excluding these imports from its safeguard measure even if the USITC had based its affirmative threat of serious injury determination on imports from all sources, as New Zealand and Australia claim. New Zealand concedes this point at footnote 188 of its First Submission.

245. However, Australia's and New Zealand's argument that the USITC based its determination on all imports is simply wrong. The USITC stated explicitly that its:

> findings and recommendations in this case do not apply to Israel or to the Caribbean Basin and Andean countries. There were no reported importations of lamb meat from any of these countries during the period of investigation, based on a review of data compiled by the US Department of Commerce. None of these countries are known to be significant producers or exporters of lamb meat.[235]

246. Given these facts, and the specific requirement of Article 9.1, Australia and New Zealand have no grounds for objecting to the exclusion of CBERA or ATPA imports from the US safeguard measure.[236]

(b) Canada, Mexico, and Israel

247. The United States was also fully justified in excluding from the lamb meat TRQ imports from Canada, Mexico, and Israel.

248. As Australia and New Zealand note, Article 2.2 of the Safeguards Agreement establishes a general rule that "[a] safeguard measure shall be applied to a product being imported irrespective of its source." Article 2.2 does not, however, specifically address the application of safeguard measures by the members of customs unions and free trade agreements (FTAs) to imports from other countries participating in the union or FTA.

249. Specific provisions addressing these issues are found in footnote 1 of the Safeguards Agreement, appended to Article 2.1. The last sentence of footnote 1 states that "Nothing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994."

250. This language makes allowance for members of a free trade agreement established in conformity with Article XXIV of *GATT 1994* to exclude from their safeguard measures imports of

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and the Grenadines, Trinidad and Tobago, and the British Virgin Islands. The ATPA beneficiary countries are Bolivia, Colombia, Ecuador, and Peru.

[233] *See* USITC Report at II-19.

[234] *See* US Exhibit 17.

[235] USITC Report at I-34 n.170.

[236] In addition, given that such favorable treatment is required by Article 9.1 of the Safeguards Agreement, New Zealand's argument that the measure violates Article I of the *GATT 1994* is misguided. *See* New Zealand First Written Submission at ¶ 7.114. General Interpretative Note to Annex1A to the Marrakesh Agreement Establishing the WTO provides that, in the event of a conflict between provisions of the GATT and a provision of another agreement in Annex 1A (including the Safeguards Agreement), the provision of that other agreement shall prevail. There is a clear conflict between a provision in the Safeguards Agreement requiring the United States to favor developing countries under specified circumstances and the provision requiring most-favoured-nation treatment in GATT Article I. Accordingly, the General Interpretative Note mandates that the particular provision of the Safeguards Agreement – i.e., Article 9.1 – shall prevail.

products from their FTA partners. The United States has concluded Article XXIV-consistent FTAs with Canada and Mexico pursuant to the *North American Free Trade Agreement*, and Israel pursuant to the *United States - Israel Free Trade Area Agreement*, and notified them both to the GATT.[237]

251. The United States does not understand either Australia or New Zealand to suggest that Article 2.2 (or GATT Article I) precludes participants in a free trade area from excluding each other's imports from the application of their safeguard measures. This must be so, as Australia and New Zealand exclude *each other's* imports from their own safeguards measures under the Australia New Zealand Closer Economic Relations Agreement (ANZCERTA). Indeed, Australia has stated:

> Article XIX of GATT 1994 and the Agreement on Safeguards do not provide the basis for action on imports into Australia covered by the Australia New Zealand Closer Economic Relations Trade Agreement (CER).[238]

252. New Zealand has made similar statements as well.[239] The United States is attaching copies of Australia's and New Zealand's statements on this issue to the WTO Safeguards Committee for the Panel's reference.

253. Thus, Australia and New Zealand must instead be arguing that the United States erred in excluding Israeli, Mexican, and Canadian lamb meat imports from the TRQ because the USITC based its threat of serious injury determination on all imports, including Israeli, Mexican, and Canadian lamb meat imports.

254. This argument is based on a faulty premise. The USITC did not base its threat of serious injury determination on Israeli, Mexican, or Canadian imports. As noted above, the USITC report states plainly that its findings and recommendations do not apply to Israel.

255. There were no lamb meat imports from Mexico the last three years of the investigatory period.[240] Thus, there is no basis for suggesting that imports from Mexico played any significant role in the USITC's determination.[241]

256. Finally, Canadian imports during the 1996-98 period were negligible, reaching a high-water mark of 0.3 per cent of total imports in 1997. Imports at that level could not, and did not, account for the threat of serious injury that the USITC found. Indeed, the USITC stated this quite explicitly:

> We find that imports of lamb meat from Canada . . . are not contributing importantly to the threat of serious injury. Imports from Canada accounted for less than 1 per cent of total lamb meat imports in each year of the period of investigation. At their

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[237] *See* North American Free Trade Agreement, L/7176/Add. 1 (1 February 1993); Israel-United States Free Trade Agreement, L/5862 (13 September 1985).

[238] Replies to Questions Posed by Japan Concerning the Notification Provided by Australia of Laws and Regulations under Article 12.6 of Agreement, G/SG/W/141, at 3 (12 March 1996). Attached hereto as US Exhibit 18.

[239] Replies to Questions Posed by Canada, the European Community, Korea and The United States to New Zealand Concerning the Latter's Notification of Laws and Regulations under Article 12.6 of the Agreement, G/SG/W/175, at 4 (5 June 1996) (stating that ANZCERTA does not permit Australia and New Zealand to take safeguard action against each other's imports). Attached hereto as US Exhibit 19.

[240] See US Exhibit 17. The United States imported Mexican lamb meat during only one year of the investigatory period, 1995. In that year, Mexico's import market share was less than one per cent. USITC Report at I-27, II-18 n.73.

[241] Indeed, the USITC specifically found that Mexican lamb meat did not contribute importantly to the threat of serious injury. USITC Report at I-27.

> highest level of the period of investigation, 209,000 pounds, in 1997, imports from Canada accounted for only 0.3 per cent of total US lamb meat imports.[242]

257. Thus, Australia and New Zealand are simply wrong in claiming that Canadian lamb meat imports figured in the USITC's threat of serious injury determination. Accordingly, New Zealand and Australia cannot stake an argument against the exclusion from the TRQ of Canadian lamb meat imports on the ground that the USITC based its determination in whole or part on those imports. It did not.[243]

258. In summary, the United States was fully justified by virtue of footnote 1 and Article XXIV of *GATT 1994* in excluding Canadian, Mexican, and Israeli lamb imports from its safeguard remedy.

9. The United States satisfied its obligations under Articles 8 and 12

(a) The United States has satisfied its obligations under Article 8

259. Australia, unaccompanied by New Zealand, suggests that the United States ran afoul of Article 8.1 of the Safeguards Agreement, purportedly by failing to offer Australia trade concessions substantially equivalent to those withdrawn by the US safeguard measure. Australia's argument is based on a misreading of Article 8 and should be rejected.

260. Article 8 provides as follows:

> 1. A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT1994 between it and the exporting Members which would be affected by such a measure, in accordance with the provisions of paragraph 3 of Article.[244] To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade.
>
> 2. If no agreement is reached within 30 days in the consultations under paragraph 3 of Article 12, then the affected exporting Members shall be free, not later than 90 days after the measure is applied, to suspend, upon the expiration of 30 days from the day on which written notice of such suspension is received by the Council for Trade in Goods, the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure, the suspension of which the Council for Trade in Goods does not disapprove.
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> 3. The right of suspension referred to in paragraph 2 shall not be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement.

261. When read in conjunction with Article 12.3, Article 8.1 requires a Member to engage in consultations in advance of applying a safeguard measure. It does not impose an obligation to offer or

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[242] USITC Report at I-27.

[243] This alone is enough to distinguish this case from the situation in *Argentina--Footwear*. In that case, imports from MERCOSUR countries constituted between 21 and 55 per cent of total imports during the years examined. Argentina included those imports in its injury and causation analyses, but excluded them from its footwear safeguard. *See Argentina–Footwear* at n.474 and accompanying text.

[244] Paragraph 3 of Article 12 states that "A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations . . . with a view to, *inter alia* , . . . reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8."

provide trade concessions as a condition for applying such a measure. This interpretation is borne out by the texts of Articles 8 and 12, as well as by the object and purpose of the Safeguards Agreement.

262. Article 8.1 provides that a Member proposing to apply a safeguard measure "shall endeavour to maintain a substantially equivalent level of concessions and other obligations . . . in accordance with the provisions of paragraph 3 of Article 12." Article 12.3 provides that a Member shall provide opportunity for prior consultations with a view to, among other things, "reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8." Thus, the only obligation that Article 8.1 imposes on a Member considering a safeguard measure is to provide an opportunity for prior consultations. The United States satisfied that obligation.

263. Moreover, Australia's interpretation of Article 8.1 improperly divorces that provision from its rightful place within the entirety of Article 8. Again, Article 8.1 provides that a Member proposing to apply a safeguard measure "shall endeavour to maintain a substantially equivalent level of concessions and other obligations . . . in accordance with the provisions of paragraph 3 of Article 12." Article 8.2 then references the Article 12.3 consultations, explaining that the exporting country Members affected by a safeguard measure may suspend substantially equivalent concessions or other obligations under *GATT 1994* if no agreement is reached in the Article 12.3 consultations within 30 days. Finally, Article 8.3 states that the right of suspension referred to in paragraph 2 "shall not be exercised for the first three years" of the safeguard measure, provided that the requisite conditions are met.

264. Thus, it is clear that Article 8.1 creates an obligation to consult. Article 8.2 creates a right of retaliation if no agreement is reached in the consultations. However, Article 8.3 suspends that right of retaliation during the first three years a safeguard measure is in place, provided that the requisite conditions are met. The United States respectfully submits that it has fully met its obligations under the framework of Article 8.

265. A stated object and purpose of the Safeguards Agreement supports this interpretation of Article 8. The preamble to the Agreement recognizes the need "to re-establish multilateral control over safeguards and eliminate measures that escape such control." Specifically, drafters of the Safeguards Agreement intended to eradicate so-called grey-area measures. To ensure this objective, they permitted Members to impose safeguards for a limited period without fear of "having to pay" for such action. At the same time, they imposed disciplines on voluntary restraint agreements and other grey-area measures. The inclusion in the Agreement of both Article 8.3 and Article 11, which have no counterparts in Article XIX, reflect the framers' understanding.

266. For Australia to now argue that a Member must offer substantially equivalent concessions for the application of safeguard measures during the three-year period referred to in Article 8.3 jeopardizes the objective to re-establish multilateral control because it would encourage Members to find methods outside of the Safeguards Agreement to protect their injured domestic industries. Such an outcome would defeat a key purpose of the Agreement.

267. Accordingly, the United States respectfully submits that it satisfied its obligations under Article 8.1 of the Safeguards Agreement.

(b) The United States satisfied Article 12 notification requirements

268. Australia also claims (again unaccompanied by New Zealand) that the United States has failed to observe the notification requirements set out in Article 12 paragraphs 2, 3, and 6. There is no basis for this assertion.

(i) The United States notified "all pertinent information" to the Committee on Safeguards as required under Article 12.2

269. While acknowledging that such a requirement is not "specifically called for" in the Safeguards Agreement, Australia nonetheless asserts United States was required by Article 12.2 to furnish the Committee on Safeguards a written justification of the US lamb meat measure.[245]

270. Article 12.2 of the Safeguards Agreement provides in relevant part:

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

271. In *Korea -- Dairy*, the Appellate Body concluded (at ¶ 109) that to satisfy Article 12.2, a Member's notifications under 12.1(b) and (c) must at a minimum address all of the items specifically enumerated in Article 12.2, as well as the injury factors listed in Article 4.2. The US notifications provided all such information, including a precise description of the proposed measure, its proposed date of introduction, expected duration and timetable for progressive liberalization.[246] The United States has therefore amply satisfied the minimum notification requirements of Article 12.2. Australia has not suggested otherwise.

272. Instead, Australia seeks to read into Article 12.2 a requirement to provide a written justification of the measure the United States applied. In support of its position, Australia claims only that information regarding the basis for the US measure would be "highly pertinent."[247] This bare conclusion does not amount to a legal argument and hence cannot support a finding that the United States has failed to carry out its obligations under Article 12.2.

273. In any event, as discussed earlier in this Submission, the Appellate Body has considered and rejected under Article 5.1 the notion that Members are under a general requirement to justify their safeguard measures. That door having been shut, Australia has sought two other avenues for imposing a justification requirement -- first, Article 3.1 and second, Article 12.2.

274. Australia's claim under Article 12.2 fails for essentially the same reason that it fails under Article 3.1. Article XIX, as applied in accordance with the Safeguards Agreement, permits Members to depart to a limited degree from their GATT obligations and concessions if, following an investigation based on the substantive and procedural strictures set out in Articles 3 and 4, they make an affirmative determination of serious injury or threat of serious injury consistent with Article 2.2 of the Agreement. Such a determination *is* the justification for applying a safeguard measures. No further justification or explanation is required under Article 3.1 or 12.2.

275. As noted earlier in connection with Article 3.1, any requirement that would seek to reveal the reasons why a Member decided between various alternative measures, or between applying a safeguard measure and refraining from doing so, would intrude on the Member's deliberate process,

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[245] Australia's First Written Submission at ¶ 247.

[246] G/SG/N/10/USA/3, G/SG/N/11/USA/3 (circulated 12 July 1999). Attached hereto as US Exhibit 6. The United States issued a supplemental notification informing the Safeguards Committee that the measure would become effective with respect to goods *exported* on or after 22 July 1999. *See* G/SG/N/10/8SA/3/Suppl.1, G/SG/N/11/USA/3/Suppl. 1. Attached hereto as US Exhibit 7.

[247] Australia's First Written Submission at ¶ 247.

including its communications with other Members. On the other hand, to the extent Australia is seeking to compel the United States to explain why the measure it chose is compatible with Article 5.1, the Appellate Body has already spoken.

276. Australia next asserts that the United States should have provided information to the Committee regarding "unforeseen developments," which in Australia' s view was "pertinent information." Australia's claim on this point is once again a mere legal conclusion without legal argument sufficient to demonstrate the validity of its contention, much less demonstrate a *prima facie* violation.

277. In fact, nothing in Article 12.2 required the United States to make a specific notification regarding "unforeseen developments." Inferring a requirement to do so would run contrary to the Appellate Body's view in *Argentina -- Footwear* that "unforeseen developments do not constitute an independent condition for the application of a safeguard measure but rather certain circumstances that must be demonstrated as a matter of fact."[248] Unforeseen developments are thus unlike evidence of "serious injury," for example, which *is* an independent conditions for the application of a safeguards measure, and thus is subject to notification under Article 12.2.

278. Article 12.2 does not require an accounting of all pertinent facts that a competent authority considered in its investigation. Even if it did, the United States would have fully complied with Article 12.2 on this score, since it forwarded to the Committee the USITC report on its lamb investigation. As fully explained at ¶¶ 47-60 of this submission, the USITC report amply demonstrated the existence of "unforeseen developments."

(ii) The United States conducted consultations in conformity with Article 12.3

279. Australia argues that the United States failed to comply with Article 12.3 because, while it entered into consultations with Australia as that article requires, the United States failed to conduct the consultations in "good faith" with a view to achieving the objective of Article 8.1.[249] Article 8.1 provides that a Member proposing to apply a safeguard "shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994."

280. Australia does *not* allege that the United States failed to hold the consultations specified in Article 12.3 or that the subjects covered in those consultations failed to include those specified in that article. Rather, Australia raises the novel claim that the United States failed to comply with Article 12.3 because the United States referred in the course of those negotiations to the fact that Article 8.3 prevents a Member from suspending substantially equivalent concessions during the first three years of the measure. That objection does not form the basis for a violation of Article 12.3.

281. Article 12.3 requires a Member proposing to apply a safeguard to provide "adequate opportunity for prior consultations" with Members having a substantial interest in the product concerned. Australia does not deny that the United States not only provided this opportunity but entered into such consultations with Australia. Therefore, the United States fully met the obligation of Article 12.3. The United States emphatically rejects Australia's assertion that citing Article 8.3 constituted a lack of good faith. Reference by a Member in the course of consultations under Article 12.3 to the rights and obligations set out in the Safeguards Agreement can scarcely be characterized as a demonstration of bad faith. Any finding to the contrary would inappropriately limit Members' ability fully to represent their interests and address pertinent legal and factual issues in the course of such consultations.

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[248] Appellate Body Report, *Argentina -- Footwear*, at ¶ 92.

[249] Australia's First Written Submission at ¶ 253. Notably, Australia cites the provision of Article 8.1.

(iii) The United States properly notified its "laws, regulations and administrative procedures" pursuant to Article 12.6

282. Australia's final objection under Article 12 is that United States failed to observe the requirement in paragraph 6 to notify the Safeguards Committee of "laws, regulations and administrative procedures relating to safeguards measures."[250] Australia finds support for this assertion in its contention that the US authorities deliberated for more than three months before deciding to apply a safeguard measure and the measure, in Australia's view, was more restrictive than the one the USITC had recommended.[251] Australia thus concludes that the United States must have engaged in "further intensive investigation" but did not notify such a procedure under Article 12.6.[252]

283. As previously demonstrated, nothing in the Safeguards Agreement required the United States to adopt the recommendation of the USITC plurality. Indeed, there is no requirement in the Agreement for the United States to develop and publish recommendations, such as those that US law requires of the USITC, much less adopt them. Unlike its injury investigation, a Member's remedy decision-making process is not subject to discipline under Article XIX or the Safeguards Agreement. Thus, Australia's complaint that the United States undertook a further review or "investigation" in the course of deciding on an appropriate remedy, even if true, would not be grounds for complaint in this forum.

284. The United States notified its laws and regulations relating to safeguards measures to the Safeguards Committee.[253] The US notification set out the relevant provisions of the US safeguard law, in particular the following:

Sec. 203. Action by the President After Determination of Import Injury.

> (1)(A) After receiving a report under Section 202(f) containing an affirmative finding regarding serious injury, or the threat thereof, to a domestic industry, the President shall take all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.
>
> (B) The action taken by the President under subparagraph (A) shall be to such extent, and for such duration, subject to subsection (e)(1), that the President determines to be appropriate and feasible under such subparagraph.[254]

The notification also set out the range of factors that the President is required to take into account in making his determination and deciding what action to take.

285. Following the conclusion of the USITC's investigation, the President received a report from the USITC containing an affirmative finding of threat of serious injury to the domestic lamb meat industry. In accordance with the legal provisions notified to the Committee, the President then determined and took action in response to that report. Australia's claim that the United States has failed to notify the relevant procedure to the Safeguards Committee is demonstrably wrong.

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[250] Australia's First Written Submission at ¶¶ 250-257.
[251] Australia's First Written Submission at ¶ 257.
[252] Australia's First Written Submission at ¶ 257.
[253] *See* G/SG/N/1/USA (6 April 1995).
[254] *Id*. at 13, *citing* Section 203(a)(1) of the Trade Act of 1974, as amended.

10. The United States measure is not inconsistent with Article 11 of the Safeguards Agreement

286. Australia, once again alone, claims (at ¶¶ 266-270) that the US safeguards measure contravened Article 11 of the Safeguards Agreement because it allegedly was not an "emergency action." The basis for Australia's argument appears to be that if there had been a true emergency the United States would have imposed a safeguard measure sooner than nine months after the petition was filed.

287. Article 11.1(a) provides:

> A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.

288. Australia's argument is founded on the erroneous assumption that Article 11.1(a) establishes an independent obligation for a Member to demonstrate that an "emergency" exists before it may take action under the Safeguards Agreement. As its title demonstrates, Article 11 is concerned with the "Prohibition and Elimination of Certain Measures. " The purpose of Article 11 is to discipline certain "grey-area" measures, not to establish additional conditions for imposing safeguard measures above and beyond those set forth in Article XIX or Article 2.2.

289. Australia simply misreads the phrase in Article 11.1(a) "emergency action on imports of particular products as set forth in Article XIX of GATT 1994". The phrase is nothing more than a word-for-word recitation of the title of Article XIX. As such, it does nothing more than invoke that article. It thus does not create a requirement independent of those already set out in Article XIX, as applied through the Safeguards Agreement. As the United States has already demonstrated, the United States fully complied with its obligations under Article XIX and *GATT 1994*. Hence Australia's Article 11 claim is without merit.

11. The United States satisfied its obligations under Article II of the GATT 1994

290. Finally, Australia and New Zealand claim that because, in their view, the United States has acted inconsistently with Article XIX of the *GATT 1994* and the Safeguards Agreement, it is therefore in breach of Article II of the *GATT 1994*. For all the reasons discussed above, the premise for this claim is baseless.

291. Having fully met the requirements of Article XIX as applied in accordance with the Safeguards Agreement, the United States was fully entitled to adopt the safeguard measure it did. Inasmuch as Article XIX and the Safeguards Agreement specifically contemplate the application of safeguard measures, the United States cannot be held to have acted inconsistently with Article II of *GATT 1994*.

VI. CONCLUSION

292. For the foregoing reasons, the United States respectfully submits that its safeguard measure applied to imports of lamb satisfies US obligations under Article XIX of *GATT 1994* and the Safeguards Agreement and does not contravene Article II of *GATT 1994*. Australia's and New Zealand's claims to the contrary are without merit and the Panel should reject them.

ANNEX 3-3

ORAL STATEMENT OF THE UNITED STATES
CONCERNING PRELIMINARY ISSUES

(25 May 2000)

1. On behalf of the United States delegation, I would like to thank the Panel for this opportunity to present our views on the preliminary matters at issue in this proceeding. We will first address the adequacy of Australia's and New Zealand's panel requests. Next, we will address the exclusion of the US statute from the Panel's terms of reference. We will then address the issue of business confidential information, including Australia's argument that the United States should provide information that the Administration and the President of the United States took into account in the course of deciding whether to apply the US measure.

Insufficiency of Panel Requests

2. Turning first to the adequacy of New Zealand's and Australia's panel requests, the Panel in this dispute has the somewhat unusual advantage that the Appellate Body has spoken directly on the issue involved. In the Appellate Body report in *Korea Dairy* the provisions analyzed by the Appellate Body include the exact same provisions at issue here - Articles 2, 4, 5, and 12 of the Safeguards Agreement and Article XIX of the GATT 1994. And there the Appellate Body made clear that just listing these article in a panel request is not enough to satisfy the obligation under Article 6.2 of the DSU. While legally the Appellate Body report in that dispute is not binding on any other dispute, there is no reason why the Appellate Body would take a different approach if confronted with the same issue again.

3. The thrust of the arguments that Australia and New Zealand raised in their 17 May letters to the Panel confuse the functions of consultations and Panel requests. New Zealand and Australia insist that the United States should have known what claims their Panel requests raised because of issues they mentioned during consultations under Article 4 of the DSU. These arguments ignore the admonition of Article 4.5 that parties to consultations should "attempt to obtain a satisfactory adjustment of the matter."

4. Australia and New Zealand seem to be suggesting that consultations serve to place Members on notice of the claims that other Members participating in the consultations may later advance before a panel. But consultations are not meant to stake out legal claims. Rather, they are meant to facilitate efforts to achieve a mutually satisfactory resolution of the controversy. To credit Australia's and New Zealand's view that consultations should be understood to put Members on notice of legal claims that will be advanced in later legal proceedings would require this Panel (and will require future panels) to make a decision about the facts of an oral interchange in consultations of which no neutral records are kept, and where there are no neutral observers. There are good reasons why consultations are oral -- the desire to facilitate settlement of disputes by negotiation and agreement, which is the most desirable outcome in many cases.

5. If panels were to hold Members to the specific claims they advanced in the course of such consultations, it would make consultations unnecessarily rigid and formalistic, undermine the objective of achieving a negotiated settlement, and reduce chances for narrowing the range of issues eventually presented to a panel if a settlement cannot be achieved. Moreover, no matter how much notice is provided during such consultations, no such notice will have been provided to other Members who may wish to intervene as third parties. In sum, we ask the Panel to reject the complainants' assertions that they could provide notice of their claims through consultations and thus

could avoid the requirement in Article 6.2 of the DSU to provide a summary of the legal basis for their complaints sufficient to present the problem clearly.

6. Article 6.2 was designed to avoid the kind of prejudice that the United States has suffered here in having to respond to 156 pages of argument within 26 days, when the Panel request did not present the legal basis for the claims made. The US safeguard measure was announced on 9 July 1999, which provided Australia and New Zealand with nine months in which to prepare their First Written Submissions. By contrast, the United States did not know with any certainty until three weeks before its First Submission was due precisely which claims Australia and New Zealand intended to advance.

7. Both Australia and New Zealand advanced a variety of legal claims during the lamb meat consultations. They have not pressed before this Panel some of the claims they made during the consultations, and at the same time they have also made new claims in this proceeding that they did not present in the consultations. Australia admits, for example, that it did not raise during consultations its claim that the United States breached Article 4.2(c) of the Safeguards Agreement. *See* Australia's 17 May Letter at ¶ 30. Thus, the United States was not in a position to know which arguments they raised during consultations would be raised in this proceeding, or in what form.

8. Australia's and New Zealand's attempt to shift the consequences of their failure onto the United States cannot be accepted. In arguing that the United States should have known which claims were at issue, Australia and New Zealand concede that they knew at the time of the consultations – or shortly thereafter – which obligations they would claim that the United States had violated. They could have, but apparently chose not to, identify these obligations in their panel requests, as required by Article 6.2. If they had done so, the United States would have been in a more equitable position to prepare its defense in the short time period allowed by the DSU.

9. Finally, contrary to complainants' assertions, the United States did not sit on its rights to challenge the panel request. Australia and New Zealand first argue that the United States should have challenged the panel requests when the panels were requested in October 1999, or alternatively at the DSB meetings in November 1999. Their argument ignores the fact that the Appellate Body only issued its decision in *Korea–Dairy* in December 1999.

10. They also argue that the United States could have objected to the panel requests at the organizational meeting of the Panel on 28 March 2000. The purpose of that meeting was in part to determine when it would be proper for parties to request preliminary rulings. In its working procedures, the Panel determined that requests for preliminary rulings should be submitted not later than in a party's first written submission. The United States did not know (and could not have known) how deficient the panel requests were, and the degree to which the United States was prejudiced, until Australia and New Zealand filed their First Written Submissions. The United States challenged the adequacy of the panel requests as soon as possible thereafter, and even before it filed its own first written submission.

11. Finally, the United States notes that complainants base much of their argument on the Appellate Body's statements in *United States – Tax Treatment for "Foreign Sales Corporations"* (FSC). Their argument is wholly misplaced, as the issue in the FSC case related to the adequacy of a request for *consultations*, not a request for a panel. A consultation request clearly presents different timing issues and different opportunities to raise objections. The circumstances here are entirely different.

12. Finally, the gist of complainants' argument here is that once a panel request is filed, the burden of perfecting any defects in the request shifts to the *responding member*. Nothing in Article 6.2 or elsewhere in the DSU shifts the burden to the responding member; the burden at all times lies with the complaining member.

13. Accordingly the United States respectfully submits that the Panel should dismiss this proceeding in its entirety, or, in the alternative, exclude those claims that were not adequately set out in the complainants' panel requests.

Exclusion of the US Statute from the Panel's Terms of Reference

14. I would now like to turn briefly to our request that the Panel rule that the consistency of the US statute with US obligations under the Safeguards Agreement is not within the Panel's terms of reference and is thus outside the scope of this dispute. Australia and New Zealand each concede that they are not seeking a finding that the US statute is inconsistent with the Safeguards Agreement. New Zealand claims, however, that it *is* challenging the USITC's application of the "substantial cause" test. This is in essence challenging the statute itself. New Zealand is free to claim, as it does, that the USITC's report does not adequately establish a causal link as required by Article 4. But it cannot challenge the application of the US statutory standard without having referenced the statute in its panel request.

15. Indeed, as the United States noted in its First Written Submission (at ¶ 110), the USITC found that factors other than increased imports played no significant role in causing the threat of serious injury. This being the case, New Zealand's challenge can only concern the fact that the USITC stated its conclusions in the terms mandated by the US statute. Such a challenge asks the Panel to rule on the validity of the US statute regardless of the actual content of the authority's findings. Since New Zealand appears to agree that its panel request does not notice such a challenge, the Panel should regard this aspect of New Zealand's submission as beyond the terms of reference.

16. Accordingly, we urge the Panel to rule that the consistency of the US statute with US obligations under the Safeguards Agreement in not within the Panel's terms of reference and is thus outside the scope of this dispute.

Request to Produce Information

17. I will now turn briefly to address Australia's request in its First Written Submission (at ¶¶ 15-18) that the Panel make a preliminary ruling requesting the United States to produce all confidential business information that the USITC gathered in its lamb meat investigation and information taken into account by the Administration and the President of the United States in the course of deciding whether to apply the US measure. This is not in truth a request for a preliminary ruling, because there is nothing to rule on. The Panel is not being asked to make any finding, but merely to exercise its authority to request information. The Panel has the ability to request information at any time during a proceeding.

18. The United States explained in its May 5th letter why the release of business confidential information collected by the USITC is a complex issue, and suggested an appropriate procedure that was best designed to help the US authority obtain consent for disclosure to the Panel of confidential information that the Panel might request. The United States recognizes, as the Appellate Body indicated in *Canada -- Aircraft*, that under DSU Article 13.1, a Panel may seek information from any body it deems appropriate and the United States is fully prepared to assist the Panel if it should make such a request. However, the complainants' blanket requests for all information in the USITC record does not justify the Panel's seeking business confidential information presented to the USITC, nor are those requests reasonably calculated to allow the US authority to obtain the consent necessary to disclose any such information to the Panel.

19. Article 3.2 of the DSU recognizes the fundamental principle that the DSU "serves to preserve the rights and obligations of Members under the covered Agreements" and that "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered

agreements." Accordingly, the Panel's authority under Article 13.1 of the DSU to seek information reaches its limit when providing the information requested would cause a Member to violate its obligations under another covered Agreement.

20. Article 3.2 of the Safeguards Agreement governs treatment of business confidential information that an authority obtains in the course of its investigation. Article 3.2 states that confidential information submitted to the competent authority "shall not be disclosed without permission of the party submitting it." This provision makes no exception for the disclosure of confidential information in Panel proceedings.

21. Consequently, in order for the United States to assist the Panel in obtaining access to confidential information submitted to its authority, it must obtain the submitters' consent. The USITC received information in this investigation from about 100 questionnaire recipients. The indiscriminate request that Australia, as well as New Zealand, make for all confidential information obtained by the authority almost ensures that it will be impracticable to obtain consent from the multitude of different firms involved.

22. Moreover, neither complainant has stated how any of the information they are seeking would be relevant to the Panel's consideration of issues they have raised, much less why it would be essential for the Panel to make an objective assessment of the facts of this case. This failure impedes the United States' ability to explain to the submitters of the information why they should consent to the further disclosure of their business confidential information and what particular information is required. The question for the Panel is whether the USITC determination sets forth under Articles 3.1 and 4.2(c) reasoned conclusions on the pertinent issues of law and fact and provides a detailed explanation showing the relevance of the factors examined. The complainants have shown no reason why this question cannot be answered without recourse to confidential business information. Indeed, Article 4.2(c) expressly contemplates that the published report will omit confidential business information, because it requires that the report be published in accordance with the provisions of Article 3, and Article 3.2 prohibits disclosure without permission. As stated by the Panel in *Argentina -- Footwear* at ¶ 8.126, it is not the job of the Panel to conduct its own assessment of the underlying evidence as contained in the entire record before the competent authority, because that would effectively be engaging in a *de novo* review.

23. Finally, the United States explained in the cover letter to its First Written Submission that Australia's request for "all information" that the Administration and President took into account in the course of deciding whether to apply the US measure is without legal foundation. Any requirement that would seek to reveal the reasons why a Member decided between alternative measures, or between applying a measure and refraining from doing so, would inappropriately intrude on the Member's deliberative process regarding the application of safeguard measures. There is no basis in the Safeguards Agreement for such an enquiry. Australia's request should be rejected.

24. This concludes our presentation. We would be pleased to receive any comments that you may have.

ANNEX 3-4

FIRST ORAL STATEMENT OF THE UNITED STATES

(25 May 2000)

1. On behalf of the United States delegation, I would like to thank the Panel for this opportunity to comment on certain issues raised by Australia and New Zealand in their First Written Submissions. We do not intend to offer a lengthy statement today; you have our written submission, and we will not repeat all of the comments that we made there. We will be pleased to receive any questions you may have at the conclusion of our statement.

2. I will first make some general comments concerning the importance of this proceeding. Mr. Gearhart of the USITC, the US competent authority, will then briefly address topics raised by Australia and New Zealand concerning the USITC's injury determination, the USITC's identification of the domestic industry, and its demonstration of unforeseen developments. I will then return to Australia's and New Zealand's claims regarding the safeguard measure that United States applied and certain procedural complaints they have made as well. For brevity, we will refer to Australia and New Zealand together as the "complainants".

3. Mr. Chairman, this proceeding squarely presents the question of whether Members of the World Trade Organization can seek meaningful, temporary relief for industries seriously injured, or threatened with serious injury, due to a surge in imported products that are the subject of tariff concessions those Members have made. Article XIX, the so-called "safeguards" provision, has been a fundamental component of multilateral trading rules for more than 50 years. Article XIX was elaborated upon and strengthened in the Agreement on Safeguards, negotiated during the Uruguay Round, but its fundamental purpose has not changed. From the very beginning, Article XIX has been an essential component of the GATT because it has allowed the Contracting Parties, whether developed or developing countries – and now the Members of the WTO – to make tariff concessions with the confidence that they can take temporary action to assist their industries in the event that those concessions lead to import surges that seriously injure or threaten to injure their domestic industries. Article XIX sets high standards -- for example, there must be "serious injury" instead of the lower "material injury" standard that applies in antidumping and countervailing duty cases. But if those standards are met, Article XIX states explicitly that Members "shall be free" to take action to prevent or remedy the serious injury. If this avenue did not exist, or was unduly limited, Members would make fewer concessions in the first place, and would be more likely to respond to injury caused by increased imports by either permanently modifying or withdrawing concessions under Article XXVIII of the GATT, or resorting to "grey-area" measures, such as voluntary restraint agreements, instead.

4. Prohibiting grey-area measures was a principal achievement of the Safeguards Agreement. Members were willing to agree to accept the greater disciplines imposed by the Safeguards Agreement in the expectation that if they followed the rules set out in that Agreement, they would be able to provide meaningful, short-term relief to domestic industries suffering or threatened with serious injury due to increased imports subject to their tariff concessions.

5. This is a case where the United States scrupulously observed the disciplines imposed by the Safeguards Agreement and has sought to provide modest short-term import relief for an industry, US lamb meat producers, threatened with serious injury resulting from a sudden jump in imports from Australia and New Zealand. As the Safeguards Agreement provides, the USITC conducted a thorough, transparent investigation, open to the participation of all interested parties (including the exporting countries' producers and governments), held public hearings, and gathered detailed information from importers, producers, consumers, and publicly available sources. Based on the

information it collected, the USITC carefully reviewed the condition of the domestic lamb meat industry over the most recent five-year period and determined that it had experienced a severe downturn at the end of that period, specifically in 1997 and the first nine months of 1998. Mr. Gearhart will describe some of the USITC's detailed injury findings. The USITC concluded that the industry's condition had deteriorated to the point where serious injury was clearly imminent. The USITC next looked at each of the factors that might have accounted for the industry's decline and found that only one, a surge in imports during the period from Australia and New Zealand, played an important role.

6. Based on the USITC's determination, the United States was fully entitled to apply temporary safeguard measures -- both to ensure that the industry did not deteriorate further into serious injury and to give the domestic industry short-term breathing room in which to adjust to import competition. The safeguard measure that the United States selected is limited in scale and duration. It takes the form of a three-year tariff-rate quota (TRQ), tailored to address the threat of serious injury that the USITC had found, and structured to facilitate the industry's adjustment to import competition.

7. The TRQ is specifically designed to raise US market prices, and limit import levels, just enough to return the domestic industry to minimally profitable levels during the three-year period. The import relief is phased down over the second and third years, allowing both imports and import competition to increase. Moreover, the United States did not place the entire burden of relief on imports. The United States also committed substantial financial and regulatory assistance to the US lamb industry to assist in its recovery.

8. As it was considering an appropriate safeguard measure, the United States heard repeatedly from both Australia and New Zealand and took their views into account to the extent possible. Most importantly, the TRQ is structured to ensure that lamb meat imports into the United Stats can continue at the highest level they achieved before their all-time peak in 1998. Moreover, the United States limited the application of the TRQ to just three years. By contrast, the USITC had recommended four years of import relief.

9. The United States took pains to minimize the measure's effects on producers in Australia and New Zealand in other ways as well. For example, at the complainants' request, the United States agreed to provide separate quota allocations to New Zealand and Australia and also agreed to implement the TRQ through an export permit system. Also at the complainants' request, the United States delayed implementation of the TRQ, allowing approximately 1.5 million extra pounds of Australian and New Zealand lamb meat to enter the United States without being subject to the safeguard measure. In each of these ways, the United States sought to ensure that the safeguard measure would restrict Australian and New Zealand lamb meat imports to the minimum degree compatible with preventing serious injury and facilitating the domestic industry's adjustment.

10. In sum, the United States has faithfully adhered to the letter and spirit of Article XIX and the Safeguards Agreement, both in the conduct of its serious injury investigation and in the application of a temporary safeguards measure. By contrast, in their innumerable claims, Australia and New Zealand are asking this Panel at every turn to read Article XIX and the Safeguards Agreement in such a constricted or contorted way that recourse to Article XIX would effectively be rendered unavailable. This is unjustifiable. In *Wool Shirts* (at p. 16), the Appellate Body described the transitional safeguard mechanism provided in Article 6 of the Agreement on Textiles and Clothing as a fundamental part of the rights and obligations of WTO Members. Article XIX, which has been part of the GATT for over half a century, and the Safeguards Agreement, are no less a fundamental part of Members' rights and obligations.

11. If the complainants' approach in this proceeding is credited, then Members may well conclude that, despite their plain text, the WTO safeguard provisions cannot be relied upon. That could raise doubts about the continued willingness of Members to make difficult market access

commitments in the multilateral trade negotiations that lie ahead. We urge the Panel to reject the excessively narrow interpretations that the complainants are proposing in this case. Instead Article XIX and the Safeguards Agreement should be given effect based on their plain meaning, their context, and the object and purpose they serve.

12. I will now ask Mr. Gearhart to address the USITC determination.

13. While the USITC's findings are discussed at considerable length in the United States' First Written Submission, I would like to highlight a few key points. The USITC's report demonstrates that it properly considered all relevant factors during its investigation. In their First Written Submissions to the Panel, neither Australia nor New Zealand disputes the core facts that led the USITC to determine that the US lamb meat industry was threatened with serious injury caused by increased imports, and that serious injury was imminent. In reaching its affirmative determination, the USITC found that imports of lamb meat from Australia and New Zealand surged late in the period of investigation. Although the USITC examined imports and the condition of the domestic industry over the full 1993 to September 1998 period of investigation, the USITC based its determination on the most recent data for 1997 and the first nine months of 1998, which the USITC referred to as "interim 1998." The USITC's focus on 1997 and 1998 was consistent with the Appellate Body's decision in *Argentina -- Footwear,* which held that the competent authority should concentrate on the most recent period. Focusing on that period, the USITC found that lamb meat imports increased by 19 per cent in 1997 over the previous year, and by another 19 per cent in interim 1998 over the same period in 1997. Since imports actually declined between 1993 and 1994 and were otherwise steady early in the period of investigation, the sharp increases in imports in 1997 and thereafter were, in terms used by the Appellate Body in *Argentina -- Footwear* (at ¶ 131), "recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively" to cause threat of serious injury.

14. The ITC Report demonstrates that these developments were unforeseen. The import surge coincided with an unexpected change in the type of lamb meat being imported into the United States. This change in the market was unforeseen at the time the United States negotiated its Uruguay Round tariff concession on lamb meat in 1992 and 1993 or granted that concession in 1995. Prior to 1995, most imported lamb meat was frozen and comprised of smaller cuts, while US lamb meat was sold as fresh or chilled in larger cuts. However, the mix in imported products shifted after 1995 – particularly in 1997 and interim 1998 -- from frozen lamb meat to fresh or chilled lamb meat, and to larger cuts. Consequently, the imported product unexpectedly became more similar to the domestic like product. Imported lamb meat competed more vigorously with domestic lamb meat in the US market and eroded US market share. In fact, US market share held by imports nearly doubled during the period of investigation, with most of the increase occurring in 1997 and 1998. At the end of the period, the direct effect on the US product was apparent as the USITC found that a 9.7 million pound increase in imports came at the direct expense of an 8.4 million pound decline in US lamb shipments. Both domestic and foreign producers told the USITC that they expected these trends to continue and even accelerate in the imminent future.

15. Although Australian and New Zealand producers claimed that some of the imports were filling new demand in US markets created as a result of their promotional efforts and differentiated marketing, the USITC concluded, instead, that demand had stabilized and the change from smaller frozen products to larger fresh cuts had made imports more similar to US products, not more differentiated. The surge in imports and change in the mix of the imported products caused prices to fall sharply in 1997 and interim 1998. The USITC made explicit the correlation between the fall in US lamb meat prices and price pressure from increased imports. Data the USITC gathered for individual cuts showed that imported lamb meat had undersold domestic lamb meat by wide margins in most quarters, often by more than 20 per cent.

16. Moreover, the USITC found serious injury was imminent. Projections by Australian and New Zealand producers in response to USITC questionnaires showed that their exports to the United States would increase by an additional 21 per cent in 1999, that is, at an even faster rate than in 1997 and interim 1998. Further, they told the USITC that the major portion of the 1999 increase would be in fresh or chilled lamb meat, the product most similar to domestic lamb meat. The USITC concluded that this increase in import volume was "likely to have further negative effects on the domestic industry's prices, shipment volumes, and financial condition in the imminent future."

17. The USITC considered all of the evidence with regard to the impact of the surging, low-priced imports on the domestic lamb meat industry and concluded that the industry as a whole was threatened with serious injury, and that serious injury was clearly imminent. The USITC determined that the domestic industry included growers and feeders of live lambs, as well as packers and breakers of lamb meat. As the USITC found, packers and breakers are essentially "finishers" of lamb meat, adding only a small proportion of value-added. The USITC's industry definition reflected (1) a continuous line of production from the raw to the processed product in which lambs are substantially devoted to lamb meat production; and (2) a substantial coincidence of economic interests between the growers and the processors. Indeed, some lamb growers both feed and slaughter their lambs. In such circumstances, the USITC properly found that firms in all four segments of the line of production were producers. The alternative would have led to an artificial definition of the domestic industry not in keeping with the injury analysis required by the Safeguards Agreement.

18. Even if the USITC had defined the domestic industry more narrowly to include only packers and breakers as Australia and New Zealand suggest, the complainants have not shown that this would have made a difference in the injury determination the USITC reached. To the extent practicable, the USITC obtained data on each of the economic factors for all four segments of the industry and found that packers, like other segments of the industry, experienced deteriorating profits during 1997 and interim 1998. Furthermore, firms in the packer and breaker segments reported difficulties in recouping new investments in plant and equipment and in repaying loans. The USITC also found that the operating income for most packers and breakers during the period of investigation fell to its lowest point in 1997 and interim 1998, consistent with the decline registered by other segments of the industry at that time.

19. Contrary to Australia's and New Zealand's claims, the USITC's determination also fully satisfied the requirement of Article 4.2(b) not to attribute to increased imports injury caused by other factors. Australia and New Zealand would have the Panel believe that the US lamb meat industry was not threatened with serious injury from increased imports but was in a long-term decline brought about by falling demand and made worse by the termination in 1996 of Wool Act support payments to lamb growers and feeders. The complainants are simply asking this Panel to undertake a *de novo* review of the evidence on this point. The USITC found, to the contrary, that termination of the wool subsidy payments did not have much influence on events after 1996. This is because payments under the Wool Act were phased-out principally in 1994 and 1995, and ended in 1996, *before* the surge in imports occurred in 1997 and interim 1998. The USITC found that consumption had stabilized by 1996 – after the termination of the Wool Act – and any lingering residual effect of termination of the payments receded each month after 1996. Moreover, the payments never went to the packers and breakers. The USITC reasonably concluded that it was the surge in imports in 1997 and interim 1998 that explained the imminent worsening of the entire domestic industry's condition at the end of the period of investigation -- not the cessation of payments made under the Wool Act. The USITC found no factor other than increased imports that would have a significant impact on the deterioration of the US industry in the imminent future. Thus, the USITC did not and could not have attributed to increased imports the effects of other factors, because it found no other factors of significance in the relevant period, 1997 and interim 1998.

20. Australia and New Zealand also wrongly question the objectivity of the evidence on which the USITC relied in making its safeguard determination. We note that their objections do not go to

the USITC's evidence on packers and breakers, whom the complainants insist should have constituted the entirety of the domestic industry. In evaluating the condition of the grower segment of the industry, the USITC relied on data obtained both from responses to USITC questionnaires and from the US Department of Agriculture (USDA). The USITC noted that the sheer size of the domestic industry, which comprised 70,000 growers nationwide in 1997 alone, made it impossible for it to develop a statistically valid sample. Consequently, the USITC prudently relied on the more comprehensive USDA data when possible.

21. Although the complainants allege that the use of two data sets from different sources in analyzing injury can allow an authority to pick and choose which set to use arbitrarily to support an outcome, it is clear that the USITC did not do so here. In evaluating factors such as financial conditions -- for which there were no USDA data -- the USITC did rely on questionnaire response data. Its careful analysis of that information assured that the USITC based its determination on objective evidence. Available data suggested that those who answered the questionnaires were, if anything, doing better than the industry as a whole. Thus, the USITC reasonably concluded that information from those questionnaire responses suggesting a downturn in the grower segment was not likely to be overstated.

22. The complainants have not asserted a violation of the Safeguards Agreement in the USITC's approach to the available data. The Agreement does not require that an authority rely only on questionnaire data that it finds scientifically valid in a statistical sense or require, as Australia suggests, the authority to send repeated waves of questionnaires to additional firms if extensive sampling does not yield responses from each and every addressee. As the Panel in *Korea-Dairy* stated at ¶ 7.31, quoting *US -- Shirts and Blouses*, the Safeguards Agreement does not impose on the importing Member any specific method for collecting data. Rather, it simply requires the competent authority to examine all relevant factors of an objective and quantifiable nature, to explain its findings, and to demonstrate the relevance of the factors it examined. That is what the USITC did.

23. In summary, an objective assessment of the USITC's report shows that it properly defined the domestic industry; it examined all relevant factors concerning its determination of the threat of injury; it adequately explained why the facts supported its conclusion; and it reached its determination based on objective evidence in accordance with the Safeguards Agreement.

24. Mr. Ross will now discuss Australia's and New Zealand's remaining claims.

25. Mr. Chairman, Members of the Panel, as I noted at the outset of this presentation, I do not intend to consume a large amount of your time; my remaining comments will be brief.

26. As Mr. Gearhart has discussed, after conducting a thorough, transparent, and well-documented investigation, the USITC properly found that increased lamb meat imports from Australia and New Zealand threatened the US lamb industry with serious injury. The USITC's findings demonstrated in detail the deterioration the domestic industry had suffered due to the increased imports, as well as the basis for concluding that serious injury from those increased imports was clearly imminent.

27. Under these circumstances, the United States was fully entitled under Article XIX of *GATT 1994* and the Safeguards Agreement to apply a temporary safeguard measure sufficient to prevent the serious injury from occurring and to assist the domestic lamb meat industry to regain its competitiveness.

28. Article XIX does not specify or mandate particular safeguard measures. Decisions regarding the appropriate safeguard measure have always been understood to be left to the government concerned, subject to the limitation that the measure -- whatever its form -- should not be applied

beyond the time and extent commensurate with the twin goals of preventing or remedying serious injury and facilitating the domestic industry' s adjustment to import competition.

29. Article 5 of the Safeguards Agreement elaborates on the pertinent language of Article XIX. However, nothing in the text of Article 5 can be read as a departure from the basic rule that the choice of measures is left to the importing Member. Article 5.1 mentions the possibility that a Member may choose to apply a quantitative restriction, using the introduction "If a quantitative restriction is used". This language suggests that the Member concerned is free to choose among a range of measures. The discipline that Article 5.1 imposes is to ensure that there is a reasonable relationship between the degree to which a measure is applied, on the one hand, and the objectives that safeguard measures are intended to achieve, namely preventing or remedying serious injury and providing a short period of relief for the domestic industry, on the other.

30. Contrary to the position that New Zealand and Australia advocate, neither Article XIX nor Article 5.1 says that there can be only one possible safeguard measure in any particular case. There is no requirement in either provision that Members must search out and apply the single, theoretical "least trade restrictive" measure available. Rather, Article 5.1 calls for a Member to ensure that any safeguard measure it applies is commensurate with the specific injury findings its competent authority has made, both as it seeks to prevent or remedy that injury and to help the industry adjust to import competition. To date, New Zealand and Australia have failed to present a *prima facie* case that the US measure is inconsistent with this standard. By contrast, the United States has made clear why the import relief it has provided for its lamb meat industry represents a careful, measured response to the USITC findings, structured to prevent serious injury and facilitate industry adjustment, and no more.

31. Australia's and New Zealand's claims regarding Article 3 of the Safeguards Agreement are also unfounded. They suggest that the United States was required under that Article to justify its safeguard measure at the time it was applied. Article 3 is entitled "Investigation." By its plain terms, the obligations in that Article apply to the investigation conducted by a competent authority; here, the USITC. Article 3 does not apply to a Member's subsequent decision on whether to apply a safeguard measure, and it did not oblige the United States to "justify" its measure or publish an explanation of why its chosen measure was "necessary".

32. I would next like to comment briefly on the US decision to exclude lamb meat imports from Canada, Mexico, Israel, and developing countries from the safeguard measure. The United States was required to exclude developing country imports under the plain terms of Article 9.1 since they were negligible. During its oral statement, Australia asked why the United States did not notify the safeguard measure under Article 9. In fact, the United States did notify the measure under Article 9; the US notification is attached to our First Written Submission as US Exhibit 6.

33. As we noted in our written submission, in their own safeguards legislation, Australia and New Zealand exclude each other's imports from their own safeguard measures under the Australia New Zealand Closer Economic Relations Agreement. Therefore, they cannot be arguing that the United States is prohibited from doing likewise under its free trade agreements with Canada, Mexico, and Israel.

34. Instead, they must simply be arguing that a Member cannot base a threat of injury determination on an increase in imports from all sources, and then apply a safeguard measure to imports from only some of those sources. If this *is* their argument, then it must fail, because New Zealand and Australian imports constituted approximately 99 per cent of total imports during the period of investigation, and there was no discernible increase in lamb meat imports from Mexico, Canada, or Israel during the 1997 - interim 1998 period. Thus, Australia and New Zealand cannot credibly argue that the USITC' s injury determination was based on increased imports from Canada, Mexico, or Israel.

35. Australia also raises claims under Articles 8, 11, and 12. These arguments are unfounded as well. One of the primary accomplishments of the Safeguards Agreement was to subject "grey-area" measures to GATT disciplines. As part of the overall understanding that made that accomplishment possible, Article 8.3 permits Members to impose safeguards for a three-year period without fear of having to "pay" for such action. Australia's argument that Article 8.1 obliged the United States to offer compensation for its three-year safeguard measure jeopardizes the objective of re-establishing multilateral control over safeguards. It would encourage Members to find methods outside the Safeguards Agreement to protect their threatened or injured domestic industries. Article 8.1 imposes an obligation on a Member considering a safeguard measure to provide an opportunity for prior consultations, and the United States satisfied that obligation by meeting with Australia twice.

36. Similarly, the United States did not contravene Articles 11 or 12. Despite Australia's claim, the US safeguard measure fully satisfied the specific prerequisites established in the Safeguards Agreement for applying import relief. Article 11, which addresses "grey area" measures, does not establish any further such requirements, in particular any need for a Member to make an additional showing that an emergency exists before taking action under the Agreement. Finally, the United States provided the Committee on Safeguards all pertinent information required by Article 12.2; conducted consultations in conformity with Article 12.3; and properly notified its laws, regulations and administrative procedures as required by Article 12.6.

37. I would now like to turn briefly to one final issue. During this morning's presentation, New Zealand submitted a new exhibit NZ13, a report prepared for the New Zealand Government for purposes of this dispute. New Zealand claims that it is submitting the report to show that it is possible to conduct such an analysis and to demonstrate that if the USITC had conducted such an analysis, it would have reached a different conclusion in its investigation. The United States has obviously not had any chance to study the report, and therefore our initial comments must necessarily be limited and confined to the question of the appropriateness of such a report to the Panel's work. We do, however, wish to stress a few important points.

38. First, the United States notes that New Zealand's point that such a report could have been prepared is not relevant. As the United States noted in its First Written Submission (at ¶ 131), the Safeguards Agreement does not require that a competent authority perform such an analysis. In fact, the Agreement does not address any specific methodology that a competent authority must perform. The United States explained in its first written submission (at ¶ 131) why using such studies is questionable.

39. Second, and more important, New Zealand concedes that its purpose in submitting the report to the Panel is to demonstrate that the USITC would have reached a different conclusion if it had conducted such an analysis. This suggests to the United States that New Zealand is trying to lead this Panel to conduct an impermissible *de novo* review, something that New Zealand conceded in the standard of review section of its brief is not appropriate.

40. Indeed, this study was never submitted to the USITC. This must be so, since the report cites the USITC's Report, and it plainly was commissioned for purposes of this dispute by a party with a direct interest in challenging the result of the USITC investigation. This is troubling in several respects.

41. First, as we have already stated, the Report invites an inappropriate *de novo* review of the USITC's determination. Second, it is not clear whether the data it is based on was part of the USITC's record. Third, if New Zealand *had* submitted the Report to the USITC during the proceeding, the USITC itself – as well as the US lamb meat industry and other interested parties – would have had an opportunity to review the Report, the underlying data (if made available), and the conclusions that it reached. By failing to submit the Report during the USITC's proceeding,

New Zealand has rendered such scrutiny impossible. Finally, there are obvious problems with submitting at this late stage a report done by a party solely for purposes of an adversarial proceeding.

42. Therefore, the United States respectfully submits that the Panel should disregard Exhibit NZ13. However, if the Panel is nevertheless inclined to consider the Report, then the United States respectfully submits that it too be permitted to submit econometric studies commissioned for purposes of this dispute that will analyze the various factors at issue in the USITC's investigation. Otherwise, the United States will be unfairly prejudiced.

43. This concludes our presentation today. As we noted at the outset, we will be pleased to receive any questions you may have.

ANNEX 3-5

CLOSING STATEMENT OF THE UNITED STATES AT THE
FIRST MEETING OF THE PANEL

(25-26 May 2000)

1. On behalf of the United States delegation, I would like to thank the Panel for taking the time during the past two days to hear our views on this important proceeding, and for giving us the opportunity today to make this closing statement. I have only a few points to make this morning.

2. First, New Zealand and Australia make several claims that find no textual support in the Safeguards Agreement. Indeed, it is difficult to see how the complainants are reading the same Safeguards Agreement as the one agreed to by the Uruguay Round negotiators. According to the complainants, the Safeguards Agreement prescribes all manner of detail about the investigation by the competent authority and the decision on the measure to apply. However, complainants are unable to support these claims by any provision in the text. For example, in the first submissions, New Zealand, but not Australia, argues that Article 5.1 requires a Member to apply the "least trade restrictive" measure available. But the text of Article 5.1 says that a Member shall apply a measure "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment," not that a Member shall identify and apply the "least trade restrictive" measure. Similarly, complainants argue that the United States was required to "justify" its choice of safeguard measures. But once again, Article 5.1 says nothing of the sort. Complainants also claim that Article 3.1 requires a Member to publish the reasons it imposed a particular safeguard measure. But Article 3.1, by its plain terms, applies to the investigation conducted by a competent authority, not to a Member's decision to apply a safeguard measure. Finally, Australia suggested in its oral presentation yesterday (at ¶ 71) that the President of the United States was somehow required to impose the USITC plurality's suggested remedy. But nothing in the Safeguards Agreement requires a competent authority to recommend a safeguard measure, let alone requires a Member to adopt such a recommendation.

3. These points are important because the WTO is a treaty-based system, based on the mutual consent of the Members as reflected in the text of the WTO Agreements. Therefore, if there is no textual basis for complainants' various "tests" and "requirements", then the Members of the WTO have not consented to be bound by them. Accordingly, the United States urges the Panel to interpret the terms that the drafters actually used, not the terms that Australia and New Zealand wish they had used.

4. I would now like to respond briefly to certain points raised by complainants regarding the USITC's investigation and determination.

5. The USITC's affirmative threat determination was soundly based on the record developed by the USITC in its investigation, and the USITC findings and conclusions as set out in its report met all the requirements of Articles 3 and 4 of the Safeguards Agreement. The United States' First Written Submission did not "concoct" or "cobble together" a new version of the USITC's findings to fill in "gaps" or create a more defensible decision. It did not need to.

6. The United States at ¶¶ 79-82 summarized four central findings of the USITC report that were essentially uncontested by the complainants:

7. First, imports of lamb meat from Australia and New Zealand surged late in the period of investigation, and this surge was projected to continue through 1999.

8. Second, the mix of imported lamb meat imports shifted during the investigation, from frozen lamb meat to fresh/chilled lamb meat, and from smaller cuts to larger cuts, the form and cut size of lamb meat most similar to that produced and marketed by domestic lamb meat producers. This trend was projected to continue through 1999.

9. Third, this surge in imports, and the change in mix of imported product, led to falling domestic prices for lamb meat in 1997 and interim 1998, and the USITC found that these trends would continue in the future.

10. Fourth, economic indicators relating to the health of the domestic industry, which had stabilized in 1996 after the termination of the US Wool Act payments, deteriorated sharply in 1997 and interim 1998, when imports surged. This deterioration was predicted to continue into 1999. In particular, industry profitability fell sharply in 1997 and interim 1998.

11. Contrary to New Zealand's contention yesterday, this is all stated in the USITC's written findings. The recent increase in imports and projected further increase was described on pages I-15 and 23 of the USITC report. The change in product mix and projected further change was described on pages I-22 and 23. The fall in prices in 1997 and interim 1998 and linkage to increased imports, and likely impact on prices of further increases in imports, was described on pages I-23-24. The fact that the domestic industry had stabilized in 1996 after termination of the Wool Act, the fact that the condition of the domestic industry had deteriorated and that further deterioration was projected, and the linkage between the deterioration, the projected further deterioration, and the surge in lamb meat imports, are all described on pages I-17 to 21 and on I-23 to 26.

12. Thus, the United States had no need to create a revised story. The story was in the USITC report. In case there were any doubt, the United States urges the Panel to rely simply on the USITC report.

13. I would now like to turn briefly to the USITC's causation finding. In asserting that the USITC found increased imports to be one of several factors causing the threat of serious injury, New Zealand fails to consider the USITC's evaluation of each of those factors. While the USITC expressed its finding in terms of the US statute, it is clear from the USITC's evaluation of the several possible causes that increased imports were the *only cause of any significance* of the deterioration in the condition of the domestic industry in 1997 and interim 1998, and the projected continuation of this deterioration in 1999. The USITC did not attribute the effects of other factors to increased imports.

14. Finally, as the United States made clear in its First Written Submission and in its oral statement yesterday, the USITC report demonstrates –

> (1) that the USITC conducted a thorough investigation that met all the requirements of Article 4.2(a) of the Safeguards Agreement. As the United States stated in its First Written Submission and again yesterday, the Safeguards Agreement does not prescribe any specific methodology that an authority must follow in demonstrating the link between increased imports and the threat of serious injury;
>
> (2) that developments relating to the change in import mix and size were unforeseen by the United States at the time it negotiated and implemented its most recent tariff concession on lamb meat imports;
>
> (3) that the USITC properly defined the domestic industry, and that the USITC would have reached the same conclusion if it had limited the industry to lamb meat packers and breakers; and
>
> (4) that the USITC found that the serious injury was clearly imminent.

15. Mr. Chairman, Members of the Panel, I discussed at length yesterday the importance of Article XIX and the Safeguards Agreement as critical components of trade liberalization. We would like to close by asking the Panel to keep that perspective in mind in addressing this proceeding, and in particular when addressing the arguments by Australia and New Zealand that these provisions should be narrowly construed.

16. Finally, Mr. Chairman, it bears repeating that Australia and New Zealand have the burden of proof in this proceeding, a burden that the United States considers they have not met in any respect. We respectfully ask this Panel to so find in the report that it prepares.

17. This concludes our presentation today.

ANNEX 3-6

UNITED STATES' REPLIES TO QUESTIONS FROM AUSTRALIA

(22 June 2000)

Injury

Question 1. Does the US rely in this dispute on any data designated as confidential in the public version of the USITC Report? If so, where does this occur? Could the US please provide any such confidential data from the USITC Report on which it seeks to rely for justifying the measure and the US's compliance with Safeguards Agreement and GATT 1994 Article XIX.

Reply

1. We believe that the public report of the USITC provided the detailed analysis and demonstration of the relevance of the factors examined that are required by Article 4.2(c). The "views" of the USITC Commissioners, which set out their findings and conclusions on all pertinent issues of fact and law, contain virtually no confidential data. The small amount of confidential data in their views relates to (1) data concerning the proportion of lamb meat imports that are fresh or chilled (certain Australian data were confidential);[1] (2) data relating to the per cent of the value of packers' net sales accounted for by carcasses and per cent accounted for by pelts and offal;[2] (3) support for the petition by firms other than those listed in the petition;[3] (4) the percentage by which packer production declined between 1993 and 1997 (but not the fact that production fell);[4] (5) the percentage amount by which the value of net sales of packers and breakers fell (but not the fact that the value of their net sales fell);[5] and (6) certain inventory data (which the USITC did not find particularly relevant because lamb meat is perishable).[6]

2. Thus, USITC Commissioners directly cited confidential data in the non-public version of their views in only six instances. In four of the instances, the first, second, fourth, and fifth, the data support findings and conclusions that are fully stated in the public version of the report. The data in the two remaining instances do not relate findings on which the USITC based its affirmative decision (the position of non-petitioner firms, and certain inventory data).

3. With respect to the provision of confidential information, please see the United States' response to the Panel's Question 24 to the United States.

Question 2. Does the US agree that one of the essential requirements under the Safeguards Agreement for a Member to apply a safeguard measure is that its competent authority has made an affirmative finding in terms of SG Article 4 that increased imports are causing or are threatening to cause serious injury to the "domestic industry" specified in SG Article 4.1(c)?

[1] USITC Report at I-11.
[2] USITC Report at I-13.
[3] USITC Report at I-14.
[4] USITC Report at I-18.
[5] USITC Report at I-19.
[6] USITC Report at I-20.

Reply

4. Yes. The United States also wishes to call to Australia's attention its responses to the questions of the Panel.

Question 3. At paragraph 66 of its First Submission, the US refers to "vertical integration of the industry". Could the US please provide data on how many growers are feeders, and how many growers are both feeders and packers.

Reply

5. Approximately 20 per cent of all growers and grower/feeders who responded to USITC questionnaires indicated they were both growers and feeders.

6. The USITC Report states that at least one grower owns both a feeder and a packer.[7] We also note that one holding company is a major domestic lamb packer that also owns both a major feeder and a major breaker operation.[8] Some lamb producers retain title to their lambs in feedlots, by having them fed for a fee or in partnership with the feedlot owner.[9] The exact number is not known. Clearly, lamb producers have a direct interest in slaughter operations as estimates indicate that 70 to 80 per cent of lambs slaughtered were previously fed in feed lots.[10]

Question 4. Could the US please also provide the numbers of feeders, packers, packer/breakers, and breakers in the US, including not only specialist packers and breakers of sheepmeat but also those that produce meat from other livestock species.

Reply

7.	**Number of Feeders:**	11[11]
8.	**Number of Packers:**	The exact number is not known. USDA data show that 9 plants accounted for 85 per cent of the sheep and lambs slaughtered in 1997, while 571 plants were certified by USDA in 1997 to slaughter lamb and sheep.[12]
9.	**Number of Packer/Breakers:**	Four operators defined themselves as packer/breakers in response to USITC questionnaires.
10.	**Number of Breakers:**	Less than 10 major firms.[13]

Measure to be applied "only to the extent necessary"

Question 5. Was there a further investigation or inquiry by whatever name carried out by the US following the USITC reporting to the President in April 1999? If so, could the US please

[7] USITC Report at II-12.
[8] USITC Report at I-14.
[9] USITC Report at II-12.
[10] USITC Report at II-24.
[11] USITC Report at II-13.
[12] USITC Report at II-15, n. 57.
[13] USITC Report at II-15.

provide details about it and any new information obtained. Could the US please also provide copies of the documentation, if any, setting out the findings and reasoned conclusions of the investigation or inquiry on WTO issues regarding the measure.

Reply

11. After the USITC issued its affirmative determination that imports of lamb meat were threatening to cause serious injury to the US industry, the United States considered whether to apply a safeguard measure and, if so, to what extent. As part of this process, the United States authorities conferred with interested parties, including on several occasions with representatives of Australia and the Australian lamb meat industry, to obtain their views on an appropriate remedy. Indeed, after the United States announced its measure, Australia's Deputy Prime Minister and Minister for Trade issued a press release crediting "Australia's intensive lobbying" for delaying and ultimately reducing the level of the US measure.[14]

12. Article 3.1 of the Safeguards Agreement requires competent authorities to publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law. By its plain terms, Article 3.1 applies to the competent authority's investigation, not to the subsequent decision by a Member on whether to apply a safeguard measure and, if so, the nature of the measure. Neither Article 3.1 of the Safeguards Agreement nor any of its other provisions requires a Member to maintain or publish a record of its deliberations.

13. Australia's request for "documentation . . . setting out the findings and reasoned conclusions of the investigation or inquiry on WTO issues regarding the measure" appears to be a request for the United States to provide a justification of its measure. The Safeguards Agreement imposes no requirement of this kind. As a complainant in this dispute, Australia has the burden of proving its claim that the United States has applied a safeguard measure beyond the extent necessary to prevent or remedy serious injury and to facilitate adjustment. Australia cannot shift that burden to the United States.

Question 6. Did the US make a finding on the necessity of the extent of the measure under SG Article 5.1 before applying the measure? If so, could the US please provide a copy of the decision and supporting documentation.

Reply

14. Please see response to question 5.

Question 7. What was the "economic model" referred to in paragraphs 216-224 of the US's First Submission? Could the US please provide details of the model used.

Reply

15. The United States provided details on the model in footnote 220 of the United States' first written submission.

Question 8. What aspect of this model did the US use to ensure that the measure was applied "only to the extent necessary" in order to satisfy SG Article 5.1?

[14] Attached hereto as US Exhibit 42.

Reply

16. The United States used the model to try to predict the effects of various combinations of in-quota and out-of-quota tariffs. The United States explained the model's predictions in ¶¶ 217-219 of its first written submission.

"Shall endeavour to maintain a substantially equivalent level of concessions and other obligations"

Question 9. Can the US confirm that, as set out in the last sentence of paragraph 35 of its Opening Statement on 25 May 2000, it considers that it met its SG Article 8.1 obligations by meeting with Australia twice and did not endeavour to maintain a substantially equivalent level of concessions and other obligations with Australia.

Reply

17. Paragraph 35 of the United States' opening statement does not state that the United States "did not endeavour to maintain a substantially equivalent level of concessions and other obligations with Australia." It does, however, note that the United States consulted with Australia on two occasions, specifically, on 28 April and 14 July 1999.

18. Australia argues that Article 8.1 required the United States to offer Australia trade concessions in recompense for the trade effects of the US safeguard measure. Article 8.1 imposes no such requirement, a fact that Australia itself appears have acknowledged outside this proceeding.

19. After Australia notified its safeguards regime to the Committee on Safeguards[15], Canada asked whether the safeguard procedures that Australia had notified provided for adequate compensation under Article 8 and, if not, whether other Australian legislation made provision for compensation. Australia's response was:

> No. That would not be the responsibility of the [Australian competent authority]. There is no specific provision for this in Australian legislation. The issue of compensation or concessions would have to be addressed in each case and, *if appropriate*, the requisite action taken, which might conceptually involve new legislation. *Our understanding is that the issue of compensation or concessions, apart from the issue of the size and administration of quota and tariff quotas has been rare for safeguard action.*[16]

20. Australia's response to Canada indicates that, in Australia's view, a Member may choose to accommodate the interests of other Members through adjustments in the size and administration of quotas and TRQs, and that compensation under Article 8.1 will rarely be appropriate. Australia also appears to view this question as one for the importing Member to decide.

21. The United States has acted in this case in conformity with the approach Australia outlined in its response to Canada's question. Throughout the course of its deliberations on an appropriate remedy, the United States conferred with Australia on an appropriate safeguard measure. The high in-quota quantity included in the TRQ, the separate quota allocations for Australia and New Zealand, and the fact that the TRQ does not establish specific limits for fresh and frozen lamb meat products are all consistent with requests that Australia (and New Zealand) made to the United States as the

[15] G/SG/N/1/AUS/2, circulated on 2 July 1998.

[16] Notification of Laws and Regulations Under Article 12.6 of the Agreement, Replies from Australia to Questions Posed by Canada and the United States, G/SG/Q1/AUS/3, at 2 (27 April 1999) (emphasis added).

measure was under consideration. Moreover, at Australia's and New Zealand's request, the United States promulgated a regulation to administer the TRQ through an export certificate system and agreed to delay the effective date of the measure to permit an additional 1.5 million tons of lamb meat to enter the United States outside the TRQ. As noted above in response to question 5, Australia's Deputy Prime Minister and Minister for Trade issued a press release crediting "Australia's intensive lobbying" for delaying and ultimately reducing the level of the US measure.

ANNEX 3-7

REPLIES BY THE UNITED STATES TO QUESTIONS FROM THE PANEL

Was the "unforeseen developments" provision of Article XIX:1 of GATT 1994 fulfilled?

Question 1

In *Korea - Dairy Safeguard* and *Argentina - Footwear Safeguard,* the Appellate Body stated that "the developments which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been 'unexpected"', Australia, New Zealand and the EC interpret this statement to mean that there must be unforeseen developments that *cause* a surge in imports which *in turn* causes a threat of serious injury, for the "unforeseen developments" requirement of Article XIX to be fulfilled.

(a) Please comment on this interpretation of the Appellate Body's statement.

Answer 1(a)

1. Through their two-step causation approach, Australia, New Zealand, and the EC have misconstrued both the relevant language of Article XIX and the Appellate Body's findings. The error in this approach is that, contrary to the plain language of Article XIX:1(a), and the Appellate Body's characterization, it de-links the "unforeseen developments" both from the "conditions" under which increased imports are occurring and from the serious injury (or threat) that the increased imports have caused.

2. As a preliminary matter, it is worth noting that, unlike the complainants and the EC, the Appellate Body did not describe the relationship between "unforeseen developments" and increased imports in terms of the former "causing" the latter. That is because Article XIX:1(a) uses the expression "If, as a result of" [emphasis supplied] to describe this relationship, and indeed the relationship between "unforeseen developments" and both "under such conditions" and serious injury (or threat). By distinction, paragraph 1(a) uses the expression "as to cause" in linking "such increased quantities" and "under such conditions" to serious injury.

3. The choice of the expression "If, as a result of" suggests that the framers of Article XIX were seeking to characterize a situation in which a particular outcome ("a result") has followed generally from earlier occurrences. By contrast, the expression "as to cause or threaten", used later in the paragraph, denotes a considerably more direct, cause-effect relationship. The words "If, as a result of" emphasize the end result of "unforeseen developments" (namely, products being imported in such increased quantities and under such conditions as to cause or threaten serious injury) rather than the manner in which those developments produced that outcome.

4. The choice of "If, as a result of" makes plain that, as the Appellate Body concluded in *Korea–Dairy* (at ¶ 85), "unforeseen developments" do not constitute an additional condition for the application of a safeguard measure. Rather, its focus on result rather than causation suggests that the "unforeseen developments" language is meant to characterize the unexpected ("unforeseen") nature of injurious import surges of the type described in Article XIX:1(a). Seen in this light, "unforeseen developments" are simply a restatement of the "emergency" character of those situations that Article XIX is designed to address.

5. Thus, the complainants' specific suggestion that Article XIX:1(a) imposes a simple, two step causation requirement is wrong because it fails to differentiate between " If, as a result of" and the causation language used elsewhere in that article.[1] It is also wrong because the "result" of unforeseen developments can be either an increase in imports or a change in economic, financial, or other "conditions" that apply to such imports, or both. The text of Article XIX:(1) makes clear that both increased imports and such "conditions" can result from "unforeseen developments," not merely the former.

6. Indeed, as the phrasing of Article XIX:1(a) suggests, there may be an interplay between the conditions under which increased imports affect a domestic industry and the quantity of the increase that will cause serious injury. For example, where conditions of competition have unexpectedly changed, an increase in imports that would not otherwise have been injurious may cause serious injury.

7. Moreover, as the Appellate Body recognized in the quotation that the Panel cites, "unforeseen developments" of the kind described in Article XIX:1(a) do not merely lead to increased imports or changes in the conditions under which they are imported. Rather the result of the "unforeseen developments" is those specific types of import increases ("in such quantities") and circumstances ("under such conditions") that cause or threaten serious injury. Thus, the result of unforeseen developments is the entire set of consequences addressed by Article XIX:1(a): to wit, an increase in imports that is "recent enough, sudden enough, sharp enough, and significant enough" as to cause or threaten serious injury to a domestic industry.[2]

8. Because this is the case, it would be highly unlikely that a Member would ever have "foreseen" developments of the sort mentioned in Article XIX:1(a) at the time it makes a tariff concession. The structure of GATT tariff concessions (incremental reductions phased in over time), the fact that Members bargain for and schedule tariff concessions on a product-by-product basis, and the intermittent nature of tariff negotiating rounds together create an environment in which governments can grant tariff concessions in a manner that avoids knowingly imperiling their domestic industries. Because Members cannot be presumed intentionally to place their industries in jeopardy through the grant of tariff concessions, it must be presumed that later developments which imperil their producers are of a kind that were "unforeseen" when the concessions were negotiated.

(b) In the light of the Appellate Body's statement, how does the United States substantiate its argument that a major "unforeseen development" was increased import volume combined with a shift in the product mix of imports away from frozen lamb meat and toward fresh/chilled lamb meat?

Answer 1(b)

9. The facts in this case are similar to those found by the Working Party in *Hatters' Fur* to constitute unforeseen developments.[3] Here, as in *Hatters' Fur*, an unforeseen development both

[1] As the Appellate Body concluded in *Hormones*, "the implication arises that the choice and use of different words in different places in the *SPS Agreement* are deliberate, and that the different words are designed to convey different meanings. A treaty interpreter is not entitled to assume that such usage was merely inadvertent on the part of the Members who negotiated and wrote that Agreement." *European Communities - Measures Concerning Meat and Meat Products*, WT/DS26 and 48/AB/R, Report of the Appellate Body, 13 February 1998, at ¶ 164, *citing United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R, Report of the Appellate Body, 25 February 1997, at 17.

[2] *Argentina–Footwear*, Report of the Appellate Body at ¶ 131.

[3] *Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade*, GATT/CP/106, report adopted on 22 October 1951.

results in increased imports *and* contributes to conditions in which the quantity and effects of the increased imports so affect the domestic industry as to cause or threaten to cause serious injury. In fact, the USITC found that both increased imports and a deterioration in the condition of the domestic industry occurred as a result of the shift in the product mix of imports from frozen to fresh or chilled lamb meat.

Increased imports

10. The change in the product mix of imported lamb meat resulted in a surge of low-priced lamb meat into the United States after 1995. The surge was not foreseen at the time the tariff concession on lamb meat was negotiated as part of the Uruguay Round. Lamb meat imports increased by 19 per cent in 1997 from the same period a year earlier, and imports increased by 19 per cent in the first nine months of 1998. Most of the increase in imports between 1995 and 1997 was in fresh or chilled lamb meat, which increased by 101 per cent during that period, as compared to 11 per cent for imports of frozen lamb meat.[4]

Conditions based on quantity and effects of imports

11. The shift in the product mix of imports away from frozen lamb meat and toward fresh and chilled lamb meat deeply affected conditions in the US market. This was true both in terms of increased quantities of imported lamb meat flooding the US market in 1997 and interim 1998, and in their effects. A primary effect of the change in the product mix of imports was an increasing convergence in the US market of domestic and imported product. Consumers were no longer limited to purchasing fresh or chilled lamb meat only from domestic sources but could purchase competing, lower-priced imports sold in a form (fresh or chilled) and cut similar to that produced by the domestic industry. Since 1996, the majority of lamb meat imports from Australia has been fresh or chilled[5], and an increasing share of imports from New Zealand were fresh or chilled.[6]

12. The changing conditions of competition in the domestic lamb market during the latter stages of the period of investigation required US producers to adjust to a market with increased competition from imported fresh and chilled lamb meat.[7] Competing imports displaced US product, which resulted in a higher market share for importers of lamb meat.[8] Complainants' submissions before the Panel, and their nationals' submissions before the USITC, evidenced that imports displaced domestic lamb meat. Australia has conceded that about one third of the increase in lamb meat imports over the period of investigation displaced domestic lamb meat.[9] During the USITC investigation, both Australian and New Zealand respondents made a similar concession.[10]

13. Neither the change in the product mix of imports nor the degree to which this change would affect market conditions for US producers of lamb meat could have been foreseen in 1993 by US negotiators of the tariff concession on lamb meat. The change in the product mix of imports, in this particular case, both resulted in increased imports and contributed to conditions in the US market whereby the quantity and effects of the increased imports threatened to cause serious injury to the domestic industry.

(c) Please explain your apparent view that no *finding* of "unforeseen developments" is necessary for this provision of Article XIX:1 of GATT 1994 to be fulfilled. If

[4] USITC Report at I-22.
[5] USITC Report at II-16.
[6] USITC Report at II-43.
[7] USITC Report at I-32.
[8] USITC Report at I-31and I-32.
[9] Australia's First Written Submission at ¶ 146.
[10] USITC Hearing Transcript at 164, attached hereto as US Exhibit 20.

no such finding is necessary, how can compliance with this provision be reviewed by a panel?

Answer 1(c)

14. The Appellate Body's decisions in *Korea–Dairy* and *Argentina– Footwear* establish that "unforeseen developments" do not constitute an "independent condition" for the application of a safeguard measure. This conclusion is in keeping with the specific language of Article XIX:1(a) as discussed above. It is also consistent with the fact that nothing in Article 3 of the Safeguards Agreement, which establishes procedures for investigations by the competent authorities, or Articles 2 and 4, spelling out the subject matter of such investigations, requires the establishment of such a condition. Nor do any of these provisions furnish a standard on which the competent authorities could decide on the degree, type, source, and specificity of evidence necessary to determine whether a government's negotiators (or the government as a whole) "foresaw" later developments. This fact again suggests that the competent authorities are not required to find the existence of "unforeseen developments" in the course of their investigation.[11]

15. This silence reflects the understanding embodied both in Article XIX and arising from the structure and procedures applicable to GATT tariff concessions, as discussed above, that Members should not ordinarily be presumed to intend their tariff concessions to result in serious injury to their domestic industries. This conclusion is consistent with the historical context in which Article XIX was developed.

16. Paragraph 1(a) of Article XIX was inserted in the GATT 1947 at US insistence. It was derived virtually verbatim from so-called "escape clause" provisions included in contemporaneous US trade agreements, specifically the US reciprocal trade agreement with Mexico, negotiated in 1942.[12]

17. The United States' insistence on such provisions, both in bilateral agreements and in the GATT, reflects the restraints that had been placed on the President's ability to negotiate tariff concessions. At the time, the President was negotiating trade agreements under a limited grant of tariff authority from the Congress provided in the Reciprocal Trade Agreements Act of 1934 (an amendment to the Smoot-Hawley Tariff Act of 1930).[13] To reassure domestic industries, the President was constrained under the 1934 Act in the depth of tariff cuts he could commit the United States to undertake. As a result, US tariff concessions in any particular negotiation – including the original GATT negotiations – were necessarily limited in nature.

18. Moreover, under the terms of an Executive Order issued in February 1947 (between the GATT preparatory sessions)[14], before negotiating any trade agreement the President was required to seek written, public advice from the USITC (then the US Tariff Commission) on the probable economic effect of tariff reductions on all product categories the President proposed for inclusion in

[11] If competent authorities were required to make findings with regard to "unforeseen developments", they would need to undertake two additional inquiries, one directed at identifying those developments and their impact and a second regarding whether they were "foreseen". The first investigation would take a considerable time, perhaps as long as the authorities' injury and causation investigation itself, since much of the evidence to be collected would be related to and derived from evidence in the injury investigation. The second investigation could not begin until the first had been completed, thus substantially delaying issuance of the authorities' final report. The second inquiry would entail an entirely new additional investigation, based on interviews of and the results of questionnaires addressed to current and former government and industry officials, plus an examination of pertinent negotiating, other governmental, and industry records. Moreover, it is not clear that competent authorities (which normally perform economic analyses) would have the expertise, or legal authority, to perform such a task.

[12] 57 Stat. 833 (1943), E.A.S. 311 (effective 30 January 1943), attached hereto as US Exhibit 21.

[13] Attached hereto as US Exhibit 22.

[14] *See* John Jackson, *World Trade and the Law of GATT* 553 (1969), attached hereto as US Exhibit 23.

the negotiations.[15] That is, the Commission was to publish its views on the effect that tariff reduction would have on each product.

19. The net effect of the tariff limitation and public advice provisions included in the 1934 act and the subsequent executive order was to place the President under legal and political restraints designed to preclude the negotiation of drastic tariff reductions of a nature that might be expected to result in a flood of imports and serious injury, or threat of injury, to any domestic industry. By contrast, the President was authorized to agree to smaller duty reductions negotiated on a product-by-product basis to avoid imperiling US producers. This incremental approach to tariff reduction was reflected in the relatively modest, phased-in duty reductions provided for under the original GATT tariff concessions, and was enshrined in GATT Article XXVIII *bis*, which calls for periodic rounds of tariff negotiations with a view to progressive duty reductions over time.

20. Given this gradualist approach, while tariff concessions might be expected to lead to modest import growth in particular sectors, the concessions would not normally be expected to unleash a flood of imports with consequent serious injury, or threat of serious injury, to domestic industries. Nonetheless, US negotiators recognized that even with limited tariff concessions, it was impossible to rule out the possibility – especially given the economic dislocations and uncertainty provoked by World War II – that future, unforeseen changes in market, financial, or economic conditions might lead to a surge in imports. That concern created the need for an "escape clause," which would be available to allow "emergency action" to address such situations. The escape clause provided reassurance for concerned domestic constituencies and, in turn, enabled the United States (and other governments) to make tariff concessions that might otherwise have been politically impossible.

21. Viewed in this light, the "unforeseen developments" referenced in Article XIX are any later occurrences that upset a Member's expectation that its tariff concession will not result in serious injury or threat of serious injury for its domestic industry. As the chairman of the Tariff Commission remarked in a report submitted to the Senate Finance Committee in June 1948 on the Commission's procedures for implementing the "escape clause" (then embodied both in an Executive Order and in GATT Article XIX:1(a)):

> The construction which the Commission places on the words 'unforeseen developments,' as concerns the exercise of its functions under the escape clause, is that when imports of any commodity enter in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers, this situation must, in the light of the objective of the trade agreements programme and of the escape clause itself, be regarded as the result of unforeseen developments.[16]

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[15] *See* Exec. Order No. 9832 of February 25, 1947, ¶¶ 5-8, attached hereto as US Exhibit 24.

[16] *Extending Authority to Negotiate Trade Agreements, Hearings before the Committee on Finance, United States Senate*, H.R. 6556, at 128 (1948), attached hereto as US Exhibit 25. Three members of the Commission repeated this view in a 1953 report of an escape clause investigation conducted on imports of hand-blown glassware. Despite the fact that these Commissioners found that increased imports had not caused serious injury, they observed that:

> In granting trade agreement concessions, the United States fully contemplates that imports will increase. It does not, however, intentionally grant concessions of such breadth and depth as to cause (or threaten) serious injury to a domestic industry. The major purpose of the escape clause legislation is to provide a remedy whenever experience under a trade agreement concession indicates that an error was committed and that imports have in fact increased, either absolutely or relatively to domestic production, to such an extent as to cause or threaten serious injury to a domestic industry.

22. Thus, the Tariff Commission made clear as early as 1948 – like the Appellate Body more than 50 years later – that the reference to " unforeseen developments" does not create an independent condition for application of the escape clause. Rather, the language is a restatement of the circumstances in which recourse to the escape clause itself is permitted – namely, a situation in which, following implementation of a negotiated tariff reduction, a surge in imports and serious injury (or threat) to a domestic industry has unexpectedly occurred.

23. The 1951 Working Party report on *Hatters' Fur* provides further support for this conclusion. The members of the Working Party (with the exception of the United States) considered that "unforeseen developments" should be understood to be "developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated".[17]

24. As the Working Party report notes, US negotiators in Geneva had been aware in 1947 that hat styles were subject to change and they had expected some increase in imports following implementation of the tariff concession. The members of the Working Party (except the United States) considered that US negotiators should have foreseen that hat fashion styles would, in fact, change. But the Working Party (except Czechoslovakia) found that US negotiators could not have foreseen the specific change in style that actually occurred, the large scale of that change, or its prolonged duration.[18]

25. Taken as a whole, the Working Party report suggests that future developments (*e.g.*, later changes in hat styles) can be understood to have been "foreseen" at the time the tariff concession was made if they are a direct result of economic factors of which the tariff negotiators had actual knowledge at the time (hat fashions are subject to change). But the report also suggests that specific developments in the marketplace of the type leading to an injurious import surge (a major, sustained shift to a new hat style) cannot be understood to have been "foreseen". Thus, the Working Party report confirms the conclusion that specific changes in the marketplace that result in an injurious import surge cannot normally be considered to have been "foreseen".

26. Since Members can normally be assumed to structure their tariff concessions in a way to avoid unleashing an injurious import surge, a surge of that nature must presumptively be regarded as the result of unforeseen developments. The developments themselves will typically be apparent in the competent authority's report of its investigation, as is the case in the USITC report of its lamb meat investigation. Their unforeseen character will be implicit in the result they have produced.

27. There may be rare instances in which a Member has specifically contemplated that a tariff concession it has made would result in sudden and severe injury, or threat of injury, to a domestic industry. In such a case, parties appearing before the competent authority in its injury investigation would be free, under Article 3.1 of the Safeguards Agreement, to present evidence to this effect and argue that the application of safeguard measures would not be "in the public interest." Should such measures be applied nonetheless, a complaining Party in panel proceeding brought under the DSU would equally be free to point to this evidence and argue that the normal presumption of "unforeseen developments" should not apply.

United States Tariff Commission, *Hand-Blown Glassware*, Report to the President on Investigation No. 22 Under Section 7 of the Trade Agreements Extension Act of 1951, as amended, at 51-52 (1953), attached hereto as US Exhibit 26.

[17] *Hatters' Fur* at ¶ 9.

[18] *Hatters' Fur* at ¶ 11.

Is the definition of the "domestic industry" that was used in the USITC's investigation consistent with the Safeguards Agreement and GATT 1994?

Question 2

The United States takes the view that - where there is a "continuous line of production from the raw to the processed product" and "substantial coincidence of economic interest" - producers of input products form part of the "domestic industry" producing the processed product. Can the United States explain, in the hypothetical situation where the end-product is composed of and processed from a large number of inputs which are functionally dedicated to the production of only that end-product, under which conditions or circumstances input producers would be *excluded* from the domestic industry definition even if there is a continuous line of production and economic interests happen to substantially coincide? Or is it the United States' view that such input producers would in all cases be a part of the domestic industry?

Answer 2

28. The panel's hypothetical has not arisen before the USITC and will not because of the nature of the USITC's test. Cases in which the USITC considers whether to include producers of the raw product (*e.g.*, growers) and processors in the same domestic industry solely involve processed agricultural products.[19] In those investigations, the USITC examines whether the evidence establishes a continuous line of production from the raw product to the processed product. As reflected in the term "raw," the product moves along the continuum from unfinished to finished form. Multiple inputs are not contemplated in such a situation because the test is reserved for moving a primary product from being raw to "market-ready." The US test does not, as the *Manufacturing Beef* panel characterizes the Canadian test at issue there, simply provide for relief to be available to input suppliers in general when they suffer injury from imports equivalent to that normally suffered by those who produce end-products.

29. Likewise, the hypothetical the panel poses would not arise because of the second prong of the USITC's test. The hypothetical assumes there would be a "substantial coincidence of economic interest" between the producers of multiple inputs and the processors of the finished product. However, it is difficult to conceive of a processed product comprised of a mix of raw agricultural products, each of which would be dedicated to only one end-product. It is also unlikely there would ever be a coincidence of economic interests between such multiple input producers and the processors of the final product. Such a situation is only liable to occur where, as here, the processing stage reflects minor value-added components contributing to essentially a finishing operation.

Question 3

We note that Article 4.1(c) focuses on the "output" of the "like or directly competitive products" (i.e., "firms whose collective *output of the like or directly competitive products* constitutes a major proportion of the total domestic production of those products"). How would the United States reconcile its definition of the domestic industry with this provision?

Answer 3

30. The United States' definition of the domestic lamb meat industry is consistent with Article 4.1(c) of the Safeguards Agreement. The USITC defined the domestic industry producing

[19] *See Fresh Tomatoes and Bell Peppers*, Inv. No. TA-201-66,USITC Pub. 2985 (Aug. 1996), at I-9-10, attached hereto as US Exhibit 27; *Apple Juice*, Inv. No. TA-201-59, USITC Pub. 1861 (June 1986), at 5-10, attached hereto as US Exhibit 28; *Certain Canned Tuna Fish*, Inv. No. TA-201-53, USITC Pub. 1558 (Aug. 1984), at 5-7, attached hereto as US Exhibit 29.

lamb meat to include growers and feeders of live lambs as well as packers and breakers of lamb meat.[20] The ordinary meaning of the term "product" is defined as the "output" of an industry or firm[21], and the ordinary meaning of the word "production" is defined as the "total output especially of a commodity or an industry".[22] Consistent with these definitions, lamb meat is produced by the domestic industry through an extended and continuous line of production yielding the output of a commodity, "lamb meat". The plain meaning of the term "output" refers to "something produced" in "agricultural or industrial production".[23] US growers and feeders of live lambs as well as packers and breakers of lamb meat all produce an "output" that is an agricultural product.

Question 4

In this context, please discuss the *Canada - Manufacturing Beef* dispute (SCM/85), in which the panel rejected Canada's reasoning (which was very similar to the USITC's reasoning in this case) for considering the producers of live cattle to be among the producers of manufacturing beef. Why would that panel's reasoning not be equally persuasive and relevant in this case?

Answer 4

31. It is important to note at the outset that *Manufacturing Beef* was an unadopted decision. In *Japan–Taxes on Alcoholic Beverages*, the Appellate Body discussed the legal status of panel reports, and in particular unadopted panel reports. *Adopted* panel reports:

> are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.[24]

32. *Unadopted* panel reports, by contrast, "have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the CONTRACTING PARTIES to GATT or WTO Members".[25] The Appellate Body's conclusion is especially pertinent in this case, because the WTO membership could have "endorsed" the *Manufacturing Beef* decision by codifying it in the new WTO Subsidies Agreement. Their failure to do so should counsel against extending that decision 's reasoning to cases under the Subsidies Agreement, much less the Safeguards Agreement.

33. In any event, even if the panel's decision in *Manufacturing Beef* were applicable in a countervailing duty case, it is not relevant to this case. The panel's determination that cattle producers were not "producers" of manufacturing beef was based in large part upon its interpretation of Article 6.6 of the Subsidies Code, which stated that:

> The effect of the subsidized imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of production in terms of such criteria as: the production process, the producers'

[20] USITC Report at I-13.

[21] *Webster's Third New International Dictionary (Unabridged)* at 1810 (1981), attached hereto as US Exhibit 30.

[22] *Webster's New Collegiate Dictionary* at 918 (1977), attached hereto as US Exhibit 31.

[23] *Webster's Ninth New Collegiate Dictionary* at 838 (1985), attached hereto as US Exhibit 32.

[24] *Japan–Taxes on Alcoholic Beverages*, Report of the Appellate Body, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, at 14.

[25] *Id.* at 14-15.

> realization, profits. When the domestic production of the like product has no separate identity in these terms the effects of subsidized imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.[26]

34. In the view of the Panel, Article 6.6:

> indicates a preference for narrowing the analysis of injury to those production resources directly engaged in making the like product itself. Applied to a vertical production process involving several stages, this principle would indicate that the analysis should likewise be focused on the stage of production devoted to actually making the like product in question, as opposed to earlier stages devoted to producing inputs.[27]

35. The Panel also cited Article 6.6 in distinguishing the panel's decision in *New Zealand – Transformers* (unlike *Manufacturing Beef*, an adopted decision), which, as the United States explained in its First Written Submission (at ¶ 71), supports the USITC's determination of the domestic industry in this case.

36. The Safeguards Agreement contains no provision equivalent to Article 6.6. Therefore, the Panel's analysis, which was based on that provision, is inapposite.[28]

37. As discussed in the United States' First Written Submission, the USITC's approach in this case is supported by the express purposes of the Safeguards Agreement and its remedial provisions, which are not comparable to provisions of the Tokyo Round Codes. The resolution of the question at hand should be decided on the basis of the text of the Safeguards Agreement, the particular Agreement at issue, and not by reference to an unadopted decision of a GATT panel interpreting another Agreement and, in particular, a provision of that Agreement that does not appear in the Safeguards Agreement.

38. In addition, this case is distinguished from *Manufacturing Beef* not only by its legal posture, but also by its facts. In *Manufacturing Beef*, the Panel found boneless manufacturing beef to be a "by-product" resulting from economic activities whose principal aim was to produce other products for sale.[29] The EEC had argued that "viewing the entire economic process by which inputs were produced for transformation into boneless manufacturing beef, it could not be said to involve either continuous production or functional dedication".[30] In contrast, and as confirmed by the USITC, the production of lamb meat involves both continuous production and functional dedication of the live lamb to lamb meat. The USITC found that, in the United States, most sheep and lambs are meat-type animals kept primarily for the production of lambs for meat.[31] Except for lambs withheld for breeding purposes, virtually all meat-type lambs are shipped to feeders in the fall[32] and are then generally shipped to packers for slaughter.[33] Packers then either further process the lamb or ship the carcasses to breakers who perform a similar processing function.[34] The cuts are then sold to wholesalers or

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[26] Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, Art. 6.6.

[27] Manufacturing Beef at ¶ 5.3.

[28] In the view of the United States, the Panel's interpretation of Article 6.6 (and thus its conclusion in *Manufacturing Beef*) was erroneous. Therefore, even if the Safeguards Agreement did include such a provision, it would not change the fact that the USITC's approach to this issue was correct.

[29] *Manufacturing Beef* at ¶ 5.12.

[30] Manufacturing Beef at ¶3.23.

[31] USITC Report at I-13 and II-4.

[32] USITC Report at I-13 and II-11, II.

[33] USITC Report at I-13 and II-14.

[34] USITC Report at I-13 and II-14-15.

retail outlets. Obviously, this is not a case where production of the like product results "from economic activities whose principal aim is to produce other products for sale" as was claimed in *Manufacturing Beef*.

39. To the extent *Manufacturing Beef* is at all relevant, it is because one of the complainants in this case – Australia – took a position in *Manufacturing Beef* that was contrary to the position it takes here. In *Manufacturing Beef*, Australia argued it was the growers who produced the beef; the abattoirs were merely finishers who placed the product in a usable form.[35] Australia adopted the same reasoning as the USITC in its lamb meat investigation and agreed that the CCA should include cattle growers in the domestic industry producing beef. As Australia there argued, when the processor is simply making a product "market-ready", a grower is properly regarded as a producer of the finished good. Australia's position in that case is inconsistent with any conclusion that the ordinary meaning of the term "producer" can resolve the question at issue here contrary to the United States' position. Further, if Australia believed in *Manufacturing Beef* that cattle growers supplying less than 50 per cent of a product's meat input constituted producers of the finished product, then it certainly must also believe that lamb growers supplying 100 per cent of the product's meat input are producers of the product.

40. As Australia argued in *Manufacturing Beef*[36], such an approach is in keeping with Ad Article XVI of the *GATT 1994*, Section B, paragraph 2, which defines a primary product as "Any product of farm . . . in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade". Although the *Manufacturing Beef* panel declined to rely on the Ad Article because it and the Tokyo Round Agreement had different purposes, the Ad Article definition provides further evidence that, in normal trade parlance, the production of primary products involves both raw and processed forms.

Question 5

Please comment on New Zealand's argument at para. 29 of its oral statement that the term "as a whole" in Article 4.1(c) has to do with the representativeness of the data used in an investigation in respect of the entire industry, and not with the scope or breadth of the domestic industry itself.

Answer 5

41. The term "as a whole" is not defined by the Safeguards Agreement. While the United States supports New Zealand's view that the purpose of the term may be to ensure that a safeguard investigation is not limited to selected individual members of an industry, it rejects the claim that "as a whole" is a qualifying term meant to define the scope of the producers *within* an industry. Contrary to New Zealand's additional assertion, the United States has not used the term "as a whole" to expand the membership of an industry beyond those who produce the "like or directly competitive product".

Did the USITC demonstrate that the domestic industry faced a "threat of serious injury" due to "increased imports"?

Question 6

In its investigation, how did the USITC determine that the threatened injury was "serious" as opposed to some lesser degree of injury? Where in its determination can this be found?

[35] *Manufacturing Beef* at ¶ 4.1.
[36] *Manufacturing Beef* at ¶ 4.1.

Answer 6

42. As a preliminary matter, it would appear that the question of whether Article 3.1 of the Safeguards Agreement required the USITC to state in its report why the threatened injury was "serious" as opposed to meeting some lesser standard, does not appear to be at issue in this dispute and would be outside the Panel's terms of reference. Article 3.1 is the only provision obligating a Member to publish conclusions reached on pertinent issues. The complainants did not identify this issue in their panel request, nor did they raise it in their first written submissions. Those submissions rely on Article 3 only in challenging the United States' choice of a safeguard measure, not in challenging the USITC's threat of serious injury determination, for which they rely on Article 4. Consequently, any claim that under Article 3.1 the USITC should have articulated an additional legal conclusion is outside the terms of reference of this dispute. However, the United States is pleased to respond to the Panel's question.

43. The USITC justified its conclusion that the industry was threatened with injury that was serious through its findings at pages I-16 through I-21. That discussion affirmatively explains why the USITC regarded "the deterioration in [economic] indicators . . . after 1996"[37] as confirming that the industry was threatened with serious injury. The USITC explicitly recognized that the requisite standard for its injury determination was whether there had been "a serious . . . overall impairment in the position of [the] domestic industry".[38] which is the definition of serious injury under Article 4.1(b) of the Safeguards Agreement. The authority's conclusion emphasized the declines in the domestic industry's "market share, production, shipments, profitability, and prices, among other difficulties that the domestic industry [was] facing".[39] The findings on those factors demonstrate why the USITC regarded the industry on the verge of a significant overall impairment of its position.

44. The Agreement does not require more. The WTO Agreements as a whole do not articulate a precise relationship between the "serious injury" standard set forth in the Safeguards Agreement and other standards set forth in other agreements, such as the "material injury" standard used in the Antidumping Agreement. Although the Safeguards Agreement defines the term "serious injury", neither the Antidumping Agreement nor Article VI of the GATT 1994 defines "material injury". Consequently, the WTO Agreements do not provide the basis for a precise comparison between different "degrees" of injury, nor do any of the Agreements call for a comparison.

Question 7

Under the causation standard applied by the United States in this case, can it be determined that imports of lamb meat in isolation were causing or threatening to cause a degree of injury that is "serious", regardless of the possible additional injury that might be caused by other factors? If so, how? Is such a determination necessary? Please explain.

Answer 7

45. Underlying New Zealand's assertion that the Safeguards Agreement required the USITC to "isolate" the effects of increased imports is the apparent assumption that the Agreement requires increased imports to be the sole cause of serious injury or threat of serious injury. Both the purported "isolation" requirement and the premise on which it is based are unfounded.

Sole Cause

[37] USITC Report at I-18.
[38] USITC Report at I-16, *quoting* Section 202(c) of the Trade Act of 1930.
[39] USITC Report at I-21.

46. Articles 2.1 and 4.2 of the Safeguards Agreement, which respectively set out the conditions for the application of safeguard measures and requirements for determinations of serious injury or threat thereof, both employ the verb "to cause" in one form or another. *Webster's Third New International Dictionary (Unabridged)* at 356 (1981) defines the verb 'cause' as follows: "to serve as cause or occasion of." Webster's makes clear that 'cause' (in noun form) need not be the sole determinant of an outcome:

> cause indicates a condition or circumstance or combination of conditions and circumstances that effectively and inevitably calls forth an issue, effect or result *or that materially aids in that calling forth.* (emphasis added.)[40]

As the preceding definition indicates, while a cause need not be the sole determinant of a result, it must nevertheless be important. That is, it must *materially* aid in generating the result.[41] Webster's defines the term 'material' as follows: "being of real importance or great consequence: substantial".

47. New Zealand has objected to the fact that the USITC applied a "substantial cause" analysis in determining whether increased imports threatened serious injury to the US lamb industry. But, as demonstrated above, the expression "substantial cause" (defined under US law as "a cause which is important and not less than any other cause") fully accords with the ordinary meaning of "to cause" as used in the Safeguards Agreement.

48. The fact that the Safeguards Agreement treats "cause" in accordance with its ordinary meaning, rather than as "sole cause", finds support in Article 4.2(b). That provision requires a competent authority to demonstrate "the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. " The term 'causal' has the meaning "of or relating to, or dealing with a cause" and the term 'link', "a unifying element: a means of connecting or communicating".[42] Contrary to New Zealand's reading of "to cause", the manner in which Article 4.2(b) defines 'causal link' suggests that a competent authority is under no obligation to demonstrate that increased imports alone caused the serious injury or threat of serious injury. Rather, Article 4.2(b) requires a competent authority simply to demonstrate a connection between the increased imports and the injury it has found.

49. That the terms 'cause' and 'causal link' do not require that a cause be the sole cause is illustrated by the way these terms may ordinarily be used to describe the causes of disease.[43] To use a medical analogy, the fact that a particular person has experienced coronary heart disease may be traceable to several "causes", including high fat intake, sedentary lifestyle, genetic predisposition, prolonged periods of stress, and so forth. These factors can act together and in combination to produce a single medical condition: each, to use the dictionary terms, "materially aids in calling forth" the disease.

50. Article 2 of the Safeguards Agreement contemplates a similarly synergistic approach to causation. Specifically, it calls for an analysis not just of whether a particular product is being

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[40] Webster's Third New International Dictionary (Unabridged) at 356 (1981), attached as US Exhibit 33.

[41] While the relevant *New Shorter Oxford English Dictionary* ("NSOED")definitions support the concept of multiple causes, *see* NSOED at 355 (defining "cause" as "That which produces an effect or consequence; an antecedent *or antecedents* followed by a certain phenomenon") (emphasis added), they do not address the "materiality" element of "cause". *See also* NSOED at 355 (defining "to cause" as "Be the cause of, effect, bring about; occasion, produce; induce, make, bring it about".)

[42] *Webster's Third New International Dictionary (Unabridged)* at 355, 1317 (1981), attached hereto as US Exhibit 33.

[43] *See Webster's Ninth New Collegiate Dictionary* at 217 ("agent of a disease" used to explain "causal"), 695 (meaning of 'link' illustrated by "sought a . . . between smoking and cancer") (1985), attached hereto as US Exhibit 34.

imported in such increased quantities, but also "under such conditions", as to cause or threaten serious injury. Thus, Article 2 contemplates an inquiry into those other factors affecting an industry that may help create the conditions under which increased imports cause serious injury.

51. Moreover, as noted in the United States' first written submission (at ¶ 116), Article 4.2(b) recognizes that factors other than increased imports may be " causing injury to the domestic industry at the same time." This language makes plain that the serious injury or threat of serious injury that the domestic industry has experienced need not be traceable exclusively to increased imports. Thus, neither the ordinary meaning of the term "to cause" nor the relevant language of Article 4.2 supports the claim that the Safeguards Agreement requires increased imports to be the sole cause of serious injury or threat of serious injury.

52. Finally, the negotiating history of the Safeguards Agreement indicates that the drafters did not intend to impose a "sole cause" requirement. In 1988, the United States submitted a paper that explained US procedures for determining injury in Article XIX cases.[44] The paper specifically addressed the US "substantial cause" standard and explained that "the increase in imports must be both an important cause and a cause that is equal to or greater than any other cause of serious injury or threat".[45] Subsequently, the Secretariat issued a note that summarized the United States' discussion of its paper and briefly summarized descriptions by the EEC and Australia of their safeguards regimes. It also summarized the negotiating group's discussions on the causation standard:

> Many delegations said that it should be demonstrated that the cause of serious injury and threat thereof derived from sharp increases in imports, and that a major part of domestic producers were adversely affected. Some delegations said that the causal link between increased imports and the overall decline in the conditions of domestic producers had to be clearly established. One delegation said that if there were a multitude of causes, then it had to be established that increased imports was the principal cause, not just an important or substantive cause.[46]
>
> * * * * *
>
> The Chairman summed up the discussions . . . . There seemed to be agreement that there should be a direct, demonstrable causal link of imports to injury, although there were various opinions on whether increase in imports should be an essential, substantial, or important cause.[47]

Notably, there were no suggestions that imports should be the "sole" cause of the serious injury.

53. The Secretariat's summary demonstrates that the negotiators of the Safeguards Agreement were aware that the causation language in Article XIX was susceptible of different constructions, though none of them included the "sole cause" option that New Zealand apparently advocates. In the light of this range of views, it is significant that the negotiators did not seek to specify in the Safeguards Agreement the degree of "causation" required, whether "essential," "substantial", "important", "principal", or otherwise. Consistent with the divergent practice of GATT contracting parties under Article XIX, the Safeguards Agreement does not seek to impose a rigid benchmark for causation, but instead treats "cause" in a manner consistent with its ordinary meaning.

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[44] *Negotiating Group on Safeguards: United States Procedures for Determining Injury in Article XIX Cases*, MTN.GNG/NG9/W/13 (3 March 1988).

[45] *Id.* at 6.

[46] Negotiating Group on Safeguards, Meeting of 7 and 10 March 1988, Note by the Secretariat, MTN.GNG/NG9/5, at ¶14 (22 April 1988).

[47] *Id*. at ¶ 24.

Isolation Requirement

54. Nothing in the Safeguards Agreement requires that the competent authority examine the effects of increased imports "in isolation" from other factors, even if such examination were in general practicable. The GATT panel in *United States -- Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Salmon from Norway*[48] rejected just such a proposition when it was urged that provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (the Tokyo Round Anti-Dumping Code) similar to those of the Safeguards Agreement required that the effect of subject imports be considered "in isolation".[49] The report is also relevant for purposes of considering whether the Safeguard Agreement imposes an "isolation" requirement regarding the effects of increased imports.

55. As the panel noted, the Tokyo Round Anti-Dumping Code contained no affirmative guidance on how other causal factors were to be examined. Rather, as it found, the primary focus of the relevant Code provisions concerning injury determinations was on specific factors that authorities should consider in examining the effects of imports. It concluded there was no requirement, "in addition to examining the effects of the imports" under those provisions, that "the USITC should somehow have identified the extent of injury caused by these other factors in order to isolate the injury caused by these factors from the injury caused by the imports from Norway".[50]

56. Similar to the relevant provision of the Tokyo Anti-dumping Code, Article 4.2(a) sets out specific factors that the authority is to examine in determining whether increased imports have threatened to cause serious injury. None of those factors requires the authority to ascertain the extent of harm due to other causes in order to ascertain the effects of imports viewed in isolation. Indeed, the specific factors that an authority is to examine under Article 4.2(c) may be influenced by a number of conditions. An industry facing increased imports may, for example, sacrifice market share and sales but not cut employment or close facilities. Or it may seek to protect its market share at the price of lost profits. Alternatively, an industry may cut production, close facilities and reduce employment while retaining profitability. Presumably, other factors will affect the nature of its response. Since it is generally the case that multiple factors are affecting a domestic industry at the same time, if the negotiators had intended to require an isolation analysis in every case, they would have explicitly required such an analysis.

57. The Panel's use of the word "somehow" ("the USITC should somehow have identified the extent of injury . . .") suggests that the Panel understood that the notion of "isolating" the effects of increased imports is problematic, at least in many cases. For example, the multiple factors affecting an industry are often interdependent and attempting to isolate the effects of imports can involve creating counterfactual constructs based on unverifiable assumptions or broad estimates. Nothing in the terms of the Safeguards Agreement can be read to require such constructs.

58. Moreover, economic models that attempt to isolate factors generally assume that a market remains in price equilibrium, a particularly questionable assumption in the circumstances giving rise to a safeguards investigation, where imports have suddenly surged. While equilibrium may be reached over the long run, threat determinations in particular concern the "imminent" future.

59. The Safeguards Agreement, like the Tokyo Round Antidumping Code, does not mandate an analysis in which effects of imports are "isolated" from other effects. It requires authorities to

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[48] See *United States -- Imposition of Antidumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, 30 November 1992, at ¶¶ 544-561 ("United States -- Atlantic Salmon") (interpreting provision of Tokyo Round Antidumping Code).

[49] The panel report will be discussed further in response to Question 10, particularly as it addresses the origin of the second sentence of Article 4.2(b) of the Safeguards Agreement.

[50] *United States -- Atlantic Salmon* at ¶ 555.

examine all relevant factors bearing on the industry's condition, but it does not instruct them on how to do so.

Question 8

The United States argues that the fortunes of all segments of the industry as defined in the investigation rise and fall together although possibly at different times. The data and discussion in the USITC report seem to indicate that the growers and feeders performed worse during the period of investigation than the packers and breakers. This suggests that the price effects of increased imports were felt first by the producers of live lambs and only thereafter by the packers and breakers, i.e., the producers of lamb meat, in spite of the fact that the imports were of lamb meat. If this is correct, why would this be the case, i.e., would such a situation not depend on the ability of the packers and breakers to *immediately* pass along the *full* price impact of the imports to the growers? Where in the USITC 's report is it *demonstrated* that this in fact happened, and on the basis of what factual information? Please explain in detail.

Answer: 8

60. This question in effect asks two questions: (1) which segments of the industry were hurt worst; and, (2) which segments were hurt first.

61. The USITC did not rank the segments of the domestic lamb meat industry in terms of which were hurt most. Thus, it did not find that the grower segment or any other segment was hurt more than any other. It found that the price of lamb meat affects all four segments of the industry similarly, and that all four segments of the domestic lamb meat industry suffered financially during 1997 and interim 1998 when the surge in imports occurred. While the USITC cited evidence indicating that the price effects of increased imports were felt first by the packers and breakers of lamb meat and later by the producers of live lambs, it did not find it necessary to find a progression or find that the most injured segment was the segment initially impacted. The facts in a case rarely fall into the perfect sequence. Indeed, it is entirely possible that the grower segment, which was clearly being impacted by the surge in low priced lamb meats imports, was the most injured of the four segments due in part to the residual and receding effects of termination of the Wool Act payments. What is important is that the USITC looked at the condition of the whole industry – all four segments – and concluded that the industry as a whole was threatened with serious injury due to the surge in low priced imports.

62. The principal USITC finding on this point is set out on page I-14 of the USITC report. The USITC stated as follows:

> There is also evidence that the price of lamb meat affects all four industry segments similarly – that is, when processors do well, growers and feeders also benefit, *but when processors confront lower prices, they pass the lower prices back to feeders and then growers, and all suffer to some extent.* [Emphasis added.] As described below, all four segments suffered financially over the period of investigation, and all experienced significant declines in the unit value of their sales at the end of the period. No representatives in any of the four industry segments testified that the economic interests of packers and breakers diverged from those of growers and feeders.

63. The USITC's finding is amply supported by evidence in the record of the investigation. For example, the USITC report shows that the value of net sales of packers and breakers fell from 1996 to 1997, and between interim 1997 and interim 1998.[51] Operating income for packers was at its lowest point at the end of the period of investigation. Representatives of packer and breaker firms reported

[51] USITC Report at I-19.

having to reduce prices, sometimes selling at a loss in order to compete with low-priced imports.[52] The USITC also cited testimony at its injury hearing on the pass-through effect from witnesses representing different industry segments.[53] The USITC quoted testimony of a rancher to the effect that "lower import prices forced processors to reduce prices for the carcasses they bought from packers, who in turn had to reduce the prices they paid to feedlots for live lambs". The rancher explained that because of falling prices at the processor level, feedlot operators sold their lambs in the spring of 1998 for less than they paid for them in the fall of 1997, and had to reduce the price they could pay for lambs in the fall of 1998. The USITC further found, quoting the rancher, that "lower import prices 'forced the entire US lamb meat industry in successive waves to substantially reduce the prices they could pay for the lamb'".[54]

64. The phrase in the second sentence of the question that refers to performance "during the period of the investigation" suggests that the question might be premised at least in part on a consideration or comparison of industry data for some of the four segments during the period that preceded the surge in imports. While the USITC examined imports and industry conditions during the period 1993-September 1998, the full "period of the investigation," as explained in the United States' First Submission, the USITC's threat determination was based on the surge in imports that occurred after 1996 and the resulting downturn in industry indicators, and the projected continuation of these trends.[55] The evidence in the USITC's report concerning the sequence of events that occurred after the surge in imports fully supports the USITC's determination.

Question 9

The United States has argued that even if the domestic industry would be defined as comprising only packers, packers/breakers and breakers, the investigation would have led to a determination that a safeguard measure is necessary to prevent a "threat of serious injury" and facilitate adjustment. Could the United States indicate precisely which information in the published report supports this statement?

Answer 9

65. The USITC stated explicitly that "we find that all sectors show evidence of a threat of serious injury".[56] The USITC gathered data on all four segments of the domestic lamb meat industry so that it would have the ability to include domestic growers and feeders in the domestic industry if the facts supported such a finding. Specifically, the USITC gathered data and other information that directly related to lamb meat packers, packers/breakers, and breakers with respect to market share, domestic lamb meat production, shipments, profitability, capacity, capacity utilization, inventories, employment, productivity, and prices. In its causation analysis it also considered possible causes of injury other than imports at the processor level.

[52] USITC Report at I-19.

[53] USITC Report at I-14, n.50.

[54] USITC Report at I-14, n.50. *See also* similar testimony of Joseph Casper, Vice President, Chicago Lamb & Veal Co., a breaker, transcript of injury hearing at 22, attached hereto as US Exhibit 35; testimony of Harold Harper, owner of a feedlot operation, transcript of injury hearing at 30, attached hereto as US Exhibit 36 ("Here is how it happened. In the fall of '97, I bought lambs for approximately $1 a pound. However, when I went to sell the lambs in the winter of '97 and '98, I could only get 40 and 60 cents a pound. Why? Because the packer that I had traditionally supplied with lambs was forced to reduce his prices to me because his customer, the processor, had to lower his prices substantially to compete with imports. The impact of the incredibly low prices offered by importers was felt throughout the distribution chain as each sector was compelled to demand price breaks from their suppliers to try to remain competitive.")

[55] *See, e.g.*, United States' First Written Submission at ¶¶ 79-82.

[56] USITC Report at I-16, n.61.

66. The USITC's findings show why it found evidence of the threat of serious injury if the packer and breaker sectors were considered alone. That analysis focused on the 1997-98 period, when imports' share of the US lamb meat market rose from 20.7 per cent in 1996 to 24.8 per cent in 1997 and to 30.7 per cent in interim 1998.[57] It also found that the 9.7 million pound increase in lamb meat imports in 1997 was mirrored by a decline in US lamb shipments of 8.4 million pounds.[58] Based on data developed by the US Department of Agriculture, the USITC found that both domestic production and shipments of lamb meat fell in 1997, and that production continued to fall in interim 1998.[59]

67. Based on responses to USITC questionnaires, the USITC found that the value of net sales and operating income of packers and breakers declined significantly. The USITC referenced the percentage decline in its confidential report. The USITC found that the operating income for most packers and breakers was at the lowest point at the end of the period of investigation in 1997 and interim 1998. The USITC also observed that representatives of packer and breaker firms reported having to reduce prices, sometimes selling at a loss, in order to compete with low priced imports.[60] The USITC also found that firms in the packer and breaker segments reported difficulties in recouping new investments in plant and equipment and in repaying loans.[61]

68. The USITC found that packer capacity was lower in 1997 than earlier in the investigation, although higher in interim 1998 than in interim 1997. It found that packer capacity utilization, after having risen irregularly during 1993-96, fell in 1997 and was at its lowest level of the investigation period, 73.5 per cent, in interim 1998, significantly below the level the level of 85.7 per cent in interim 1997.[62] The USITC found that breaker capacity utilization declined significantly, although it noted that breaker capacity had also increased significantly.[63]

69. The USITC collected extensive data comparing domestic and imported lamb meat prices. It found that US, Australian, and New Zealand lamb meat prices were in most cases lower in the second half of 1997 and the first three quarters of 1998 at the time that imports were rapidly increasing. It found that further increases in imports would be expected to put further downward pressure on prices in the US market.[64] The USITC found that the financial performance of "the various segments worsened due to declining sales and falling prices, as a result of the increase in imports".[65]

70. In examining other possible causes of injury, the USITC made findings specific to the packer/breaker segments of the domestic industry. Specifically, it found none of these other possible causes – competition from other meat products, increases in input costs, concentration in the packer segment, and the effectiveness of domestic marketing plans – to be causes of any significance, and that the only cause of significance of the threat of serious injury was increased imports. With respect to competition from other meat products, the USITC found no evidence that other meat products were displacing lamb meat, but rather that domestic consumption of lamb meat had been relatively steady since 1995.[66] With respect to input costs, the USITC found that costs of inputs for packers and breakers rose moderately in line with production; it thus concluded that there had been no increase in input costs that explained the sharp decline in industry profits, and that no increase was predicted in the imminent future.[67] With respect to packer concentration, the USITC noted petitioners' claim that concentration had actually fallen during the most recent 5 years. The USITC also reasoned that an

[57] USITC Report at I-24, II-50 (Table 32).
[58] USITC Report at I-24.
[59] USITC Report at I-18.
[60] USITC Report at I-19.
[61] USITC Report at I-21.
[62] USITC Report at I-20.
[63] USITC Report at I-20.
[64] USITC Report at I-24.
[65] USITC Report at I-24.
[66] USITC Report at I-25.
[67] USITC Report at I-25.

undue level of concentration among packers would have suggested that they would have been sheltered from the effects of low-priced imports, and would have been able to pass through lower prices more readily to feeders and growers. Instead, packers experienced deteriorating profits and operated at a loss in interim 1998.[68]

Is the USITC's finding that increased imports were a "substantial cause" of threat of serious injury consistent with the Safeguards Agreement and GATT 1994?

Question 10

Would the United States agree that Article 4.2(b) requires that increased imports, even in isolation from other causal factors, must be demonstrated to cause a threat of serious injury? If not, what in your view is the correct reading? Please explain. If so, how does the US "substantial cause" standard applied in this case ("important cause and not less important than any other single cause") reconcile with this requirement?

Answer 10

71. As demonstrated in response to Question 7, the Safeguards Agreement does not require increased imports to be the sole cause of serious injury or threat of serious injury. The "substantial cause" standard established under US law comports fully with the requirement in Article 4.2(a) to determine whether increased imports "caused" serious injury or threat of serious injury. In the same response, the United States demonstrated that Article 4.2(a) does not require a competent authority to conduct an isolation analysis and explained why the results of any such analysis would be suspect.

72. Nothing on the face of Article 4.2(b) mandates an isolation analysis of the type the panel describes. The second sentence of that article simply requires the competent authority to avoid attributing to increased imports injury caused by other factors. That can be done, as the USITC did, simply by examining each possible injury factor in turn to determine its effect, if any, on the industry's condition.

73. The derivation of Article 4.2(b), second sentence, argues strongly against construing it to require an "isolation" analysis. Prior to the completion of the Uruguay Round, the language incorporated in that sentence was understood not to impose an isolation requirement.

74. Article 4.2(b), second sentence, is drawn from similar language in Article 3:4 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (also known as the Tokyo Round Anti-Dumping Code). The second sentence of Article 3:4 provided that "[t]here may be other factors which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports".[69] Well before the Uruguay Round negotiations concluded in 1994, a GATT dispute settlement panel interpreted Article 3:4, second sentence, in a manner that flatly rejected the argument that New Zealand makes here, concluding that the requirement:

[68] USITC Report at I-25-26.

[69] The second sentence of Article 4.2(b) of the Safeguards Agreement reads, "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." The dependent clause of this sentence, like the parallel provision in the Tokyo Round Antidumping Code, recognizes that other factors may, in some cases, but not all, also be causing injury. The independent clause substitutes "shall not" for "must not" and, in keeping with the different subjects of the agreements, "increased imports" for "dumped imports". Thus, the changes made in the adoption of this language into the Safeguards Agreement are insubstantial.

> not to attribute injuries caused by other factors to the imports . . . did not mean that, in addition to examining the effects of imports under Article 3:1, 3:2 and 3:3, the USITC should somehow have identified the extent of injury caused by these other factors in order to isolate the injury caused by these factors from the injury caused by the imports from Norway.[70]

The *Norwegian Salmon* panel held that it was sufficient that the USITC had not ignored other factors it found had caused adverse effects on the US industry. In that case, the USITC did not eliminate the possibility that other factors had caused adverse effects.[71]

75. As in the current case, the Panel considered whether the USITC determination had adequately addressed increased production of other, similar products that might have affected prices for the subject product. Although the USITC did not specifically address the issue in its determination, "the Panel considered that the specific factors discussed by the USITC suggested that the increased availability of Pacific salmon could have had only a limited effect on domestic prices in the United States of fresh Atlantic salmon".[72]

76. Likewise, the Panel upheld the USITC's discussion of problems unique to the industry as a possible alternative cause of injury, finding it sufficient that the industry had recently been profitable and its more recent financial performance was worse than would otherwise be expected.[73] Discussing the USITC's findings concerning the effects of increases in non-dumped imports as an alternative cause, the Panel held it sufficient that "it could not, in the view of the Panel, reasonably be found that the USITC had attributed to the Norwegian imports effects entirely caused by imports from other supplying countries".[74]

77. In no instance did the *United States -- Atlantic Salmon* panel find that the obligation not to attribute injury due to other causes to the subject imports required that the authority isolate the effects of subject imports and determine whether the amount of injury they caused was material. In the current case, the USITC determination goes well beyond what the *United States -- Atlantic Salmon* panel held was sufficient. In that case, the panel held that the USITC need not explicitly address the effects of each proposed alternative cause of injury. Unlike that case, in the investigation at issue here, the USITC examined each proposed alternative cause. The *United States -- Atlantic Salmon* panel did not require that the USITC find that the effects, for example, of non-subject imports were not more important than those of dumped imports. The USITC examination of causation in safeguards investigations must, under US law, contain conclusions that no other cause is more important than increased imports. Thus, the US examination of alternative causes goes beyond what was held to be sufficient in *United States -- Atlantic Salmon* to assure that injury due to other causes is not attributed to increased imports.

78. If the framers of the Safeguards Agreement had wanted to impose an "isolation" requirement, they would not have been content with language nearly identical to text that had already been interpreted, well before the Uruguay Round concluded, not to impose such a requirement. The United States would be deprived of the benefit of its bargain if Article 4.2(b) of the Safeguards Agreement were interpreted to require an "isolation" analysis.

Question 11

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[70] *United States -- Atlantic Salmon* at ¶ 555.
[71] *See United States -- Atlantic Salmon* at ¶ 547, quoting the USITC Report.
[72] *United States -- Atlantic Salmon* at ¶ 558.
[73] *United States -- Atlantic Salmon* at ¶ 559.
[74] *United States -- Atlantic Salmon* at ¶ 557.

The USITC found that "the increased imports are an important cause*, and a cause no less important than any other cause* of the threat of serious injury to the domestic lamb meat industry". In its first written submission in this case, the United States argues that the USITC found no evidence that any other alleged factors might have significantly affected the condition of the domestic industry during 1997 and interim 1998 (para. 108). Please explain how you reconcile the apparent difference between the language of the USITC report and the language of the US first written submission, i.e., where in the USITC report can the findings referred to in the US first written submission be found?

Answer 11

79. The findings referred to by the United States in ¶ 108 of its first written submission are in the USITC's evaluation of the evidence with regard to each of the other possible causes of injury alleged or identified during the investigation. While the USITC framed its finding in terms of the US statute, its evaluation of the evidence with respect to each of those other possible causes – termination of the US Wool Act payments, competition from other meat products, increased input costs, overfeeding of lambs, alleged concentration in the packer segment, and effectiveness of the industry's marketing programme – makes it clear that no asserted cause other than increased imports significantly contributed to the threat of serious injury.

80. With respect to the impact of termination of the US Wool Act, the USITC found that the payments under the act were largely phased out in 1994 and 1995 and terminated in 1996, *before* the surge in imports. It found that the industry had experienced some recovery since full termination of the payments, and that remaining effects of termination were receding with each month. Accordingly, the USITC's report shows no nexus between the diminishing effect of the termination of Wool Act payments and its conclusion that the domestic industry's condition would *worsen* in the imminent future. Although the USITC addressed the Wool Act termination as an alleged "other cause", it is clear that the termination was not such an other factor within the contemplation of Article 4.2(b), which requires such a factor to be causing injury "at the same time" as increased imports. Moreover, the USITC found that the effects of termination could only have had an indirect effect on the packer and breaker segments of the industry, since firms in those two segments never received payments under the Wool Act.[75]

81. With respect to competition from other meat products, such as beef, pork, and poultry, the USITC found that domestic per capita consumption of lamb meat had been relatively steady since 1995, indicating no shift by consumers away from lamb meat to other meat products.[76] The USITC also found no reason to anticipate such a shift in the imminent future. Thus, although this factor was alleged as another cause of injury, the USITC rejected the allegation.

82. With respect to increased input costs, the USITC found that expenses for growers rose at a modest rate and then fell in interim 1998, that expenses for feeders increased at a faster pace but not at a dramatic pace, and that input costs for packers and breakers rose moderately in line with production. The USITC concluded that there had been no significant increase in input costs that explained the sharp decline in industry profits, and no increase was predicted in the imminent future.[77] In short, the USITC found no causal link between input costs and the threat of serious injury.

83. The USITC also considered the allegations of the Australian and New Zealand respondents in the investigation that US feeders in 1997 held lambs unduly long in feed lots and that such over-weight "fat" lambs depressed prices when sent to slaughter. Here, too, the USITC rejected the allegation on the facts. The USITC noted that US Department of Agriculture data showed that the fat

[75] USITC Report at I-24-25.
[76] USITC Report at I-25.
[77] USITC Report at I-25.

content of domestic lambs was lower in 1997 than earlier in the period of investigation. It also found that, even if it accepted respondents' allegations, these "fat" lambs would have accounted for no more than a small share of total domestic lamb production. The USITC also noted that respondents did not allege that such overfeeding was currently taking place or represented a future threat.[78] Thus, again, this was a factor that was not occurring "at the same time."

84. With respect to concentration in the packer segment, the USITC noted petitioners' claim, unrefuted by respondents, that concentration in the packer segment had actually decreased over the past five years. Moreover, the USITC found that undue concentration would have suggested that packers would have been sheltered from the effects of low-priced imports and better able to pass through lower prices to feeders and growers. Instead, packers, like other segments of the domestic lamb meat industry, experienced deteriorating profits in the latter part of the investigation and operated at a loss in interim 1998.[79] The USITC also rejected this allegation on the facts.

85. Finally, the USITC considered the industry's failure to develop an effective marketing programme to expand demand in light of the repeal of Wool Act payments.[80] The USITC was not required to assume that it was appropriate to consider the absence of such a programme to be a factor causing injury under Article 4.2(b), as opposed to a possible adjustment measure to address injury. It would indeed be a paradoxical interpretation of the Safeguards Agreement to hold that, because an industry had not earlier applied adjustment measures, it is prevented from obtaining the relief necessary to make adjustment measures effective.

86. In any event, the USITC found only that development of an effective programme could (*i.e.*, had the potential to) have had an important impact. It did not find that the industry could have developed a programme that would have been successful between the end of Wool Act payments and the onset of the import surge.[81] The USITC did not find the failure to develop programmes to expand demand, about whose potential benefits it could only have speculated, a factor causing the threat of injury. Rather, it referred to its decision as a whole, in which (as mentioned above) it found that consumption, which had previously declined, had stabilized since 1996 when Wool Act payments ended. It also found that there was no reason to expect consumer preference for lamb to change in the imminent future.[82] Thus, the USITC found stabilized demand as a condition under which increased imports would cause US producers to lose sales, lower prices or both in the imminent future.[83] In short, the report as a whole shows that the USITC did not regard lack of demand enhancement programmes as causing worsening conditions in the imminent future.

87. In sum, the USITC's findings establish why none of the proposed alternative causes of injury should be considered "factors other than increased imports [that] are causing injury to the domestic industry at the same time" under Article 4.2(b). The fact that the USITC stated its conclusions in terms of whether, in keeping with the US statute, proposed other causal factors were more important than the increased imports does not change this conclusion. As is shown elsewhere, even if the USITC had found them to be relevant alternative causes, its findings under the US standard would

[78] USITC Report at I-25.
[79] USITC Report at I-25-26.
[80] USITC Report at I-26.
[81] Indeed, the Commissioners' findings on remedy suggest the contrary. Three Commissioners observed that it would "take time" to develop new markets and products that expand demand. USITC Report at I-34. Indeed, those Commissioners' remedy recommendation made clear that a demand-expansion programme alone could not have prevented serious injury in the imminent future, particularly since it recognized that production-side adjustment, as well as marketing, was needed to make the US industry competitive. USITC Report at I-34, n.169. Two Commissioners noted that there was an unavoidable "degree of uncertainty" as to whether the industry, even with safeguard protection, could effectively implement adjustment. USITC Report at I-41.
[82] USITC Report at I-22, I-25.
[83] USITC Report at I-22.

have been adequate. However, even if the Panel holds to the contrary on that issue, the fact that the USITC stated its conclusions in the terms required by the US statute is not properly at issue in this case.

88. As is discussed in answer to the Panel's first question to the United States, the sole requirement to state legal conclusions appears in Article 3.1 of the Safeguards Agreement, and complainants have not attacked the USITC's determination under that article. Thus, the only question on this issue before the Panel is whether the USITC report pursuant to Article 4.2(c) contains a detailed analysis of the case and demonstrates the relevance of the factors examined such that it shows compliance with Article 4.2(b). Regardless of the terms in which the USITC expressed its conclusions, its examination of other asserted causal factors meets the requirements of Article 4.2(b) even as interpreted by New Zealand.

Question 12

If in two hypothetical situations increased imports accounted for the same proportion of serious injury (e.g., 30 per cent), but in the first situation one of the "other factors" accounted for more than 30 per cent, while in the second situation no "other factor" individually caused more than 30 per cent, would the US "substantial cause" standard permit the imposition of a safeguard measure in the first situation, but not in the second one?

Answer 12

89. As will be recognized from the answers that the United States has given the Panel in Questions 7 and 10, this question poses a hypothetical situation that does not accord with the nature of the USITC analysis under the US statute. The USITC does not, as this question assumes, isolate the particular proportion of injury caused by each factor and then compare their percentages. Rather, it determines whether increased imports are important within the mix of causes of overall serious injury and then decides whether other factors are more important. "Importance" in this sense is seldom, if ever, reduceable to numerical percentages.

90. Indeed, because Article 4.2 does not set a single benchmark for "measuring" serious injury, it is difficult to see how, even if the effects of different causes of injury could be isolated, the percentages of total injury that those effects might represent could be ascertained and compared. Article 4.2(a) enumerates specific factors that competent authorities are to evaluate. To the extent that they have discrete effects, different causal factors may affect different economic indices differently. Moreover, the various enumerated factors are not commensurate with each other. For example, a factor that lowers productivity may raise employment if production is not reduced. The Agreement provides no standard according to which such variable effects are to be compared. The Panel's question presupposes a precision in the evaluation of causal factors that is incommensurate with the terms of the Agreement.

91. The Panel's question is, however, correct in its recognition that the US statute directs the USITC, in determining whether increased imports are a substantial cause, to evaluate not only whether their effects are important in themselves, but also whether other causes of injury may be more important causes of the overall serious injury or threat of serious injury. The United States does not necessarily contend that this second step in its statutory causation analysis is required by the terms of the Safeguards Agreement. This standard is, however, consonant with the objective set out in the preamble to the Safeguards Agreement that recognizes the "importance of structural adjustment." If other causes of injury are predominant, it is unlikely that addressing increased imports alone will facilitate adjustment. If, on the other hand, increased imports are an important causal factor and no other is more important, then imposing a safeguard measure on increased imports can be more reasonably expected to aid an industry in its adjustment efforts.

Question 13

Does the United States agree with the characterization in New Zealand's oral statement (para. 51) that the United States "admits" that a safeguard measure can be applied even where increased imports are, e.g., only one of three equal causes of a threat of serious injury? Please explain.

Answer 13

92. New Zealand's speculation as to a possible result under US law is irrelevant in this proceeding because the USITC did not find that increased imports were one of three equal causes of the threat of serious injury. While the USITC framed its finding in terms of US law, finding that none of the other alleged causes of injury was a more important cause than increased imports, the USITC identified only increased imports as being an important cause of the threat of serious injury. Indeed, the USITC report shows that increased imports were the only cause of any significance of the threat of serious injury. New Zealand's hypothetical question has no bearing on the finding that the USITC actually made or the measure that the United States applied.

93. Moreover, New Zealand's hypothetical ignores the fact that, in order to find that increased imports are a "substantial cause" of serious injury or threat of serious injury, the USITC must under US law find that increased imports are both an "important" cause and "not less than any other cause".[84] As the United States stated in ¶ 121 of its First Written Submission, the legislative history of the US provision makes clear that a cause of injury would not be an important cause of injury, and thus not a "substantial" cause, when it was one of many such causes, even if it was equal to or greater than any other cause. The US Senate committee that drafted the substantial cause standard stated, "The [USITC] Commissioners will have to assure themselves that imports represent a substantial cause or threat of injury, and not just one of a multitude of equal causes or threats of injury".[85] Accordingly, it cannot be said in the abstract that, if the USITC found that increased imports were one of three equal causes of serious injury, the USITC would see fit to regard any of those causes as "important".

94. Moreover, New Zealand's position, as paraphrased in this question, misstates the manner in which the US statute operates. The statute requires the United States to determine whether increased imports are an important cause of serious injury or threat of serious injury. Only if it finds increased imports to be an important cause does the USITC compare their importance to that of other causal factors. Thus, it is possible for the USITC to conclude that increased imports are not an important cause even if, had it proceeded to compare the effects of increased imports to those of multiple other causes, it would have found no other cause to be more important than increased imports.

How representative are the facts and evidence on which the determination of the USITC and the decision of the President were based?

Question 14.

Could you indicate the total number of operators in each of the industry segments (i.e., growers, feeders, grower/feeders, packers, breakers and packer/breakers, etc.), how many of those received questionnaires in each segment, how many responded and which share of the production by each industry segment is accounted for by the companies that provided usable questionnaire data? Where in the USITC's report can this information be found? Did the

[84] 19 U.S.C. 2252(b)(1)(B), attached hereto as US Exhibit 37.

[85] *Trade Reform Act of 1974, Report of the Committee on Finance . . . on H.R. 10710*, S. Rep. No. 93-1298, 93rd Cong., 2d Sess. 120-21 (1974), attached to the United States' First Written Submission as US Exhibit 16.

collective output of responding operators in each of the industry segments represent a major proportion of the total domestic production of that segment within the meaning of Article 4.1(c)? Please explain.

Answer 14

95. The evidence of record shows the following numbers of operators in each of the industry segments:

Growers:	74,710 in 1997.[86]
Feeders:	11[87]
Grower/Feeders:	18[88] (This number reflects a total of 11 feeders, plus those growers who reported that they also conduct feeder operations).[89]
Packers:	The exact number is not known. USDA data show that 9 plants accounted for 85 per cent of the sheep and lambs slaughtered in 1997, while 571 plants were certified by USDA in 1997 to slaughter lamb and sheep.[90]
Breakers:	Less than 10 major firms.[91]
Packer/Breakers:	4[92]

96. The number of operators receiving questionnaires in each segment is as follows:

Growers:	110[93]
Feeders:	See Grower/Feeders
Grower/Feeders:	11[94]
Packers/Slaughterers:	17[95]
Breakers:	16[96]
Packer/Breakers:	4[97]

97. The following responded to USITC questionnaires:[98]

[86] USITC Report at I-18, II-11, and II-12.
[87] USITC Report at II-13.
[88] USITC Report at II-13.
[89] USITC Report at II-13.
[90] USITC Report at II-15, n.57.
[91] USITC Report at II-15.
[92] This number is based on USITC questionnaire responses from 4 packer/breakers.
[93] USITC Report at I-17 and II-11.
[94] USITC Report at II-13.
[95] USITC Report at II-14.
[96] USITC Report at II-15.
[97] This number is based on USITC questionnaire responses received from four packer/breakers.

Growers and Grower/Feeders: 70[99] (USITC received usable data from 57 growers).[100]

Grower/Feeders: 18[101],[102]

Packers/Slaughterers: 6[103] (USITC received usable data from 5 firms on packing operations).[104]

Packer/Breakers: 4[105] (USITC received usable data from 2 firms).[106]

Breakers: 5[107] (USITC received usable data from 4 breakers).[108]

98. The share of production by each industry segment is accounted for by the companies that provided usable questionnaire data:

Growers: Feeders: Grower/Feeders[109]	} } }	All three groups = 57 usable questionnaire responses representing an estimated 6 per cent of lamb production (lamb crop; the number of lambs reported to be born during the year) in 1997.[110]
Packers Breakers: Packers/Breakers:	} } }	5 responding packers representing an estimated 76 per cent of the sheep and lambs slaughtered (based on US Department of

[98] The number of responses with usable data is also noted, although not each usable response contained usable information on all items requested.

[99] USITC Report at II-11. The Commission sent questionnaires to approximately 110 firms believed to be involved in raising lambs. Responses were received from approximately 70 growers and growers/feeders.

[100] USITC Report at I-17 and II-11.

[101] USITC Report at II-13. The Commission sent questionnaires to 11 firms believed to be feeders and received responses from 18 feeder operations, including several growers that also maintain feeder operations. USITC Report at II-13, n.46 states "[s]ome of the firms identified as feeders are also growers. Some of these firms provided questionnaire responses on their feeding operations and others could not separate the data for the two operations".

[102] USITC Report at II-13. The Commission sent questionnaires to 11 firms believed to be feeders and received responses from 18 feeder operations, including several growers that also maintain feeder operations. USITC Report at II-13, n.46 states "[s]ome of the firms identified as feeders are also growers. Some of these firms provided questionnaire responses on their feeding operations and others could not separate the data for the two operations".

[103] USITC Report at II-14.

[104] USITC Report at II-14.

[105] This number is based on USITC questionnaire responses received from four packer/breakers.

[106] USITC Report at II-24 and II-33 n. 93.

[107] USITC Report at II-15.

[108] USITC Report at II-15.

[109] USITC Report at II-29 n.89, regarding the financial condition of the industry, states that "[t]en firms reported they were grower/feeders; however, the questionnaire responses of seven of the firms indicated that they fed only their own live lambs. Those seven producers were reclassified by Commission staff to growers. [Financial] [d]ata for the three grower/feeders are presented separately [in the report] from growers and feeders because of the difficulty in separating growing operations from feeding operations."

[110] USITC Report at I-17 and II-11. However, USITC financial data was based on 49 questionnaire responses of growers representing 5 per cent of the US lamb crop in 1997 (USITC Report at II-24) and USITC financial data on feeders represented one-third of the slaughter lambs fed in feedlots in 1997. (USITC Report at II-24).

Agriculture (USDA) data).[111] (USDA reported that 9 plants accounted for 85 per cent of sheep & lamb slaughtered in 1997).[112]

Of 16 questionnaires sent to breakers, 5 responded and 4 provided usable data. The American Meat Institute estimates that 75 per cent of lamb carcasses currently are processed by breakers. The other 25 per cent are broken by packers at the slaughter plants.[113]

Where in the USITC's report can this data be found?

99. Please see the citations provided in the response to the earlier portion of this question.

Did the collective output of responding operators in each of the industry segments represent a major proportion of the total domestic production of that segment within the meaning of Article 4.1(c)? Please explain.

100. As discussed in the answer to Question 16, the Safeguards Agreement does not set a fixed proportion as constituting "a major proportion." The information received from questionnaires in each segment was, when combined with other information received by other means, sufficient to permit the USITC to make objective conclusions about each segment and the industry as a whole.

Question 15

How did the USITC decide to which specific companies to send the questionnaires (e.g., how did the USITC select the 110 growers of the roughly 70,000 in the United States)? Did the USITC send questionnaires only to companies associated with the petitioners, or to other companies as well? Please explain and indicate where in the USITC's report this information can be found.

Answer 15

101. The USITC, based on a listing of all companies that had received Wool Act payments before the termination of the programme, sought to select a group to receive questionnaires that would be reasonably calculated to yield both the highest level of response and the greatest proportion of industry production.

102. Given the total level of production in the industry and the number of firms involved, the USITC knew that a large number of producers were extremely small, growing fewer than 10 lambs per year. As a result, it sought to send questionnaires to the largest producers, recognizing based on experience that it would be very unlikely to receive any level of response from the large number of extremely small producers. The USITC selected the largest producers from the list of all producers based upon the level of Wool Act payments they had received.

103. All growers in the United States were associated with petitioners, since membership in the petitioning association was automatic based upon receipt of Wool Act payments.[114] Thus, the USITC

[111] USITC Report at II-14 and II-24.
[112] USITC Report at II-14 n.48 and II-15 n.57.
[113] USITC Report at II-15 n. 63.
[114] The petitioning American Sheep Industry Association, Inc. ("ASI") is a federation of 50 state organizations of lamb growers and feeders representing the nation's approximately 75,000 US sheep producers. Its membership therefore accounts for virtually 100 per cent of US production of live lambs. *See* Petition For Relief From Imports of Lamb Meat Under Section 201of the Trade Act of 1974, dated 30 September 1998, at 5, attached hereto as US Exhibit 38.

could not send questionnaires to "unassociated" growers. Only a few growers were named individually as petitioners, so the great majority of questionnaire recipients consisted of companies with no particular known view of the safeguard proceeding.

104. Information describing the USITC's decision to select these 110 questionnaire respondents is provided in the USITC Report at I-17. The USITC identified questionnaire respondents in the other three industry segments based on names and addresses which petitioner supplied in the petition pursuant to USITC regulation 19 C.F.R. § 206.14(b)(3)[115]115 The regulation requires that the petition contain the names and locations of all producers of the domestic article known to the petitioner (meaning, not simply those supporting the petition), to the extent such information is available from governmental and non-governmental sources.

105. Information describing the USITC's decision to select at least the nine feeders named in the petition is provided in the USITC Report at II-13; its decision to send questionnaires to 17 packers is provided at II-14; and its decision to send questionnaires to 16 breakers is provided at II-15 of the USITC Report.

Question 16

Does the United States consider that as long as the USITC undertakes a questionnaire survey exercise, and as long as some responses are received, the USITC can proceed on the basis of those responses, regardless of the percentage of total production for which they account? Or would there be circumstances in which the response rate to the questionnaires and/or the percentage of the total industry represented by the questionnaire responses did not account for a major proportion of the industry? If the latter, what would those circumstances be, and has this ever happened? Please explain.

Answer 16

106. Nothing in the Agreement suggests that a competent authority should not render a decision simply because it has been unable to obtain questionnaire responses from a particular percentage of producers in a highly fragmented industry. Indeed, nothing in the Agreement requires the authority to issue questionnaires at all. Thus, the share of domestic production reflected in questionnaire responses would not be determinative of whether the authority can or should proceed with its investigation. Article 4.2(a) of the Agreement obligates a member to "evaluate all relevant factors of an *objective* and quantifiable nature"[116] (emphasis added), but it does not state how this is to be done. It does not prescribe any specific approach that an authority should follow in making its evaluation, or even refer to the term "questionnaires." Consequently, nothing in the Agreement precludes an authority, in evaluating the relevant factors, from relying entirely on data collected by another government agency, or information furnished by interested parties. Thus, the issuance of questionnaires may be just one of the methods that an authority chooses, but is not required to used, in obtaining information. Provided that the information evaluated is objective and the authority has conducted an objective analysis, the authority has met its obligation.

107. Although the USITC endeavours in most investigations to send questionnaires to all known producers, this approach is impossible when the domestic industry is comprised of a very large number of small producers. Moreover, in fragmented industries, communicating directly with a large proportion of producers may be impracticable in any reasonable time frame, when no producer or reasonably reachable group of producers accounts for a significant share of production. In such a situation the USITC compares, as it did concerning the grower segment of this industry, its information from several sources to assure that the information on which it relies is sufficiently

[115] Attached hereto as US Exhibit 39.
[116] Safeguards Agreement, Article 4.2(a).

representative to allow it to make objective inferences about the industry as a whole. Such an approach entirely accords with the requirements of Article 4.2(a).

108. Nothing in the use of the phrase "a major proportion" in the definition of the term domestic industry in Article 4.1(c) of the Agreement affects this analysis. First, it is Article 4.2(a), not the definition of "domestic industry", which sets the standards for investigations. As indicated above, under Article 4.2(a), it is sufficient that the relevant factors be evaluated on an "objective" basis, a standard that is satisfied when conclusions are reached on a data set or sets that the competent authority has reasonably assured is not biased and provides a reasonable basis for making inferences about the entire industry. Second, even if, although the agreement does not require questionnaires, Article 4.1(c) did suggest that some minimum number of producers should receive questionnaires, the words "major proportion" are undefined. They are preceded by the article "a" (as opposed to the article "the"), thus indicating that the " major proportion" means "less than 50 per cent". Except that it may be less than 50 per cent, the phrase gives no fixed percentage.

109. The flexibility of this phrase suggests that the percentage that would constitute a major proportion could be different for highly fragmented industries than for concentrated industries. If this were not the case, the Safeguards Agreement would afford practical relief to concentrated industries but not to those industries that are likely to be most highly competitive. Such a result would be economically perverse and contrary to the express purpose of the Agreement "to enhance rather than limit competition in international markets". The Agreement also does not suggest that investigations be extended in order to achieve some fixed percentage of questionnaire responses because, as the Appellate Body has recalled, safeguards under GATT Article XIX are designed to address "emergency" situations. Such investigations cannot be prolonged in order to achieve a fixed ideal of data coverage. On these bases too, whether the investigation has been adequate should be evaluated in terms of whether the competent authority undertook an investigation that was reasonably calculated to obtain objective information about the industry as a whole.

110. Finally, in this case, it is also important to note that none of the respondents in the investigation, who had access to the raw grower questionnaire data under a USITC administrative protective order, argued that the data were biased or inaccurately portrayed the condition of growers.[117] Rather, those parties' representatives urged the USITC to rely on that data. One of the evident purposes of Article 3.1, which requires that authorities give interested parties an opportunity to present evidence and their views, including responding to the presentations of other parties, is to help assure that, by exposure to conflicting views, an authority receives an objective picture of the information before it. When the parties before it agree that the information the authority has received is objective, the authority should be able to rely on it.

Is the measure imposed by the US President, which differs from the USITC's recommendation, consistent with the United States' obligations under the Safeguards Agreement and the GATT 1994?

Question 17

Is it reasonable for a Panel to assume that the remedy recommended to the President by a plurality of the USITC is sufficient to prevent serious injury and facilitate adjustment? If not, why not? If so, on what basis did the President not adopt the USITC recommendation? Please provide the factual basis and reasoning that supports the measure as actually applied in terms of Article 5.1, first sentence.

Answer 17

[117] USITC Report at I-17.

Plurality Recommendation

111. It would not be reasonable for a Panel to assume that a USITC plurality remedy, if applied, would be sufficient to prevent serious injury and facilitate adjustment. Neither US law nor the Safeguards Agreement provides any basis for such an assumption. Moreover, the fact that the six USITC Commissioners split three ways on an appropriate remedy demonstrates that the plurality recommendation should not be presumptively regarded as adequate.

112. US law does not intend the USITC remedy recommendation to be understood as a definitive statement of remedial sufficiency. Section 203(a)(2)(A) of the Trade Act of 1974, as amended, requires the President to take the USITC's recommendation into account (along with other enumerated factors) in determining what remedy may be appropriate. But there is no requirement that he adopt the recommendation, or give it weight. He is free to apply a different remedy, or no remedy at all. The same provision of law also requires the President to take the USITC's *report* into account in fashioning the remedy. This means the President is to review the USITC's injury and causation findings, not just its remedy recommendation, and reach his own conclusion on what remedy would be most appropriate to address those findings.

113. The USITC plurality recommendation remedy presented the views of just three of the six USITC Commissioners. The three other Commissioners recommended different remedies, and each concluded that the plurality's remedy was insufficient to prevent serious injury and facilitate adjustment. All six Commissioners considered that four years of import relief were required. The President granted relief of three years and one day.

114. The three remedy recommendations also contained various suggestions on appropriate domestic assistance measures. The domestic assistance that the President ultimately provided differed from those recommendations. As the time they issued their remedy recommendations, the Commissioners did not know what level of assistance the President would provide and thus they did not (and could not) calibrate their import relief recommendations to take account of that level.

115. The USITC plurality apparently considered that leaving imports at their high-water mark (1998 levels) would not result in further injury and would place the industry in a position to recover from the injury it had already sustained. However, the USITC's injury analysis suggested that the industry had suffered progressively severe injury as a result of imports during both 1997 and interim 1998, and the plurality did not explain why injury would not continue to mount if imports continued at 1998 levels, or how, if the industry remained in its current state of injury, it could regain its competitiveness. The three other Commissioners examined the same evidence and concluded that the industry *would* sustain serious injury at 1998 import levels.[118] The President was entitled to conclude that the views of those three Commissioners were correct.

116. There is no requirement under the Safeguards Agreement or Article XIX of the *GATT 1994* for a competent authority to recommend a remedy, and there is therefore no legal basis to require a Member to adopt that recommendation. Under Article 5.1 of the Safeguards Agreement, the authority to select and impose a remedy is vested in the Member. Creating a rule that would require a Member in all cases to impose a measure that is less than or equal to the competent authority's recommended remedy could lead Members to revoke their competent authorities' mandate to recommend remedies, thereby denying Members the benefits of their considered opinions.

117. Finally, if the competent authorities' views are to be regarded as definitive for purposes of assessing the degree of remedy required in any particular case, this would mean that application of the competent authorities' recommendation would be presumptively consistent with Article 5.1. That could result in Members applying safeguard measures that are inadequate or excessive.

[118] USITC Report at I-40, I-49.

Basis for the US Safeguard Measure

1. Introductory Comments

118. Before addressing the factual basis and reasoning supporting the US safeguard measure, the United States offers two preliminary comments. First, while the United States is pleased to answer the Panel's question, we wish to reiterate that the burden is on New Zealand and Australia to make a *prima facie* case that the US safeguard measure fails to comply with the requirements of Article 5.1, not on the United States to prove that the measure *does* comply. Because Australia and New Zealand have failed to present a *prima facie* case, the United States is under no obligation to provide evidence and reasoning in support of the measure's consistency with Article 5.1.

119. Second, in evaluating the consistency of the measure with the Safeguards Agreement and Article XIX, the Panel should reject New Zealand's and Australia's pleas to interpret the relevant terms and provisions "narrowly" or "strictly". Their argument, which is based on the purportedly "exceptional" nature of safeguards remedies, ignores the Appellate Body's admonition in *Hormones* (at ¶ 104) that characterizing a treaty provision as an exception:

> does not by itself justify a 'stricter' or 'narrower' interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation".[119]

120. In fact, the Appellate Body has not described Article XIX as an "exception." Rather, it is a right that Members may invoke in exceptional circumstances. When Members have satisfied the conditions necessary for the application of safeguard measures, an excessively strict or narrow reading of Article 5.1 would risk rendering those measures ineffective, thus undermining the operation of Article XIX and the Safeguards Agreement.

2. Discussion of the US Safeguard Measure

121. Before considering the safeguard measure itself, it is useful to recall the various remedy recommendations that the USITC forwarded to the President. First, a plurality of the Commissioners recommended a four-year tariff-rate quota with a 20 per cent *ad valorem* duty on imports over 78 million pounds in the first year (approximately 1998 levels), 17.5 per cent *ad valorem* on imports over 81.5 million pounds in the second year, and 15 per cent and 10 per cent *ad valorem* in the third and fourth years, respectively, on imports above the second-year levels.[120]

122. The plurality believed that its remedy would increase industry revenues in the first year and that this degree of import relief, in combination with adjustment assistance, would give the industry time to improve its competitiveness.[121] The plurality did not explain how maintaining lamb meat imports at record levels would generate higher revenues for the domestic industry.

123. The remaining three Commissioners recommended two different safeguard measures to address the threat of serious injury. Two Commissioners recommended that the President increase the rate of duty on *all* lamb meat imports for four years to 22 per cent *ad valorem* in the first year, 20 per

[119] *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body, 16 January 1998, at ¶ 104.

[120] USITC Report at I-29.

[121] USITC Report at I-36.

cent *ad valorem* in the second year, 15 per cent *ad valorem* in the third year, and 10 per cent *ad valorem* in the fourth year.[122]

124. These Commissioners identified depressed domestic prices for lamb meat as the principal threat posed by the surge in imports and concluded that raising prices from then-current levels needed to be a "key focus" of an appropriate remedy. In the view of these Commissioners, "the industry would experience serious injury caused by imports if import levels and prices continue at now-existing levels, even if no further price declines occur".

125. The two Commissioners estimated that under their proposed remedy prices would rise by approximately 17 per cent in the first year of relief, while import levels would fall to a level between 1997 and 1998 imports. They expected that their remedy would allow the domestic industry to increase production due to the higher prices and to supply more lamb meat at a given price due to efficiency gains. They also expected that the remedy would result in long-term price stability and contribute to stable (if not increasing) demand.

126. The sixth Commissioner recommended quotas over four years that, in his view, would help restore industry profitability by restricting imports to their pre-surge levels.[123] He proposed an initial quota at 52 million pounds (the average level of imports in 1995-1997), with increases to 56, 61 and 70 million pounds in the second through fourth years of relief, respectively.[124] In the view of this Commissioner, the plurality's recommended remedy "would have virtually no discernable impact on the domestic industry over the four years" because it would only hold imports to 1998 levels for one year, and then allow imports to rise in line with projected increases.[125] In this Commissioner's view, the tariff remedy proposed by the two other Commissioners provided less relief than was necessary to facilitate the industry's adjustment.

127. As the foregoing demonstrates, the six USITC Commissioners all examined the same record of investigation and yet proposed three widely different remedy recommendations. The plurality recommended a tariff-rate quota. Two Commissioners recommended a straight tariff. One recommended a quantitative restriction. The various tariff and quota levels proposed as part of these recommendations differed considerably. In fact, the sole common denominators of the three proposals was import relief of four years duration and domestic adjustment assistance.

128. Thus, while each of the three remedy recommendations was aimed at achieving the same result (preventing serious injury and facilitating adjustment), the Commissioners differed on the minimum steps necessary to accomplish that result. This difference of opinion illustrates the point that decisions regarding the application of safeguard measures cannot be reduced to mathematical formulas, but rather are based on a mix of analysis, judgment, predictions, and policy preferences.

129. There are likely to be a wide range of reasonable remedy options from which a Member may choose in any given case. The remedy that the Member ultimately applies will reflect its views on a long list of considerations, including the nature of the injury the industry has sustained, which aspects of that injury the Member considers most important to address, predictions regarding the likely effect of particular forms, periods, and levels of relief, how various remedies will interact with any domestic relief under contemplation, factors affecting the industry's near-term prospects, trends in macroeconomic factors, the effects of differing measures on consuming industries, and so forth.

[122] USITC Report at I-39.
[123] USITC Report at I-48.
[124] USITC Report at I-47.
[125] USITC Report at I-49.

130. The safeguard measure that the United States ultimately applied to lamb meat imports is the product of a decision-making process of this kind. It can perhaps best be seen in perspective as falling within the range of views expressed by the six USITC Commissioners.

131. In form, the safeguard measure is most similar to the plurality recommendation in that it employs a tariff-rate quota and sets the in-quota amount at roughly 1998 import levels. However, the measure differs from the plurality recommendation in two respects.

132. First, the measure has a duration of three years, rather than four. In this respect, the measure is plainly less restrictive than the plurality recommendation.

133. Second, the measure includes an in-quota tariff while the plurality recommendation does not. All six USITC Commissioners had identified low prices as one of the principal reasons for the US industry's poor financial health.[126] In particular, the USITC found that the industry's financial performance had worsened largely due to falling prices[127] and that, as a result, firms in the industry had experienced difficulty in generating adequate capital to finance modernization of their domestic plants and equipment.[128] The plurality recommendation was designed to cap first year imports at 1998 levels, with increases over the next three years. In the plurality's view, the import cap would generate higher revenues for the domestic industry. But the plurality did not explain how that could be the case given that the industry had experienced threat of serious injury at 1998 import levels.

134. The safeguard measure seeks this same result -- revenue enhancement -- but in a way more plausibly calculated to achieve it. In particular, the measure increases duty rates on the in-quota amount with the object of generating a modest near-term price increase.[129] The measure is thus structured to provide limited relief from low prices, thereby making it possible for the industry to return to profitability. That objective is consistent both with preventing serious injury and with facilitating the industry's adjustment to import competition.

135. The high out-of-quota tariff component of the TRQ makes it likely that imports will not exceed their 1998 level (the highest import level ever) in the first year of relief.[130] The USITC concluded that increased lamb meat imports had directly captured market share from the domestic producers and that those imports were likely to have a negative impact on the industry's shipments, prices, and financial performance.[131] Three of the six Commissioners found that the US industry would suffer serious injury if imports and prices remained at 1998 levels, even if there were no further price declines.[132] The overall effect of the safeguard measure is expected to be a slight reduction in imports from 1998 levels, with import levels increasing in years two and three as the in-quota amount expands.

136. The United States accompanied the safeguard measure with a substantial programme of federal financial and regulatory assistance intended to facilitate the US industry's adjustment by providing up to $100 million to assist with market promotion; product and production improvements; basic sheep research; a scrapie eradication programme; and a lamb surplus removal programme. Half of the $100 million is being made available to the industry in the first year.

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[126] USITC Report at I-23-24.

[127] USITC Report at I-20.

[128] USITC Report at I-21.

[129] *See* United States' First Written Submission at ¶ 217.

[130] Commissioners Miller and Hillman believed that the domestic industry "would experience serious injury caused by imports if import levels and prices continue at now-existing levels, even if no further price declines occur." USITC Report at I-40. Commission Koplan found, similarly, that a remedy set at existing import levels "would not stave off the threatened serious injury, much less provide the industry with the opportunity to make a positive adjustment to prepare for the import competition." *Id*. at I-49.

[131] USITC Report at I-24.

[132] USITC Report at I-40, I-49.

137. In summary, the US safeguard measure is commensurate with the goals of preventing the threat of serious injury facilitating the industry's adjustment in this case. In its form and scope, the measure is similar to the remedy proposed by the USITC plurality except that it corrects for the plurality remedy's failure to address low prices in the near term. It addresses the high volume of imports and low prices that the USITC identified as responsible for the threat of serious injury to the US lamb meat industry.

138. The measure avoids the high across-the-board tariff levels that two Commissioners proposed and the possibility that the price increases they would have generated could have significantly depressed domestic consumption. Moreover, as noted above, those Commissioners estimated that the tariffs they proposed would roll import levels back to between 1997 and 1998 volumes. By contrast, the US safeguard measure was expected to generate a more modest import reduction.[133] In addition, the safeguard measure eschews the substantial reductions in import quantities that the sixth Commissioner proposed.

139. The safeguard measure is fully degressive, with tariff levels falling and quota levels increasing in the second and third years. The remedy has a duration of three years, a year shorter than proposed in each of the three USITC recommendations. Given its relatively short duration, the degree of trade restriction embodied in the measure is no more than that minimally necessary to restore a modicum of profitability to at least some producers during that period.

Question 18

In *Korea–Dairy*, the Appellate Body stated that Article 5.1 does not require a Member to explain at the time of the determination why the safeguard measure chosen was necessary unless that measure is imposed in the form of a *quantitative restriction* that reduces imports below the last representative three-year average level.

(a) What is the implication of this ruling for the case of the imposition of a tariff rate quota?

Answer 18 (a)

140. The implication of the Appellate Body's ruling is that there is no need to provide advance justification for a tariff-rate quota (TRQ), and no need to justify this TRQ in particular.

141. In *Korea–Dairy* (at ¶ 100), the Appellate Body rejected the Panel's broad finding that Members that apply safeguard measures are required to explain in their recommendations or determinations how they considered the facts before them and why they concluded that the measure was necessary to remedy serious injury and facilitate adjustment. The Appellate Body found (at ¶ 99) that Article 5.1 imposes a justification requirement *only* for safeguard measures that take the form of quantitative restrictions that reduce the quantity of imports below the average of imports in the last three representative years.

142. TRQs are a type of tariff measure in which the tariff is applied at different rates based on import levels.[134] TRQs are not "quantitative restrictions" as that term is understood in GATT practice, which has distinguished between the two. A primary example of this difference can be seen in the tariffication provisions of the WTO *Agreement on Agriculture*.[135] One of the main points of that

[133] *See* United States' First Written Submission at ¶ 219.

[134] The United States does not understand Australia or New Zealand to be arguing that Article 5.1, second sentence, applies in this case.

[135] *See* WTO Agreement on Agriculture, Art. 4.2 & n.1.

agreement was to require the conversion of quantitative restrictions to TRQs and to distinguish between them in terms of WTO obligations. Similarly, when the drafters of *GATT* Article XIII (which governs the administration of quantitative restrictions) sought to apply its provisions not just to quantitative restrictions but to TRQs as well, they felt constrained to say so explicitly in the final paragraph of that article.[136] Because TRQs and quantitative restrictions are understood in GATT practice to be different types of measures, the obligation in Article 5.1 to justify quantitative restrictions that reduce imports below the average of imports in the last three representative years does not apply to TRQs.

143. In any event, even if there *were* such an obligation for TRQs, there would be no need to justify the TRQ applied in this case, because the in-quota amount of the tariff is set at 31,851,151 kilograms of imports in the first year of the TRQ, thus substantially exceeding the 1995-1997 average (approximately 21,387,924 kilograms)[137], and in-quota levels in the second and third remedy years are even higher. Moreover, if the 1997 surge year is excluded as unrepresentative, the average in the last three representative years (1994-1996) would be only 18,701,821 kilograms. The Appellate Body's ruling in *Korea–Dairy* (at ¶ 99) should therefore be conclusive on this point: "a Member is not obliged to justify in its recommendations or determinations a measure in the form of a quantitative restriction which is consistent with 'the average of imports in the last three representative years for which statistics are available'".

(b) How does the Appellate Body's ruling in respect of Article 5.1 relate to (i) Article 3.1 which requires the publication of a report setting out "findings and reasoned conclusions reached on all pertinent issues of fact and law", including "whether the application of a measure would be in the public interest "; (ii) Article 7.2 which requires an investigation and determination *by the competent authorities* that a measure continues to be necessary and that the industry is adjusting, before that measure can be extended; and (iii) Article 12.2 which stipulates notification to the WTO Committee on Safeguards of the safeguard measure to be applied?

Answer 18(b)

144. Article 5.1 is the only provision of the Safeguards Agreement that requires a Member to provide written justification for the particular safeguard measure it applies, and then only for a certain class of quantitative restrictions not at issue here. Nothing in Articles 3.1, 7.2, or 12.2 conflicts with the Appellate Body's ruling that no additional justifications are required.

(i) Article 3.1

145. New Zealand and Australia have suggested that Article 3.1 requires competent authorities to justify, in the reports they are required to publish under that article, the ultimate safeguard measure that a Member chooses to apply. The subject matter of the reports referred to in Article 3.1 are the findings and conclusions the competent authorities reach based on the investigation they conduct pursuant to that article.

146. The first sentence of Article 3.1 makes plain that a Member may apply safeguard measures only *after* the Member's competent authorities have concluded their investigation:

[136] In *Korea–Dairy*, the Appellate Body noted (at ¶ 96) that the obligation to ensure that a measure is "commensurate" applies "whether it takes the form of a quantitative restriction, a tariff *or* a tariff rate quota." (emphasis added). This is a further indication that the Appellate Body distinguishes between quantitative restrictions and TRQs.

[137] *See* USITC Report at II-19.

> A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member . . .

147. Since the investigation must conclude before a Member applies a safeguard measure, the competent authorities would not be in a position to know – much less justify – the safeguard measure that the Member ultimately decides to apply. Equally, the Member would not be in a position to decide what safeguard measure to apply (if any) until the competent authorities have finished their investigation and presented their report setting forth their basis for finding injury or threat thereof.[138] In addition, the competent authorities may not be in a position to know when they conclude their investigation what type of an assistance package the Member will be able to provide to the domestic industry, and the nature of the assistance package will likely affect the Member 's decision on an appropriate measure. Accordingly, Art 3.1 does not – and could not – call on competent authorities to justify in the reports on their investigations the measures that Members ultimately decide to adopt.

148. Article 3.1 establishes the procedural conditions that a Member must meet before applying a safeguard measure. The Member's competent authorities must conduct an "investigation" that meets certain specified transparency and due process standards (public notice, hearings, procedures for submitting evidence and rebuttals, opportunity to speak for or against the application of safeguard measure, and so forth). By its plain terms, the subject matter of Article 3.1 is the procedural conditions necessary to justify the application of a safeguard measure, rather than the nature of the measure itself.

149. The subject matter of the competent authority's investigation is whether the conditions for the application of safeguard measures, as described in Article 2.1 and elaborated on in Article 4.2(a), exist. Article 2.1 requires Members to have "determined" that certain conditions are present before applying safeguard measures. Article 4.2(a) makes clear that "the investigation" the competent authorities are required to conduct is focused on the question of whether those conditions exist:

> In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate . . . .

150. Thus, the context for Article 3.1 make clear that the investigation referenced in that article is not the nature of the safeguard measure that the Member ultimately adopts, but the procedural preconditions for applying a safeguard measure in the first place. If the competent authorities meet the substantive and procedural conditions specified in Articles 2.1, 3.1, and 4, no further justification for applying a safeguard measure is required.

151. Article 3.1 states that the investigation by the competent authorities "shall include . . . public hearings or other appropriate means in which importers . . . could present evidence and their views, including . . . their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest". This requirement does not mean that the competent authorities must justify in their report the eventual measure that the Member applies. Article 3.1, second sentence, plainly refers to views regarding the appropriateness of applying "*a* safeguard measure" (emphasis added), rather than "*the*" safeguard measure.

152. Questions regarding whether the "public interest" would be served by the application of a safeguard measure are simply another facet of the competent authority's investigation concerning whether the Member would be justified in applying a safeguard measure of some kind. Article 3.1, second sentence, contemplates that the competent authorities will hear views regarding whether

[138] In this context, it should be noted that the Safeguards Agreement draws a distinction between "Members" (who apply safeguard measures) and competent authorities who conduct investigations. *See, e.g.*, references in Articles 2.1, 3.1, and 5.1.

applying a safeguard measure in the particular circumstances would be good public policy. It does not, and could not, require the competent authorities to hear views regarding the particular safeguard measure the Member decides to apply after the competent authorities conclude their investigation.

153. The "issues of fact and law" referenced in Article 3.1 are those that arise in the course of the competent authority's investigation. As demonstrated above, "the investigation" concerns the question of whether increased imports have caused or are threatening to cause serious injury to a domestic industry. The investigation called for under Article 3.1 need not address the question of what particular safeguard measure the Member should appl[139]139 and, as demonstrated above, the competent authority is not in a position to examine the measure the Member actually decides to adopt. Thus, the reasons for the Member's ultimate safeguard measure do not figure among the "pertinent issues of fact and law" that the competent authorities must include in their reports under Article 3.1. In any event, considerations of "public interest" are questions of policy, not issues of law or fact.

(ii) Article 7.2

154. Article 7.2, which establishes conditions for extending safeguard measures, does not require Members to justify their safeguard measures. Article 7.1 establishes as a general rule that the period of a safeguard measure shall not exceed four years. If a Member wishes to extend a measure beyond that period of time, Article 7.2 imposes an additional obligation for the competent authority to reexamine the situation of the domestic industry. Even if Article 7.2 were interpreted to give rise to an obligation to "justify" the *extension* of a safeguard measure, a question that we are not addressing here, it does not create an obligation to justify the measure itself.

155. When a competent authority determines whether a basis exists to extend a measure under Article 7.2, it is in essence predicting the effect on the domestic industry if the measure were revoked. To make this determination, it is not necessary for the competent authority to know what the Member's reasons were four years earlier for choosing the particular measure it did. Rather, it simply examines the remedy that is already in place.

(iii) Article 12.2

156. Similarly, nothing in Article 12.2 suggests that Members must justify their safeguard measures. Article 12.2 requires Members to provide the Committee with "all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization". The types of information listed in Article 12.2 are all factual in nature, and do not require legal or economic judgments or conclusions of the type that would be needed to justify a safeguard measure under Article 5.1.

157. Given the list of examples, the "pertinent information" called for in Article 12.2 is of a type that would inform the Committee of particular *facts* arising either out of the competent authority's investigation (product, evidence of serious injury) or the decision to apply a safeguard measure (form of the measure, its duration, and so forth). A "justification" by contrast would not be a factual description, but rather a kind of argumentation. Article 12.2 specifically requires Members to provide "evidence " of serious injury or threat thereof, but does not mention "evidence" of compliance with Article 5.1. This suggests that the drafters did not view such evidence as "pertinent information" and adds to the conclusion that Article 12.2 does not impose a justification requirement.

(c) In the light of the transparency and notification requirements under the Safeguards Agreement which at a minimum apply to the investigation, how does

[139] In this respect, the USITC practice of soliciting public views on an appropriate remedy goes beyond what Article 3.1 requires.

the United States substantiate its apparent view that the Safeguards Agreement effectively contains no transparency and explanation requirements concerning the application of Article 5.1? How in your view should the burden of proof be allocated under Article 5.1?

Answer 18(c)

158. The United States disagrees with the premise of the panel's first question. The Safeguards Agreement does contain transparency and explanation requirements concerning the application of Article 5.1, in that Article 12.2 requires that a Member notifying a safeguard measure provide a "precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization".

159. This transparency requirement marks an important advance from the situation that pertained in the past. The notification requirements in Article XIX of the *GATT 1947* were minimal, amounting to little more than the need to "give notice" of the intention to take action under the article and to give other parties an opportunity to consult. There were, of course, no notification requirements whatsoever for "grey-area" measures. The Safeguards Agreement addresses this situation by establishing a minimum level of required transparency that applies to *all* safeguard measures.

160. Moreover, Article 5.1, second sentence, contains a justification requirement for certain safeguard measures. Article 5.2(b) contains a similar justification requirement for " selective" allocation of quantitative restrictions. The fact that the drafters of the Safeguards Agreement felt a need to include these particularized justification requirements in Article 5 suggests that they did not consider that any other provision of the Safeguards Agreement imposed a general justification requirement.

161. Finally, given the requirement in Article 3 to publish a report of the competent authority's investigation (which must include findings and reasoned conclusions on the injury factors contained in Article 4.2(c)) and the requirement in Article 12.2 to provide a precise description of the safeguard measure, there is no compelling need for Members also to provide written justifications of their safeguard measures. The question of whether a Member has applied a safeguard measure that is commensurate with the serious injury or threat of serious injury that domestic producers have sustained should be discernible by examining the measure in light of the findings and determinations set out in the competent authority's report.

162. Regarding the Panel's second question, it is well established that the complainant has the burden of presenting a *prima facie* case of noncompliance with the terms of a covered agreement.[140] Therefore, in this case, the burden is on Australia and New Zealand to demonstrate that the US safeguard measure was *not* applied "only to the extent necessary to remedy or prevent serious injury and to facilitate adjustment." The United States discussed its view of an appropriate analytical framework at ¶ 210 of its first written submission. If Australia and New Zealand were to meet their burden, the United States would then be obliged to bring evidence and argument to rebut their *prima facie* case. In no event, however, would the United States be obliged to " justify" the US measure. New Zealand and Australia have not begun to meet their burden on this issue, which is not surprising given the restrained nature of the measure the United States put in place.

[140] *See* Report of the Appellate Body in *Wool Shirts* (at 16) (stating that it "was up to India to present evidence and argument sufficient to establish a presumption that the transitional safeguard determination made by the United States was inconsistent with its obligations under Article 6 of the *ATC*. With this presumption thus established, it was then up to the United States to bring evidence and argument to rebut the presumption."). *See also id*. at 17 ("[W]e find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the presumption that the mere assertion of a claim might amount to proof. . . .")

163. Australia's and New Zealand's argument that the United States was required to "justify" its safeguard measure is in essence an improper attempt to shift the burden of proof under Article 5.1 to the United States. Their approach in this regard is reminiscent of the Panel's conclusion in *Hormones* that the *SPS Agreement* allocated the "evidentiary burden" to the Member imposing an SPS measure. The Appellate Body (at ¶ 99 *et seq*.) rejected the Panel's conclusion on the grounds that:

> [i]t does not appear to us that there is any necessary (i.e. logical) or other connection between the undertaking of Members to ensure, for example, that SPS measures are "applied only to the extent necessary to protect human, animal or plant life or health . . .", and the allocation of burden of proof in a dispute settlement proceeding. Article 5.8 [of the SPS Agreement] does not purport to address burden of proof problems; it does not deal with a dispute settlement situation. . . .[141]

164. Like Article 5.8 of the SPS Agreement, Article 5.1 of the Safeguards Agreement "does not purport to address burden of proof problems; it does not deal with a dispute settlement situation". Therefore, the United States submits that the Appellate Body's ruling with respect to Article 5.8 of the SPS Agreement is equally valid with respect to Article 5.1 of the Safeguards Agreement. As the Appellate Body stated in *Wool Shirts* (at 19), "a party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim".

Question 19

In its first submission, in paragraphs 210 *et seq.* the United States proposes a four-step test for examining compliance with the requirements of Article 5.1 and applies the first three steps thereof to the lamb safeguard measure. Could the United States complete the application of its test with respect to item (iv), i.e., an assessment of "whether the measure, in its totality, is more restrictive than required both to prevent serious injury from occurring and to assist the industry in adjusting to import competition"? Where in its submission or any published source can information be found on that item, including economic modelling, if any?

Answer 19

165. Please see response to Question 17. The United States would add two additional points on the specific questions posed here.

166. While Article 5.1 plainly prohibits Members from applying measures that are manifestly excessive, it cannot be interpreted as imposing a requirement to identify and apply a hypothetically perfect import remedy. Because it is an uncertain enterprise, in which Members are called upon to make predictions about the economic effect of a measure that has not yet been proposed, the application of a safeguard measure simply is not capable of that degree of fine tuning. This point was recognized by the Committee that reviewed the United States' application of an Article XIX measure in the case on *Hatters' Fur*:

> the Working Party considered that it is impossible to determine in advance with any degree of precision the level of import duty necessary to enable the United States industry to compete with overseas suppliers in the current competitive conditions of the United States market, and that it would be desirable that the position be reviewed

[141] *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body, 16 January 1998, at ¶ 102.

> by the United States from time to time in the light of experience of the actual effect of the higher import duties . . . .[142]

167. The Working Party's observation on the impossibility of predicting the future with any degree of precision raises another factor that militates against an overly rigid approach to interpreting Article 5.1: Article 7.4 of the Safeguards Agreement requires Members progressively to liberalize their safeguard measures over time and, by corollary, not to increase them – even if events after the measures are imposed indicate that they are failing to prevent or remedy serious injury and facilitate adjustment. New Zealand and Australia have urged a reading of Article 5.1 that would require Members to apply theoretically ideal safeguard measures, with import restraints set at levels just shy of the line of ineffectiveness. That reading would risk frustrating the purpose of the Safeguards Agreement and Article XIX of *GATT 1994* by withholding the latitude that Members must have to ensure that the measures they apply have a real prospect of success.

168. Finally, the United States notes the Panel's reference in its question to the economic model that the United States used in attempting to predict the effects of its safeguard measure. Article 4 of the Safeguards Agreement establishes that an injury finding requires the examination of a number of factors, none of which is dispositive, and all of which may respond differently to a particular type of safeguard measure. Consequently, no amount of modelling can establish the necessity or lack thereof of any particular measure. While the United States did use a model to test the possible effects of its measure, nothing in Article 5.1 required modelling or makes the results of such models a sound basis for judging a measure's compatibility with that article.

169. Given that the application of safeguard measures is fundamentally a predictive -- and thus necessarily speculative and imprecise -- exercise, Article 5.1 cannot be read to require Members to achieve scientific exactitude in calibrating those measures. No economic model is infallible – there are simply too many economic variables (changes in exchange rates, consumer tastes, macroeconomic or fiscal conditions, technology) for a model to serve as anything other than an imperfect tool in deciding how a particular measure should work if all other variables are held constant.

170. In sum, safeguard measures cannot be applied with scientific certainty, and Article 5.1 cannot be fairly read to require it. Rather, as the United States stated in its first written submission, the proper inquiry under Article 5.1 is whether there is an evident mismatch between the safeguard measure, taken in its totality, and the finding and determinations set out in the competent authority's report. The burden of demonstrating a failure to comply with Article 5.1 is on New Zealand and Australia. To-date, they have failed to meet their burden.

Question 20

Assuming that the application of a safeguard measure other than a quantitative restriction has to be justified under Article 5 if it is challenged as exceeding the extent necessary to prevent threat of serious injury and to facilitate adjustment, (i) should such justification be based on information contained in the published report, (ii) would it suffice to show that the justification presented is based on information available to the competent authority at the time of the determination, or (iii) could a justification be based on information submitted *ex post* during a WTO dispute?

Answer 20

171. The United States believes that it will be possible to discern in most (if not all) cases whether there is a substantial mismatch between the safeguard measure applied and the relevant findings and

[142] Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade, GATT/CP/106, report adopted on 22 October 1951, ¶ 35.

determinations in the competent authority's report, and therefore whether the measure is "commensurate with the goals of preventing or remedying serious injury and facilitating adjustment".[143] However, it is up to the complainant to establish a *prima facie* case that such a mismatch exists, at which time the defendant will be obliged to come forward with evidence and argument sufficient to rebut the *prima facie* case.

Question 21

Is it the US interpretation of Article 5 that:

(a) this article allows Members to freely choose between different types of safeguard measures (e.g., tariff surcharges, tariff rate quotas, quantitative restrictions)?

Answer 21 (a)

172. As a preliminary matter, the United States notes that New Zealand and Australia have not questioned the United States' selection of a TRQ, and indeed have suggested that they approve of the USITC plurality's recommended safeguard measure, which also took the form of a TRQ.

173. Turning to the Panel's question, the United States considers that a Member is permitted to choose between tariff surcharges, tariff rate quotas, and quantitative restrictions provided that the selected measure is applied "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment". This conclusion is supported by the second sentence of Article 5.1, which states that "if a quantitative restriction is used," thereby demonstrating that a Member has discretion in choosing among measures.

174. Article 6 provides further support for this conclusion, since it states that provisional measures "should take the form of tariff increases . . . ". Article 5, concerning definitive safeguard measures, contains no parallel provision. Plainly, the drafters of the Safeguards Agreement knew how to limit the universe of permissible measures when they wanted to do so. The fact that they did not do so in Article 5 reflects that they did not intend to impose such a limitation as to definitive measures.

175. It is worth observing that early in the negotiation of the Safeguards Agreement some parties argued that safeguard measures should be limited to tariff increases.[144] The first "chairman's draft" reflected a compromise view, stating that safeguard measures "should preferably take the form of tariff increases, but may also take the form of quantitative restrictions".[145] In the final text, the preference for tariff increases was deleted, apparently in favour of the admonition in the third sentence of Article 5.1 that Members should choose measures "most suitable" for the achievement of the objectives in the remainder of the paragraph.[146] The outcome of the negotiations on this point reflected Member practice in choosing among a wide variety of safeguard measures.[147]

176. Finally, in *Korea– Dairy*, the Appellate Body stated (at ¶ 96) that "[w]hether it takes the form of a quantitative restriction, a tariff or a tariff rate quota, the measure in question must be applied

[143] *Korea–Dairy*, Report of the Appellate Body at ¶ 96.

[144] *See, e.g., Elements for a Comprehensive Understanding of Safeguards, Communication from Brazil*, MTN.GNG/NG9/W/3, ¶ 6 (25 May 1987).

[145] MTN.GNG/NG9/W/25 at 4.

[146] *Compare Negotiating Group on Safeguards, Draft Text of an Agreement*, MTN.GNG/NG9/W/25/Rev. 3 (31 October 1990), ¶ 6 (containing the preference for tariff increases but not referencing the "most suitable" measures) *with* Safeguards Agreement, Art. 5.1.

[147] *See Guide to GATT Law and Practice* (GATT Analytical Index), vol. I, at 522-23 (discussing the wide variety of safeguard measures notified under Article XIX).

"only to the extent necessary . . . ". This suggests at a minimum that the Appellate Body views these three types of measures as permissible under Article 5.

(b) once a measure other than a quantitative restriction has been chosen, if challenged by another Member, the Member imposing the safeguard measure has to show that, in its totality, e.g., the size of the tariff rate quota, its duration, the in-quota and out-of-quota tariffs, etc., the measure is no more restrictive than required to achieve the dual objectives of Article 5.1?

Answer 21(b)

177. The burden is on the complaining party to demonstrate that the measure was *not* applied "only to the extent necessary to prevent or remedy the serious injury and to facilitate adjustment". If the complainant establishes a *prima facie* case that the measure was not applied "only to the extent necessary", the defendant will then be obliged to provide facts and evidence sufficient to rebut the *prima facie* case.

178. As the Appellate Body stated in *Wool Shirts* (at 16), "it was up to India to present evidence and argument sufficient to establish a presumption that the transitional safeguard determination made by the United States was inconsistent with its obligations under Article 6 of the *ATC*. With this presumption thus established, it was then up to the United States to bring evidence and argument to rebut the argument". To paraphrase the Appellate Body (*id*. at 19-20), the Safeguards Agreement is a fundamental part of the rights and obligations of WTO Members. Consequently, a party claiming a violation of a provision of the Safeguards Agreement must assert and prove its claim.

Question 22

Article 5.1 provides that "a Member shall apply safeguard measures only to the extent necessary to prevent . . . serious injury and to facilitate adjustment". In order to fulfill that standard, does a Member imposing a safeguard measure have to apply, e.g., (i) an "effective" measure, (ii) the least-trade restrictive measure, (iii) a "proportionate" measure, or something else?

Answer 22

179. In the view of the United States, a Member applying a safeguard measure is not obliged to apply an "effective" measure. While a Member presumably will seek to do so, Article 5.1 imposes no such legal obligation. A Member may choose to apply a measure that may not be fully effective if, for example, the Member concludes that the public interest, or broader economic concerns, supports such an approach. In addition, since a Member may elect to apply both a safeguard measure and domestic adjustment measures, it is possible that the import relief may not be fully "effective" on its own.

180. As the United States explained in its first written submission (at ¶¶ 182-191), a Member is not obliged to apply the single "least trade restrictive measure".

181. Finally, in *Korea–Dairy*, the Appellate Body stated that a safeguard measure should be "commensurate" (or, more properly for purposes of this proceeding, not "incommensurate") with the goals of preventing or remedying serious injury and facilitating adjustment. That appears to be a somewhat more appropriate way to describe the standard that Article 5.1, first sentence imposes than the concept of "proportionality." The latter might be understood as suggesting that remedy decisions can be reduced to simple mathematical exercises, while the former better captures the complexities and judgments inherent in selecting a safeguard measure.

Is the exclusion of Canada, Mexico and Israel from the safeguard measure consistent with the Safeguards Agreement and GATT 1994?

Question 23

Is it factually correct that the United States included imports from NAFTA countries in its analysis of threat of serious injury and causation, and yet excluded those imports from the application of the measure? If not, please explain. Please indicate whether the approach taken by the United States in this case is consistent with the "parallelism principle" as endorsed by the Appellate Body in *Argentina - Footwear*, and if so, please indicate whether this is because (i) NAFTA Article 802 would exclude imports from other NAFTA countries *de jure* from the injury and causation investigation; or (ii) because the imports from other NAFTA countries were negligible in this case; or for some other reason. Was the decision to exclude imports from certain sources based on a purely static analysis of import shares, or did the USITC also take into account the potential increase of imports from sources of supply that were exempted from the application of the safeguard measure relative to imports from sources that were subject to the safeguard measure?

Answer 23

182. As a factual matter, the only lamb meat imports from Mexico during the investigatory period were 202,000 pounds in 1995, accounting for approximately 0.4 per cent of total imports in that year. There were no imports from Mexico during the final three years of the investigatory period, and therefore no imports to include in the USITC's analysis of threat of serious injury and causation. Similarly, imports from Canada ranged from a low of approximately 0.005 per cent of total imports (in 1993) to a high of approximately 0.3 per cent of total imports (in 1997).

183. Thus, imports of lamb meat from Canada were negligible throughout the investigatory period. At no time during 1993-98 did imports from Mexico and Canada collectively exceed even one-half of one per cent of total imports. Thus, as a practical matter Canadian and Mexican imports did not figure into the USITC's analysis of the effect of increased imports – for the simple reason that they remained at negligible levels throughout.

184. The United States does not understand the Appellate Body to have established a broad requirement of "parallelism" given the fact-specific nature of the *Footwear* dispute. Nevertheless, the procedures contemplated by NAFTA Article 802, and employed by the United States in the case of its lamb meat safeguard, satisfy the purpose of the "parallelism" notion the *Footwear* Panel articulated. That idea is to ensure that when a Member attributes serious injury to increased imports originating in the territory of a country that is a party to a customs union (or FTA, in this case), those imports should be included in the safeguard measure the Member determines to apply. NAFTA Article 802, and US law implementing that provision, provide for the inclusion of FTA imports in a US safeguard measure in such cases.

185. In the case at issue, due to the fact that imports from Canada and Mexico were either zero or considerably less than one per cent in each year investigated, the United States could not have acted inconsistently with any "parallelism" principle.

Request for information

Question 24

Please provide the following documents:

(a) The confidential version of the USITC's determination (i.e., pages I-7 to I-27 of the USITC report).

(b) The following tables from Section II of the USITC's report: Tables 3, 4, 8, 9, 14, 16, 18, 21, and 38-43.

Please indicate what sort of procedures would be necessary in your view to protect the business confidential information contained in the above-requested documents.

Answer 24

186. The United States proposes that the panel accept the requested information in indexed form. In brief, the United States proposes to assign an index of 100.0 to the first number in a series and express each subsequent number as a ratio to the first, multiplied by 100. While such an approach is not available in all proceedings, the USITC investigative staff has concluded that in this case almost all of the requested information can be so converted and provided to the panel without risking disclosing any firm's confidential information. Accordingly, by following this method, the United States can provide the panel the substance of the data requested in a form that need not be subject to special confidentiality procedures. The indexed numbers would permit the panel to recognize trends and calculate per cent changes between any two periods, consecutive or non-consecutive. This procedure has been applied to all data in the requested tables, and the results of that indexing accompany this submission. As to the requested information in the report, in most instances, confidential data are percentage changes based on data in the tables. The Panel can calculate these percentage changes from information obtained from the USITC's indexing of the tables.

187. This submission allows the Panel access to the requested data without requiring the competent authority, as required by Article 3.2 of the Safeguards Agreement, to seek consent for disclosure of the actual confidential data to the Panel. USITC investigative staff have expressed concern that making such requests will impede the USITC's ability to obtain updated confidential data as part of the agency's "mid-point review" of the safeguard action on lamb meat. Section 204 of the Trade Act of 1974, as amended, requires the USITC to monitor developments with respect to any safeguard action so long as it remains in effect.[148] Specifically, the USITC is to monitor the progress and efforts made by the domestic industry to make a positive adjustment to import competition under the safeguards action[149], and, if the action remains in effect for more than three years, the USITC is to prepare a report on its findings.[150] The USITC is to submit its report to the President and the Congress no later than the date that is the mid-point of the initial period during which the action is in effect.[151]

188. USITC staff are beginning investigative work in connection with the "mid-point review" of the safeguard on lamb meat. They believe that asking companies who submitted information in confidence to the USITC during the original investigation to disclose that information in the Panel proceeding will have a chilling effect on the agency's ability to gather new information. This is particularly the case because disclosure in unindexed form of much of the data the panel requested would require consent from companies, including importers and foreign producers, who, in the original investigation, did not support the requested relief. Many were already reluctant to provide confidential business information. Consequently, there is reason to believe that the necessary consents might well not be forthcoming and, even if they were, would be liable to lead firms to resist making further disclosures to the USITC. In brief, the United States believes that submitting the

[148] 19 U.S.C. § 2254(a)(1), attached hereto as US Exhibit 40.
[149] 19 U.S.C. § 2254(a)(1).
[150] 19 U.S.C. § 2254(a)(2), attached hereto as US Exhibit 40.
[151] 19 U.S.C. § 2254(a)(2).

requested information to the Panel in indexed form optimally satisfies the Panel's request while not compromising the competent authority's ability to conduct further investigative efforts.[152]

189. If the Panel believes that accepting the requested information in indexed form is not satisfactory, then the United States respectfully suggests that procedures similar to those that the Panel in the *Wheat Gluten* dispute proposed on February 24, 2000 would be most likely to enable the United States to obtain the necessary consent from the information submitters.[153]

[152] The indexed information is attached hereto as US Exhibit 41.

[153] *See Fax from Jasper Wauters, Rules Division, to Mr. J. J. Bouflet and Mr. D. Brinza*, dated 24 February 2000. The proposal suggested in pertinent part that:

> No more than two representatives of the United States would bring the requested information to a designated location at the premises of the WTO in Geneva on [date]. The Panel, two professional staff of the WTO Secretariat, and no more than two representatives of the European Communities would review the information exclusively in camera. No photocopies of the information would be permitted. The Panel, the two professional staff of the WTO Secretariat, and the representatives of the European Communities may take written summary notes of the information for the sole purpose of the Panel process. These individuals would be under an obligation not to disclose the information, or to allow it to be disclosed, to any person. Any such notes would be destroyed at the conclusion of the Panel. While the Panel would be under an obligation not to disclose the information in its report, it could make statements of conclusion drawn from such information.

LIST OF US EXHIBITS

United States – Safeguards Measures on Imports of Lamb Meat from New Zealand and Australia

US Exhibit	Description
20.	USITC Hearing Transcript at 164
21.	57 Stat. 833 (1943), E.A.S. 311 (effective 30 January 1943)
22.	Reciprocal Trade Agreements Act of 1934
23.	John Jackson, *World Trade and the Law of GATT* 553 (1969)
24.	Exec. Order No. 9832 of 25 February 1947
25.	*Extending Authority to Negotiate Trade Agreements, Hearings before the Committee on Finance, United States Senate*, H.R. 6556, at 128 (1948)
26.	United States Tariff Commission, *Hand-Blown Glassware*, Report to the President on Investigation No. 22 Under Section 7 of the Trade Agreements Extension Act of 1951, as amended, at 51-52 (1953)
27.	*Fresh Tomatoes and Bell Peppers*, Inv. No. TA-201-66, USITC Pub. 2985 (Aug. 1996), at I-9-10
28.	*Apple Juice*, Inv. No. TA-201-59, USITC Pub. 1861 (June 1986), at 5-10
29.	*Certain Canned Tuna Fish*, Inv. No. TA-201-53, USITC Pub. 1558 (Aug. 1984), at 5-7
30.	*Webster's Third New International Dictionary (Unabridged)* at 1810 (1981)
31.	*Webster's New Collegiate Dictionary* at 918 (1977)
32.	*Webster's Ninth New Collegiate Dictionary* at 838 (1985)
33.	*Webster's Third New International Dictionary (Unabridged)* at 355, 356, 1317 (1981); *New Shorter Oxford English Dictionary* (1993) at 355, 356.
34.	*Webster's Ninth New Collegiate Dictionary* at 217, 695 (1985)
35.	Testimony of Joseph Casper, transcript of injury hearing at 22
36.	Testimony of Harold Harper, transcript of injury hearing at 30
37.	19 U.S.C. 2252(b)(1)(B)
38.	Petition For Relief From Imports of Lamb Meat Under Section 201of the Trade Act of 1974, dated 30 September 1998, at 4, 5
39.	19 C.F.R. § 206.14(b)(3)

40.	19 U.S.C. § 2254(a)(1), (2)
41.	Indexed Tables
42.	Media Release of 7 July 1999 by Deputy Prime Minister and Minister for Trade Tim Fischer.

ANNEX 3-8

SECOND SUBMISSION OF THE UNITED STATES

(29 June 2000)

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I. INTRODUCTION

1. Australia and New Zealand have failed to demonstrate that the United States' safeguard measure on lamb meat is inconsistent with US obligations under the *Agreement on Safeguards* and Article XIX of the *GATT 1994*. In its first written submission, and in its response to the Panel's written questions, the United States demonstrated that the findings and economic conclusions of the USITC in this matter were carefully reasoned and amply articulated, and that the safeguard measure applied by the United States is fully in accordance with US obligations under the Safeguards Agreement and the *GATT 1994*. The United States also demonstrated that it fully satisfied the notification and consultation provisions of the Safeguards Agreement.

2. The United States does not intend to duplicate its earlier arguments in this second written submission. Instead, this submission will focus on issues raised by New Zealand and Australia in their first oral statements and in their responses to the Panel's Questions.[1] For the Panel's convenience, this submission is structured in accordance with the order of the Panel's questions to the United States.

II. THE "UNFORESEEN DEVELOPMENTS" PROVISION OF ARTICLE XIX:1 OF THE GATT 1994 WAS FULFILLED

3. The Appellate Body has confirmed that the reference to "unforeseen developments" in the first clause of Article XIX:1(a) does not establish an independent condition for the application of safeguards measures. Therefore, contrary to the arguments of Australia and New Zealand, the USITC was not required to make a finding of "unforeseen developments" in its report. The Panel should reject their attempt to read such a requirement into the text.

A. ARTICLE XIX DOES NOT REQUIRE A FINDING OF "UNFORESEEN DEVELOPMENTS"

4. The United States has explained at length why Article XIX:1(a) does not require competent authorities to make a specific finding of "unforeseen developments."[2] Basic rules of treaty interpretation affirm the United States' view.

5. Article 31 of the *Vienna Convention* states that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Moreover, in accordance with Article 31.3, a treaty interpreter shall also take into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[3] As the International Law Commission observed:

> The importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.[4]

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[1] In particular, although it was one of the issues that the Panel identified as crucial at the First Substantive Oral Session, this submission will not further discuss the representativeness of the USITC's data. The United States has addressed that issue at length in both its First Written Submission and its response to the Panel's questions, and Australia and New Zealand have raised no new arguments on the matter.

[2] *See* US Responses to Questions by the Panel at ¶¶ 1-8, 14-27.

[3] *Vienna Convention*, Art. 31.3(b).

[4] *Report of the International Law Commission on the Work of its Eighteenth Session*, Yearbook of the International Law Commission, 1966, vol. II, at 221, attached hereto as US Exhibit 43.

Subsequent practice by GATT Contracting Parties confirms that the reference to "unforeseen developments" in Article XIX was not meant to require a finding on this subject as a precondition for the application of safeguard measures.

6. In 1973, the GATT Secretariat prepared a factual note that discussed existing safeguard provisions, including the safeguard provision embodied in GATT Article XIX.[5] The Secretariat explained that "a contracting party having recourse to Article XIX must show that:

(a) the product in question is being imported in increased quantities;

(b) the increased imports are the result of unforeseen developments and of the effect of obligations under the GATT; and

(c) the imports enter in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products."[6]

7. The Secretariat observed, however, that:

> The most important case for the interpretation of these conditions is the first recourse to Article XIX by the United States on women's fur felt hats and hat bodies . . . It is fairly clear from this and subsequent cases that the conditions under (b) above do not, in fact, place any significant constraint on the freedom of action of a contracting party wishing to invoke the Article. The conditions under (a) and (c), on the other hand, limit this freedom of action."[7]

8. Illustrative of the Secretariat's observation that the GATT Contracting Parties did not view the "unforeseen developments" language of Article XIX as constraining their application of safeguard measures is the safeguard practice of Australia and New Zealand. A table prepared by the GATT Secretariat in 1995 indicates that Australia was responsible for 38 of the 150 Article XIX actions notified to the Secretariat between 1950 and 1995.[8] Based on an examination by the United States in connection with this proceeding, in 37 of those 38 cases Australia failed to identify any "unforeseen developments" underlying its action.

9. Similarly, the single safeguard action notified by New Zealand (in 1975) makes no mention of "unforeseen developments". Thus, practice by the complainants themselves suggests that they perceived no need for their competent authorities to stake their affirmative determinations under Article XIX on a finding of "unforeseen developments". Indeed, as New Zealand observes in response to Panel Question one:

> [a] Member need not prove that in the particular case it could not have foreseen or did not foresee a given development occurring after it incurred obligations under GATT 1994. It is not required that the developments be 'unforeseeable', or 'incapable of being foreseen or anticipated.'[9]

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[5] Safeguards, Factual Note by the Secretariat, Revision, COM.IND/W/88/Rev.1 (18 January 1973).
[6] *Id.* at ¶ 6.
[7] *Id.*
[8] *See Guide to GATT Law and Practice*, vol.I, at 539-559 (1995) (GATT Analytical Index).
[9] New Zealand's Response to Panel Question One at 2.

10. United States practice under Article XIX has been similar. As noted by a US negotiator of the ITO Charter and GATT 1947 in connection with the *Hatters' Fur* case:

> " . . .At that time one of the difficulties facing the United States hat industry was the increasing practice of going without hats. Czechoslovakia and other countries argued that this trend, as well as the increase in imports presumptively resulting from the tariff concession, could reasonably have been foreseen and hence that the escape clause was not applicable. The answer to this argument is simple: under United States trade-agreements procedures, whatever may be the practices of other countries, trade-agreements concessions are not made if future developments such as to cause injury to flow from the concession are in fact foreseen. Therefore, the reference to "unforeseen developments" in GATT was meaningless as far as United States obligations were concerned . . ."[10]

11. The negotiating history of the Safeguards Agreement demonstrates that the Negotiating Group on Safeguards did not intend to change the prevailing view that safeguards measures need not be based on a finding of unforeseen developments. The initial Chairman's draft text included among the conditions for applying safeguards measures a requirement that the increase in imports must have been "unforeseen".[11] In the Chairman's 15 January 1990 revised text, the term "unforeseen" was replaced with the term "unexpected". [12] In a 23 January 1990 submission, Mexico proposed certain modifications to the draft text, including the reinsertion of "unforeseen" for "unexpected" and a rephrasing of the entire sentence to read as follows:

> there has been an unforeseen, sharp and substantial increase in the quantity of such product being imported; **as a result of unforeseen developments and of the effect of the obligations, including tariff concessions, incurred by a contracting party under the General Agreement;**[13]

12. Mexico's proposed changes were not adopted. Indeed, in a subsequent meeting of the Negotiating Group, it was proposed that the term "unexpected" be deleted entirely.[14] The term was dropped in the Chairman's July 1990 draft text, and it did not reappear.

13. In summary, the practice of the Contracting Parties under the GATT 1947 reflected an understanding that safeguard measures under Article XIX did not need to be based on findings of "unforeseen developments." The decision of the Negotiating Group not to carry the "unforeseen developments" language of Article XIX:1(a) forward into the Safeguards Agreement was consistent with this long-established practice. Based on that practice, there is no reason to conclude that

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[10] J. Leddy, "The Escape Clause and Peril Points under the Trade-Agreements Program," pp. 124-173 in W.B. Kelly (ed.), *Studies in United States Commercial Policy* (1963), at p. 136, attached hereto as US Exhibit 44. Mr. Leddy notes: "One may wonder why, if the phrase is meaningless, it was inserted in the escape clause in the first place. The best explanation seems to be that the administrators of the trade-agreements program who were responsible for originating the clause in 1942 were fearful that omission of the phrase might lead Congress to believe that injury from tariff concessions was anticipated. In short, the words were a form of semantic window dressing." *Id*. at n.34.

[11] See, e.g., Negotiating Group on Safeguards, Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25, at ¶ 4 (27 June 1989).

[12] See, e.g, Negotiating Group on Safeguards, Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25/Rev.1, at ¶ 4 (15 January 1990).

[13] *Negotiating Group on Safeguards*, *Communication from Mexico*, MTN.GNG/NG9/W/28, at ¶ 4(a) (23 January 1990) (emphasis in original).

[14] See Negotiating Group on Safeguards, Meeting of 29 and 31 January, 1 and 2 February 1990, Note by the Secretariat, MTN.GNG/NG9/NG9/14, comments on ¶ 4(a) (6 March 1990).

Article XIX should be interpreted in a manner today that would require an "unforeseen developments" finding as a precondition for the imposition of a safeguard measure.

B. COMPLAINANTS FAIL TO CHALLENGE THE FACTS DEMONSTRATING THE EXISTENCE OF UNFORESEEN DEVELOPMENTS

14. The submissions of Australia and New Zealand in response to the Panel's written questions are striking in the extent to which, both by affirmative statements and by their omissions, they support the United States' position that the USITC's report demonstrates the existence of unforeseen developments. As the United States has previously noted, the USITC found that the mix in imported products shifted, particularly in 1997 and interim 1998, from frozen lamb meat to fresh or chilled lamb meat, and to larger cuts. The imported products became more similar to those produced by the US industry and consequently more likely to displace domestic lamb meat in the domestic market and depress US prices. These changes in market conditions were contrary to what prior conditions would have indicated.[15]

15. Although New Zealand asserts that "the unforeseen developments must relate to the importation of the product in terms of quantity *and* conditions, and must be the unexpected events or circumstances which lead to that importation,"[16] it fails to address the facts cited by the United States as showing that the standard even as New Zealand has articulated it has been met. As the USITC's analysis demonstrates, the change in the nature of imports allowed them *both* to increase *and* to do so in conditions under which they would have a greater impact on the US industry.

16. For the same reason, Australia is simply wrong in stating that the unforeseen developments alleged here "would apply in any increase in imports."[17] It is not true that imports increase only when there has been a change in their nature which permits them to supplant domestic production that they previously complemented. The United States agrees, however, with Australia's observation that the circumstances establishing "unforeseen developments" will differ from case to case.[18] In this case, the uncontested findings of the USITC establish such developments.

17. Australia and New Zealand in fact contest none of the findings that underlie the United States' analysis. Although New Zealand claims that the extent of fresh or chilled lamb meat from New Zealand in particular did not rise by the end of the period to above the proportion that fresh or chilled imports from New Zealand had reached in 1990, it does not contest that the USITC's conclusion was correct when one views increased imports *as a whole* (which is the relevant inquiry under Article 2 of the Safeguards Agreement). It also does not contest that between 1995 and 1997 imports of fresh or chilled lamb meat increased by 101 per cent, while imports of frozen lamb meat increased by only 11 per cent during this same period.[19] Nor does it contest that foreign exporters projected that the major portion of their 1999 increase would be in the form of fresh or chilled lamb meat."[20]

18. Failing to contest the unforeseen developments cited by the United States on the facts, Australia and New Zealand instead argue that the United States cannot rely on the USITC report because it did not reach a separate legal conclusion concerning unforeseen developments.[21] New Zealand specifically asserts that Article 3.1 of the Safeguards Agreement required the USITC to

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[15] *See* United States First Written Submission at ¶¶ 47 to 60.
[16] New Zealand's Response to Panel Question 3 at 6.
[17] Australia's Response to Panel Question 4 at 5.
[18] *See* Australia's Response to Panel Question One at 1.
[19] USITC Report at I-31.
[20] USITC Report at I-22.
[21] Australia's Response to Panel Question Two at 2-3; New Zealand's Response to Panel Question Two at 5.

include its "findings and reasoned conclusions" of unforeseen developments in its report.[22] As the United States has previously noted, this allegation is beyond the scope of this proceeding. In their first written submissions, the complainants raised claims under Article 3.1 only with respect to the US safeguard measure itself, not with respect to the USITC's treatment of unforeseen developments.

19. Moreover, the Appellate Body made clear that "unforeseen developments" is not a separate condition for the imposition of safeguard measures that must be the subject of distinct legal conclusions. As the panel noted in its second question to Australia and New Zealand, the Appellate Body in *Korea-Dairy*[23] and *Argentina-Footwear*[24]24 explicitly stated that "unforeseen developments" do not constitute an "independent condition" for the application of a safeguard measure but rather constitute a "circumstance ", the existence of which "must be demonstrated as a matter of fact." To the extent there is a requirement to demonstrate the circumstances of 'unforeseen developments' as a matter of fact, the USITC report was replete with evidence demonstrating such circumstances. The USITC report recounts in detail the unforeseen changes in market conditions that resulted in increased imports of fresh or chilled lamb meat entering the US market after 1995. The unforeseen developments which led to increased quantities of imported lamb meat, and the change in the conditions under which they were imported, were discussed at length in the USITC report.

20. In response to the Panel's third written question, Australia claims that "to demonstrate" unforeseen developments (as opposed to "discerning " them) means "to 'establish by logical reasoning or argument, or by practical proof; prove beyond doubt.'"[25] Australia is simply attempting to insert into the Safeguards Agreement a new "burden of proof" that must be met to demonstrate unforeseen developments. The Appellate Body in *Korea-Dairy* and *Argentina Footwear* resolved that unforeseen developments constitute a "circumstance," not an independent condition based on a new legal requirement that must be read into the Safeguards Agreement. The USITC report demonstrated the existence of circumstances constituting unforeseen developments. No further showing is required.

III. THE DEFINITION OF "DOMESTIC INDUSTRY" USED IN THE USITC'S INVESTIGATION WAS CONSISTENT WITH THE SAFEGUARDS AGREEMENT AND GATT 1994

21. The United States has previously addressed the legal basis for the USITC's domestic industry finding. It will not repeat those arguments here, as New Zealand's and Australia's latest submissions have not raised any new contentions not previously addressed. Suffice it for present purposes to note that the arguments of New Zealand and Australia simply assume the correctness of their result, and that Australia in particular has not established why its current argument, as opposed to the position it took in *Canada -- Manufacturing Beef*[26], and the conclusion that its own competent authority reached in a 1998 safeguard investigation in *Pig and Pigmeat*, is correct.

22. Once again, Australia and New Zealand contest little of the factual basis for the United States' definition of the domestic industry. They do not contest the facts on which the USITC found a continuous line of production from the raw product, live lambs, to the processed product, lamb meat.[27] Nor do they contest most of the findings underlying the USITC's finding of a coincidence of economic interest between lamb growers and processors. They do not contest that the value added by

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[22] New Zealand's Response to Panel Question Two at 5.

[23] Korea-Dairy -- Definitive Safeguard Measure on Imports of Certain Dairy Products, WT/DS98/AB/R, Report of the Appellate Body adopted 14 December 1999, at ¶ 85.

[24] *Argentina–Footwear -- Definitive Safeguard Measure on Imports of Footwea*r, WT/DS121/AB/R, Report of the Appellate Body adopted 14 December 1999, at ¶ 92.

[25] Australia's Response to Panel Question 3, at 3.

[26] Canada -- Imposition of Countervailing Duties on Imports of Manufacturing Beef From the EEC, SCM/85, 13 October 1987, at ¶ 4.1 (Manufacturing Beef).

[27] USITC Report at I-13.

growers and feeders accounts for about 88 per cent of the wholesale cost of lamb meat or that packers and breakers are largely finishers.

23. Although Australia contests any implication by the United States that there is a high degree of vertical integration throughout the four industry segments constituting the industry[28], neither Australia nor New Zealand alleges there is no integration. The USITC found that "some lamb meat operations are vertically integrated, which also supports a finding of a coincidence of economic interests between different industry segments."[29] It is not in dispute that some growers both feed and slaughter lambs.[30] A major lamb packer is also an owner of a major feeder and a major breaker operation.[31]

24. Complainants' chief objection is that this one packer opposed the petition. That fact, however, in no way detracts from the objectivity of the USITC's findings. The chief executive officer of that firm, Transhumance Holding Company, testified before the USITC that:

> Transhumance is the largest US packer, slaughtering and processing lamb, the largest marketer of US lamb, one of the largest US lamb feeders, and an importer of chilled lamb from Australia. Last year, [one Transhumance subsidiary] slaughtered and distributed the meat from more than 900,000 US lambs, thereby bringing to market approximately 30 per cent of the domestic industry's production.[32]

25. In short, Transhumance's own operations represent an extensive degree of vertical integration. The fact that it opposed the petition (having interests in Australian imports), as the USITC noted[33], does not change the objectively observable facts.

26. As the USITC also noted, no representatives of any of the four industry segments (including Transhumance) testified that the economic interests of packers and breakers diverged from those of growers and feeders. To the contrary, the testimony before the USITC was unanimous. The USITC quoted testimony of a rancher to the effect that "lower import prices forced processors to reduce prices for the carcasses they bought from packers, who in turn had to reduce the prices they paid to feedlots for live lambs."[34] The USITC cited similar testimony from witnesses at other stages in the production process.

27. As counsel for petitioner stated at the injury hearing during the investigation,

> What is helpful, from my perspective, is that all the data reinforce one another; that no matter where in the chain you look, you will find injury or serious injury. The only question is at what time you look. . . . So, frankly, I think it -- Your -- analysis has to be almost temporal, as opposed to focusing on -- particular segments. If you focus on

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[28] Australia's Responses to Panel Question Five, at 6.
[29] USITC Report at I-13.
[30] USITC Report at II-12.
[31] USITC Report at I-14.
[32] USITC Transcript of Injury Hearing at 258-259, attached hereto as US Exhibit 45.
[33] USITC Report at I-14.
[34] USITC Report at I-14, n.50. *See also* similar testimony of Joseph Casper, Vice President, Chicago Lamb & Veal Co., a breaker, transcript of injury hearing at 22, US Exhibit 35; testimony of Harold Harper, owner of a feedlot operation, transcript of injury hearing at 30, US Exhibit 36 ("Here is how it happened. In the fall of '97, I bought lambs for approximately $1 a pound. However, when I went to sell the lambs in the winter of '97 and '98, I could only get 40 and 60 cents a pound. Why? Because the packer that I had traditionally supplied with lambs was forced to reduce his prices to me because his customer, the processor, had to lower his prices substantially to compete with imports. The impact of the incredibly low prices offered by importers was felt throughout the distribution chain as each sector was compelled to demand price breaks from their suppliers to try to remain competitive.")

> the period from the fall of '97 to the present and you understand the chain . . . that's the overlay you need to do the analysis.[35]

28. As the United States reflected in its responses to the Panel's questions, in the 1997-98 period, operating results for all industry segments fell as imports surged. As will be discussed further below, Australia and New Zealand seek, without legal basis, to disregard the facts pertinent to this surge period.

29. Indeed, the Australian authority appears to take substantially the same approach as the USITC in deciding whether to include growers in the industry producing the processed product, and in fact included growers in the industry producing the processed product in a 1998 investigation. In that investigation, the Australian authority (the Productivity Commission) found that the domestic processed product was like or directly competitive with the imported processed product, and then concluded that the domestic industry included pig producers as well as primary processors of pigmeat.[36]

30. Finally, the United States notes that Australia, in its response to the fifth written question from the Panel, erroneously states that "out of the 49 firms growers and grower/feeders providing financial information as growers, 42 were not even integrated with feeder operations, let alone packer and/or breaker operations."[37] Based on USITC questionnaire responses received from 70 growers and grower/feeders, approximately 20 per cent indicated they were both growers and feeders. In its response to the same question, Australia also incorrectly infers that certain packer/breaker activities of growers and feeders were not part of the USITC's questionnaire survey. In fact, growers and/or feeders who were also packers and/or breakers did respond to the USITC's questionnaires.[38]

IV. THE USITC DEMONSTRATED THAT THE DOMESTIC INDUSTRY FACED A "THREAT OF SERIOUS INJURY" DUE TO "INCREASED IMPORTS"

A. COMPLAINANTS' ARGUMENTS TO THE CONTRARY IGNORE THE REQUIREMENT TO EXAMINE THE MOST RECENT TRENDS AND ARE BASED ON ALTERNATIVE THEORIES NEITHER REQUIRED BY THE SAFEGUARDS AGREEMENT NOR SUPPORTED BY THE EVIDENCE OF RECORD

31. Australia's and New Zealand's arguments about the USITC's threat of injury determination disregard the standard of review applicable in this proceeding and the substantive requirements of the Safeguards Agreement. Much of their argumentation is devoted to developing an alternative view of the evidence. As will be shown, that alternative view would bypass the analysis required by the Safeguards Agreement and posits the existence of facts for which there is no evidence. Even if complainants' views of the facts were potentially correct, the fact that another finder of fact might reach a different conclusion does not establish that a country's competent authority violated the Safeguards Agreement.

32. In particular, Australia and New Zealand continue to ignore the impact that the surge in lamb meat imports had on the US lamb meat industry in 1997 and interim 1998 and projections for an acceleration of that surge in 1999. Both complainants continue to urge the Panel to find that the USITC should have relied on trends all the way back to 1993.[39],[40] Neither complainant, however,

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[35] USITC Transcript of Injury Hearing at 130-131, attached hereto as US Exhibit 45.

[36] Productivity Commission, *Pig and Pigmeat Industries: Safeguard Action Against Imports*, Rept. No. 3 (11 November 1998), at xxi, attached hereto as US Exhibit 46.

[37] Australia's Response to Panel Question 5 at 6.

[38] USITC Report at II-12.

[39] Indeed, New Zealand in its response to Question 8 bases part of its reasoning on events that allegedly occurred in the US lamb meat market between the mid-1970's and 1993, a period that is totally outside the

explains how such reliance is consistent with the finding by the Appellate Body in *Argentina – Footwear* that the increased imports of relevance under the Safeguards Agreement must be recent and that reliance on trends over an extended period may be improper. Moreover, these arguments disregard the fact that the USITC's determination concerned the *threat* of serious injury in the imminent future. The most recent trends are clearly most relevant to that inquiry, even if complainants were correct that such trends could be disregarded for serious injury determinations.

33. While the USITC examined conditions over the whole period that it investigated, its findings concerning the earlier part of the period provided background for its examination of the changes of conditions in the most recent period, changes that complainants' long-term analyses disregard. For example, evaluating contentions that the industry's difficulties were caused by a long-term decline in demand, the USITC found US lamb meat consumption was stable in 1997 and interim 1998.[41] It also found growers had largely absorbed the effects of the termination of Wool Act payments, showing signs of recovery by 1996, and that the termination of such payments would have diminishing effects in the imminent future. Failing to address these findings, the complainants fall into self-contradictory contentions. As the Panel suggests in its Question 8, the arguments made by New Zealand and Australia to the effect that a decline in domestic demand for lamb meat caused domestic production to fall contradict their argument that domestic producers were unable to meet strong domestic demand and this caused imports to increase.

34. Moreover, their second argument, that imports did not displace domestic lamb meat, contradicts admissions made by Australia that imports displaced one-third of the decline in US production. The fact that US lamb meat prices fell sharply in 1997 and prices continued to be depressed in interim 1998, while imports surged, is further evidence of such displacement. While New Zealand and Australia acknowledge that lamb meat prices in the US market fell in 1997 at the same time that the surge in imports occurred, they never attempt to provide a credible explanation of why lamb meat prices in the US market fell sharply in 1997 and remained depressed in interim 1998. Their only explanation is that prices were higher previously and that the decline might be the result of a lamb cycle. The USITC, however, found no evidence of such a cycle and noted that no party argued that it existed.[42] Complainants do not point to any evidence contradicting the USITC's finding; they simply invent an alternative theory out of whole cloth.

35. Similarly unfounded on any evidence is the new claim that Australia now advances in its response to the Panel's Question 8. Australia alleges that US lamb production has declined because the grower segment is "inefficient with high costs, low returns and consequently low investment relative to other US agriculture production systems", and that as a result US lamb production resources shifted to other uses, "especially beef production." Australia did not raise these claims in either its first written submission or its first oral statement, nor has Australia cited in its response to question 8 any support in the USITC's record for such claims. In fact, Australia's new theory that lamb production shifted to other uses is contrary to evidence in the USITC's report, which indicates that sheep and lambs are the only suitable agricultural crop in many areas of the West, where production is concentrated.[43] Accordingly, the Panel should disregard these new claims.

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period of the USITC's investigation and beyond the three-year period that New Zealand says that its authority examines.

[40] Australia's position here is contrary to actual practice in Australia, where the competent authority, in its only safeguard investigation conducted since the Uruguay Round Agreements entered into force, made an affirmative determination of *present* serious injury based principally on developments over the most recent 12 months. The authority based its determination, made in November 1998, on a decline in prices since October 1997 and a decline in the condition of the domestic industry during the first half of 1998. Productivity Commission, *Pig and Pigmeat Industries: Safeguard Action Against Imports,* Inquiry Report No. 3 (11 November 1998) at xxiii, attached hereto as US Exhibit 46.

[41] USITC Report at I-22.

[42] USITC Report at I-14.

[43] USITC Report at II-11.

36. New Zealand likewise raises a new and untimely claim in its response to Question 11 that the decline in capacity utilization in the packing segment of the industry "must have been solely due to the expansion of capacity." New Zealand states that this was "probably" occurring in the largest firms as they sought to increase their market share. In fact, however, the USITC found that packer capacity fell over the period of investigation.[44] Thus, the fact that capacity utilization in interim 1998 reached its lowest level in the period of investigation cannot have been the result of capacity increase. New Zealand offers no evidence in support of its claim: its claim is based on sheer speculation.

37. Australia paints a similarly bold picture that ignores all details when, in its response to Question 9, it makes the sweeping assertion that "any" decline in the apparent profitability of domestic lamb growers was "entirely" due to the termination of the Wool Act payments. Australia makes this allegation without reference to any particular year or years or supporting data. Australia's argument simply disregards the USITC's findings examining the changes over time in the effects of the termination of Wool Act payments. In particular, Australia does not address the USITC's finding that the termination of the Wool Act payments would have decreasing effects in the imminent future and consequently could not explain likely imminent deterioration in the industry's position. Its arguments are therefore irrelevant as challenges to the competent authority's threat determination.

38. New Zealand's argument in response to Panel Question 8 that the end of Wool Act payments caused a shortfall in domestic supply which in turn stimulated an increase in imports both fails to address the basis for the USITC's threat of injury findings and contradicts the testimony of New Zealand producers before the USITC. A representative of those producers clearly disavowed at the USITC injury hearing any connection between the phase-out of Wool Act payments and the increase in imports in 1997-98. Mr. Malashevich, an economic consultant representing Meat New Zealand, stated:

> We, too, believe that the phase-out of Wool Act subsidies over the 1993-96 period very clearly was a cause of arguably serious injury to the industry at that time. But significantly, any such injury caused by the phase-out occurred before the increase in imports about which Petitioners are now complaining. There is a disconnect in time between the increase in imports complained of and when the damage occurred to the industry.[45]

39. Thus, New Zealand now presents as if it were a fact a causal connection that its industry's experts specifically rejected before the USITC.

40. Moreover, New Zealand's current argument does not take into account the specific facts about pricing and projected import volumes on which the USITC threat determination relied. As the USITC found, prices fell in the course of 1997 as imports rose.[46] New Zealand does not explain how this would have occurred if the increased supply were simply filling a shortage in the marketplace.

41. Indeed, despite the fact that prices by interim 1998 were lower than in comparable quarters in 1996 and the first half of 1997, the USITC found that Australian and New Zealand firms projected that their exports to the United States in 1999 would be 21 per cent above their projections for 1998.[47] Thus, the facts cited by the USITC do not support the conclusion that in the imminent future, imports would be drawn into the United States market by rising prices due to shortages. Rather, New Zealand and Australian firms expected their imports to the United States to rise at an accelerating rate despite a fall in United States prices.

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[44] USITC Report at I-20.
[45] USITC Transcript of Injury Hearing at 217, attached hereto as US Exhibit 45.
[46] USITC Report at I-24.
[47] USITC Report at I-23.

42. To the extent that complainants attempt to address the 1997-98 period, their arguments are misleading. Indeed, New Zealand's attempt in response to Panel Question 11 to minimize the extent of increased imports in 1997-98 confirms the USITC's findings about import trends. New Zealand observes that the share of the domestic market captured by imports rose from 11.2 per cent in 1993 to 23.3 per cent in interim 1998. New Zealand then observes that 45 per cent of that increase occurred during 1993-1996, and 55 per cent in 1997 and interim 1998. The 5.4 per cent increase over the three years 1993-96 represents a 1.15 per cent per year growth in import penetration. In contrast, the 6.5 per cent increase over the following year and three-quarters represents almost a 4 per cent per year growth in import market share.

43. As New Zealand's own figures demonstrate, imports took market share during the 1997-98 period at more than three times the rate that they had done previously. In fact, since this accelerating rate of increase is from a larger and larger and larger base, the market share increase reflects that imports were increasing in ever greater quantitative terms as well. Thus, insofar as New Zealand uses its calculations to attempt to show that the USITC should not have concentrated on 1997-98 as reflecting a surge in imports, the figures that it introduces demonstrate the reasonableness of the USITC's conclusions.[48] Moreover, as is reflected in the Annex that New Zealand introduced in the Panel 's first oral session, New Zealand ignores the change in conditions that led increased imports later in the investigative period to have greater impacts on the US industry than imports early in the period.

44. In summary, complainants continue to fail to address the basis for the USITC's threat determination. To the extent that they proffer alternative explanations, those explanations are not based on evidence, are based on theories repudiated by representatives of their own industry, and in any event do not detract from the USITC's findings.

B. NEW ZEALAND'S EXHIBIT NZ13 IS INADMISSIBLE AS AN ATTEMPT TO HAVE THIS PANEL ENGAGE IN *DE NOVO* REVIEW AND DEMONSTRATES NEW ZEALAND'S FAILURE TO ADDRESS THE USITC'S FINDINGS CONCERNING THE CHANGE IN THE IMPACT OF IMPORTS

45. Like complainants' other arguments, New Zealand's Exhibit NZ13, the Annex to its First Oral Statement, fails as a challenge to the USITC's threat of injury determination because it ignores the findings supporting that determination. In particular, it fails to take into account the change in the mix of imported product that the USITC found led imports to take greater market share from the US industry and depress prices for the US product. Before addressing that exhibit's analysis on the merits, however, the United States renews and expands its objections to the acceptance of NZ13 as evidence in this proceeding.

1. The factual conclusions drawn by Exhibit NZ13 are inadmissible before this Panel

46. As the United States argued at the first oral session when New Zealand sought to introduce NZ13, the Panel may not properly entertain the factual analysis which that exhibit purports to present. Since the exhibit was never submitted to the USITC, accepting it in this proceeding would be prejudicial and contrary to the applicable standard of review.

47. As the Appellate Body recently confirmed, in examining a serious injury determination, a Panel must address three questions: (1) whether the competent authority considered all relevant facts,

[48] If New Zealand intends by this discussion to suggest that the USITC erred in finding the 1997-98 surge to reflect "increased imports" within the meaning of Article 2 of the Safeguards Agreement, the United States objects to the introduction of such an issue, which was not identified in New Zealand's Panel Request nor in its First Written Submission.

including each factor listed in Article 4.2(a); (2) whether its published report contains an adequate explanation of how the facts support the determination made; and (3) whether the determination made is consistent with the Safeguards Agreement. A panel should not conduct a *de novo* review, and it is accordingly inappropriate for a panel to attempt to conduct its own assessment of the raw data reviewed by the competent authority during its investigation.

48. The *Korea–Dairy* panel, whose application of the standard of review the Appellate Body endorsed, articulated (at ¶ 7.30) the consequences of the fact that review in the WTO is not *de novo* for arguments based on evidence not before the competent authority. As that panel stated, "the Panel should examine the analysis performed by the national authorities at the time of the investigation on the basis of the various national authorities' determinations and the evidence it has collected." In short, the question before the Panel is the adequacy of the ITC's determination as it was made at the time, and the Panel's review is limited to the record that the ITC gathered in its investigation. New Zealand's presentation of new economic analysis based on information from outside the USITC's record is a clear and deliberate violation of that principle.

49. These decisions are in keeping with Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), which states 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 . . . ." The "facts" that are the subject of a WTO panel proceeding are different from the "facts" that are the subject of a competent authority's investigation under the Safeguards Agreement. A competent authority determines whether a domestic industry has been seriously injured by increased imports. A panel resolves a dispute between Members about whether, in doing so, the competent authority violated the Safeguards Agreement. The "facts" examined by the competent authority concern the economic condition of the domestic industry. The "facts" to be examined by a panel concern whether the Member's actions complied with the Safeguards Agreement. Since, under the Safeguards Agreement, injury determinations are made by competent authorities, the facts before the Panel concern what the competent authority did and the findings it made.

50. Under these principles, NZ13 and the arguments based on it are inadmissible and inapposite for a number of reasons. New Zealand seeks to present to this Panel analysis based on evidence that it concedes was not before the USITC. For example, New Zealand concedes that certain data used in constructing its analysis for graph 3 in NZ13 was downloaded by New Zealand from the web sites of the US Bureau of Labor Statistics, the US National Agricultural Statistical Service, and the US Department of Agriculture. New Zealand does not indicate when such data were downloaded, or even whether such data were available at the time of the USITC investigation.

51. Even assuming the data were publicly available, it does not excuse New Zealand's failure to submit the data to the USITC in the first instance. In accordance with Article 3.1, all interested parties (which in the United States included New Zealand and Australia) had the opportunity to present evidence and argument to the USITC. Article 3 makes clear that it is Members' competent authorities that are authorized to conduct investigations of whether increased imports have caused serious injury. There is nothing in the DSU that suggests that it was intended to operate in derogation of the fact-finding responsibilities reserved by the underlying WTO Agreements to the Members and their competent authorities.

52. Article 3 likewise establishes conditions for these investigations, including notice and public hearings, that guarantee interested parties, including both domestic and foreign commercial interests, the opportunity to present evidence and comment on the other presentations and evidence received by the competent authority. The government-to-government procedures established in the DSU do not create any equivalent process in panels. Governments should not be allowed to bypass the process mandated by the Safeguards Agreement and present evidence for the first time to a Panel that they or their citizens could have presented to the competent authority. If Members know that they can

withhold such information from the scrutiny and evaluation of the interested parties and the competent authority during the investigation and then introduce it for the first time before a WTO panel, then it will be in a party's interest to engage in such strategic gamesmanship.[49] Countenancing such practices at the WTO will undermine proceedings before competent national authorities.

2. NZ13 fails to take into account the change in product mix that the USITC found changed the nature of the effects of imports

53. New Zealand's arguments based on NZ13 are similar to those that it and Australia have made in response to the Panel's questions in contending that viewing the facts in a different framework would have led the competent authority to a different result. Such argumentation is, however, inadequate to show a violation of the Agreement. New Zealand must show that a failure to use the framework it advocates is a failure under the Agreement to evaluate the relevant factors objectively.

54. The Agreement on its face does not mandate any particular approach to evaluating the relevant factors, enumerated or unenumerated. On its face, the Agreement does not require economic modelling. New Zealand's original argument was that the USITC had in an earlier investigation used an economic model to analyze the lamb industry. The United States pointed out in its first written submission that the earlier modelling was used by the USITC for a different kind of investigation, serving quite different purposes than those required by the Safeguards Agreement. New Zealand has not contested that response and provides no argument about why economic modelling, even if possible, is required.

55. Moreover, the purported economic analysis that New Zealand has obtained from the author of NZ13 is inapposite as a challenge to the USITC's determination because it ignores the findings of fact in the USITC's report. Because it does so, the author's conclusion that, with import prices rising faster than domestic prices after 1993, "it is absolutely untenable to believe that imports could have been the slightest reason of any economic difficulties", is an economic *non sequitur*. The USITC report makes why this is the case perfectly plain. Between 1995 and 1997, the mix of products being imported changed. Imports were dominated early in the period by smaller, frozen cuts that sold at low prices but occupied a niche that had little impact on sales of US products. The increase in imports was dominated by fresh or chilled product, increasingly of larger cuts, that had much more effect on US products. Import prices rose because a greater proportion of imports came as higher value product. Nevertheless, those products now competed with the comparable US product at prices lower than the US product, taking market share and pulling down prices.

56. In economic terms, New Zealand's purported economic analysis assumes, contrary to fact, that the price elasticity of substitution between imports and domestic product did not change from 1993 to 1997. By doing so, the analysis literally begs the question: it assumes the result that it wants to reach. As an argument against the USITC's determination, even if admissible, NZ13 is irrelevant.

57. Indeed, if one takes into account the economic fallacy that underlies NZ13, its admission that "comparing only 1997 and 1998 it might be claimed, as the US does, that the producer prices on the US market between these two years has, to some extent, possibly also been caused by imports", is compelling. The only reason that the exhibit gives for rejecting such a causal link is that import prices in 1998 were above 1993 levels. The findings of fact in the USITC report concerning the change in product mix, however, account for that relationship. Thus, the analysis in NZ13, which does not challenge the finding of fact, admits the existence of a causal link between imports and the threat of injury to the domestic industry.

[49] These are precisely the types of concerns that the underlay the Appellate Body's recent concerns and findings on a procedural issue in the FSC dispute. See United States – Tax Treatment for "Foreign Sales Corporations", WT/DS108/AB/R, Report of the Appellate Body at ¶ 166 (24 February 2000).

58. Finally, the economic analysis that New Zealand presents proves too much. It concludes that, because world market prices for agricultural prices have a well-known tendency to fluctuate, one year of import price decline could not be said to be a threat of serious injury. The Appellate Body has held that, under the Safeguards Agreement, injury findings must be based on recent trends creating an emergency condition. New Zealand's position, taken on face value, would thus make safeguards unavailable generally for agricultural products. The Safeguards Agreement cannot rationally be interpreted to exclude the entire agricultural sector.

59. Indeed, the premise of the last paragraph of NZ13 – that the kind of price fluctuation observed here is normal in international agricultural industries – is inconsistent with New Zealand's other arguments in this case. New Zealand contends that the US industry's problems were due to internal problems in the US market. NZ13's suggestion that 1997-98 US lamb meat prices were consistent with a "well-known tendency" for "world market prices for agricultural products" to fluctuate contradicts its attempt to portray the US market as subject to unique conditions.

60. In this case, the USITC established why the conditions it observed were not simply cyclical and expected conditions in the market for lamb meat. New Zealand's observation, citing the cereal industry, that prices for other agricultural products may decline by more than 12 per cent in a year is an utterly irrelevant response to these findings. To the extent that New Zealand's argument is an attempt to create a legal presumption about level of harm that should be regarded as "non-threatening", it has no support in the Safeguards Agreement and New Zealand cites none.

61. In short, NZ13 is (1) inadmissible since it is based on extra-record evidence, which is not a proper subject for Panel review under the Safeguards Agreement, (2) irrelevant because it fails to address the USITC's analysis, (3) inapposite because it assumes contrary to Article 4 that only one form of analysis is permissible and contradicts any reasonable interpretation of "threat of serious injury", and (4) inconsistent with New Zealand's positions in this case. To the extent that NZ13 has any relevance whatsoever, it constitutes an admission by New Zealand supporting the USITC's conclusions about trends in 1997-98.

V. THE USITC'S CAUSATION DETERMINATION WAS CONSISTENT WITH THE SAFEGUARDS AGREEMENT AND THE GATT 1994

62. The parties' dispute concerning what showing of causation is appropriate when there are multiple causes of serious injury is, in the current case, academic. As the United States has demonstrated in its first written submission and answers to the Panel's questions, the USITC's findings establish that no other asserted factor could be regarded as a "factor . . . causing injury to the domestic industry at the same time" within the meaning of Article 4.2(b). As demonstrated above, the additional factors that complainants have asserted in this proceeding are disproved by unchallenged findings of the USITC or based upon an unfounded assumption that only trends over the entire period investigated may be examined. Accordingly, resolution of the dispute between the parties concerning the propriety of the United States' statutory test for causation is unnecessary for the resolution of this matter. Nevertheless, because of the importance of the issues that have been raised, the United States will extend its prior discussion of the causation standard, focusing here on the negotiating history to Article 4 of the Safeguards Agreement.

A. THE NEGOTIATING HISTORY OF THE SAFEGUARDS AGREEMENT DEMONSTRATES THAT THE DRAFTERS DID NOT INTEND TO CREATE A "SOLE CAUSE" OR IMPORT "ISOLATION" REQUIREMENT

63. In response to Question 13 from the Panel, New Zealand has confirmed its view that the Safeguards Agreement requires Members to "isolate" the effects of imports and determine that they

are the "sole" cause of serious injury or threat.[50] In addition, although it had not done so in its previous submissions, Australia now appears to endorse New Zealand's position.[51] The United States has discussed in its previous submissions why these arguments are wrong.[52]

64. The United States' most recent submission on this topic briefly discussed how the negotiating history of the Safeguards Agreement demonstrates that the drafters of the Safeguards Agreement did not intend to establish a "sole" cause or "isolation" requirement.[53] Given New Zealand's confirmation of its views on this issue, and Australia's adoption of New Zealand's position, it is worthwhile to discuss the negotiating history in greater detail. As the United States explains in the following paragraphs, that history is devoid of any indication that the drafters of the Safeguards Agreement sought to impose a radical new causation paradigm of the type the complainants urge.

65. Section II of the Secretariat's note of 28 April 1988, which the United States cited in its previous submission, memorializes the views of the Chairman of the Negotiating Group on Safeguards expressed at meetings on 7 and 10 March 1988, regarding how the negotiations should progress. On the issue of causation, he stated that:

> After the subject matter [of the negotiations] was identified, the Group should then address related questions such as whether imports were to be considered as a cause, a substantial cause or a necessary cause of serious injury or threat thereof.[54]

66. The Chairman plainly recognized that there might be varying views regarding the degree of causation that could be reflected in a revised Article XIX or new agreement on safeguards. Notably, however, the Chairman did not include "sole cause," or an isolation requirement, among the field of possible choices.

67. Discussion of causation among delegations at the meeting reflected this same approach:

> Many delegations said that it should be demonstrated that the cause of serious injury and threat thereof derived from sharp increases in imports, and that a major part of domestic producers were adversely affected. Some delegations said that the causal link between increased imports and the overall decline in the conditions of domestic producers had to be clearly established. One delegation said that if there were a multitude of causes, then it had to be established that increased imports was the principal cause, not just an important or substantive cause.[55]
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> * * * * *
>
> The Chairman summed up the discussions . . . . There seemed to be agreement that there should be a direct, demonstrable causal link of imports to injury, although there were various opinions on whether increase in imports should be an essential, substantial, or important cause.[56]

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[50] New Zealand's Response to Panel Question 13 at 18.

[51] Australia's Response to Panel Question13 at 16-17.

[52] *See* United States' First Written Submission at ¶¶ 112-122; US Responses to Questions from the Panel at ¶¶ 45-59, 71-78.

[53] *See* US Responses to Questions from the Panel at ¶ 52.

[54] Negotiating Group on Safeguards, Meeting of 7 and 10 March 1988, Note by the Secretariat, MTN.GNG/NG9/5, at ¶ 3 (22 April 1988).

[55] Negotiating Group on Safeguards, Meeting of 7 and 10 March 1988, Note by the Secretariat, MTN.GNG/NG9/5, at ¶ 14 (22 April 1988).

[56] *Id*. at ¶ 24.

68. The subsequent course of negotiations shows that the negotiating group declined to adopt any one of these various formulations of the necessary degree of causation and that it never considered establishing a "sole" cause or "isolation" requirement.

69. In a note dated 31 October 1988, the Secretariat provided a synopsis of proposals that delegations had presented to the group.[57] Proposals on the subject of injury (and causation) were set out in paragraphs 33 through 52 of the note. The United States has reproduced all of the potentially relevant proposals below. None of them evinced an intention to create a "sole cause" or import isolation requirement for serious injury:

> 34. The determination of serious injury or threat thereof shall depend on the establishment of a direct causal link between increased imports and an overall decline in the condition of domestic producers. In making such a determination, the relevant factors to be taken into account include, inter alia, output, sales, export performance, inventories, profits, productivity, return on investment, utilization of capacity, employment and wages. No one or several of these factors can necessarily give decisive guidance. However, serious injury cannot be deemed to exist where factors such as technological changes or changes in consumer preference or similar factors are instrumental in switches to like and/or directly competitive products made by the same domestic producers.[58]
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> 35. Factors such as market share, diversion of trade, technological changes and changes in consumer preferences, overall competitiveness of industry and its ability to generate capital, could also be included in determining injury on a case-by-case basis.[59]
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> 36. … "Substantial cause" was defined as "a cause which is important and not less than any other cause."[60]
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> * * * * *
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> 38. It was unrealistic to set quantitative standards or automatic criteria for the determination of injury because not all factors were quantifiable and mathematical formulae could not be applied to all sectors of industry. Instead, economic factors and indices should be considered together with some subjective parameters. It was not possible to determine the order of priority for various factors when determining injury or threat thereof.[61]
>
> * * * * *
>
> 43. The principal cause of serious injury or threat thereof must be increase in imports, while other economic factors relating to the sectors concerned should be taken into account in a comprehensive manner.[62]
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> * * * * *

[57] Negotiating Group on Safeguards, Synopsis of Proposals, Note by the Secretariat, MTN.GNG/NG9/W/21 (31 October 1988).

[58] *Id*. at ¶ 34.

[59] *Id*. at ¶ 35.

[60] *Id*. at ¶ 36.

[61] *Id*. at ¶ 38.

[62] *Id*. at ¶ 43.

> 46. If there were a multitude of causes, then it had to be established that increased imports was the principal cause, not just an important or substantive cause.[63]
>
> * * * * *
>
> 49. While the causal link between imports and injury is an essential feature of the objective criteria for action, there are limitations to what extent it is possible to objectively quantify the degree of injury attributable to imports and other factors affecting the industry in question. Consequently, there may be arguments in favour of establishing the causal link in individual cases primarily on the basis of sufficient factual information regarding both the development of imports and other factors applied to determine injury to be provided when notifying the introduction of safeguard measures.[64]

70. On 27 June 1989, the Chairman of the Negotiating Group tabled a draft text of a safeguards agreement, based on proposals from the participants in the Negotiating Group.[65] Paragraph 4 of the text set out the basic conditions for applying a safeguard measure, including that "the competent national authorities of the importing contracting party have established that such increase is causing serious injury . . . ." Paragraph 8 of the draft stated that:

> In the determination of whether or not serious injury or threat thereof exists, all relevant factors of an objective and quantifiable nature having a bearing on the position of the domestic industry shall be taken into account . . . ; but serious injury or threat thereof not causally linked to increased imports shall not weigh in the process of determination.

71. The reference in the text to the need for serious injury or threat of serious injury to be "causally linked" to increased imports should be read in the light of the Chairman's earlier view, noted above (at ¶ 67), that the reference to "causal link" was not intended to fix the degree of causation that might be required.

72. A Secretariat note of 24 October 1989 summarized the Negotiating Group's discussions on the draft text.[66] Among other things, the note observes that:

> Several delegations said that the causal link between the increase in imports and serious injury needed to be more clearly established. Increased imports should be the principal and predominant cause of injury.

73. This summary makes clear that members of the Negotiating Group recognized that the language in the text related to the causal link did not by itself establish a particular degree of causation. Moreover, although some members wished to have the issue of degree of causation addressed, none proposed a "sole cause" or isolation requirement.[67]

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[63] *Id*. at ¶ 46.

[64] *Id* . at ¶ 49.

[65] Negotiating Group on Safeguards, Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25 (27 June 1989).

[66] Negotiating Group on Safeguards, Meeting of 11, 12 and 14 September 1989, Note by the Secretariat, MTN.GNG/NG9/12 (24 October 1989).

[67] Id. at ¶ 11.

74. On 15 January 1990, the Chairman tabled a revised version of his draft text in response to comments from delegations. The language regarding the causal link included in the revised draft was unchanged from the earlier, June 1989, version.[68]

75. In March 1990, the Negotiating Group examined the revised text, paragraph by paragraph, and the Chairman invited delegations to make proposals for specific drafting suggestions.[69] The suggestions relating to the causation requirements in paragraphs 4 and 9 (formerly paragraph 8) of the draft text are set out below in their entirety. None of them suggests an intention to impose a sole cause or isolation requirement for imports:

> Paragraph 4(b) "the competent national authorities of the importing contracting party have established that such increase is causing or is threatening to cause serious injury to the domestic industry that produces like or directly competitive products."
>
> Suggestions:
>
> (i) Add "directly" before "causing or is threatening ...".
>
> (ii) Replace "or" by "and" in "like or directly competitive products".
>
> (iii) "an independent body has established, through a public domestic investigation and decision which included notice to interested parties, public hearings where importers and other interested parties could present evidence and their views, and a published report of the decision describing the factors considered, criteria applied and rationale used, that such increase is causing or is threatening to cause serious injury to the domestic industry that produces like or directly competitive products."
>
> (iv) Minimum domestic guidelines will have to be developed.
>
> (v) The "national authorities" should be an independent body.
>
> (vi) "the competent national authorities ... that such increase is direct and principal cause of the serious injury and threat thereof to the domestic industry that produces like or directly competitive products."
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> * * * * *
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> Paragraph 9 "In the determination of whether or not serious injury or threat thereof exists, all relevant factors of an objective and quantifiable nature having a bearing on the position of the domestic industry shall be taken into account, such as: output, inventories, utilization of capacity, productivity, employment, wages, sales, market share, exports, domestic prices, import and export prices, pace of import increase, return on investment, profits and losses. This list is not exhaustive; neither one of these factors alone, nor even several of them may necessarily be decisive in the process of determination; but serious injury or threat thereof not causally linked to increased imports shall not weigh in the process of determination."

[68] Negotiating Group on Safeguards, Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25/Rev.1 (15 January 1990).

[69] Negotiating Group on Safeguards, Meeting of 29 and 31 January, 1 and 2 February 1990, Note by the Secretariat, MTN.GNG/NG9/14 (6 March 1990).

Suggestions:

(i) First sentence remains as it is. First phrase of second sentence remains intact. Next phrase would be replaced by the following idea: "A minimum requirement for a finding of serious injury would be that certain, specified factors (such as lost sales and reduced profits, for discussion purposes) must be demonstrated. These factors would be necessary but not sufficient for injury to be found". Last phrase (on causality) should be clarified as follows: "Factors other than increased imports, in particular the prevailing market conditions in the domestic industry, shall be taken into account in determining whether injury is caused by increased imports".

(ii) Paragraph 9 bis Consideration could also be given to indicators of the existence of serious injury such as the following: significant idling of productive capacity (including plants closures and significant under-utilization of production capacity); significant unemployment across the domestic industry; a significant number of firms carrying out domestic production operations at a reduced level of profit; and, significant decline in the proportion of the domestic market supplied by domestic products as compared to imports of a like or directly competitive product.

(iii) Wages, domestic prices, import and export prices should be deleted.

(iv) Add to the list "overall economic situation and consumption".

(v) Modification of last phrase starting with "but serious": "The determination of principal cause shall be based on an examination of the effect of imports on one hand and on the other hand, all other relevant factors which, individually or in combination, may be adversely affecting the domestic industry".

(vi) Replace last phrase starting with "but serious" by: "Furthermore, serious injury or threat thereof cannot be deemed to exist where factors such as technological change or changes in consumer preference or similar factors are instrumental in switches to like and/or directly competitive products made by the same domestic industry".

(vii) Delete "Market share".

(viii) Add "competitiveness" to the list of factors.

76. In July 1990, the Chairman tabled another draft text. While the relevant portions of the agreement were slightly restated in this version of the text, there continued to be no indication of an intention to establish a “sole” cause or isolation requirement, and the earlier proposal for imposing the notion of “principal cause” was not incorporated. Article 4 of the revised draft read as follows:

> A contracting party may apply a safeguard measure only on the conditions that the importing contracting party has established, pursuant to the provisions set out in paragraphs 4 and 7 below, that a product is being imported into its territory in such increased quantities, actual or relative to domestic production, and under such conditions as to cause or threaten serious injury to the domestic industry that produces like or directly competitive products.

77. Article 9 (renumbered as Article 7) read:

7. (a) In the investigation to determine whether or not serious injury or threat thereof to a domestic industry exists under the terms of this Agreement, the competent authorities shall take into account all relevant factors of an objective and

quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

(b) No serious injury or threat thereof shall be found to exist unless this investigation demonstrates, on the basis of objective evidence, that there is a causal link between increased imports of the product concerned and such injury or threat.

78. Finally, on 31 October 1990, the Chairman of the Negotiating Group tabled a safeguards text with the statement that, "This text represents the level of agreement that could be reached at this stage."[70] This version of the text, which was sent forward and included in the Draft Final Act of the Uruguay Round circulated for the Brussels Ministerial Meeting, contained language identical to that found in Articles 2.1 and 4.2(b) of the final Safeguards Agreement:

> A contracting party[1] may apply a safeguard measure to a product only if the importing contracting party has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.
>
> * * * * *
>
> 7. (a) In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.
>
> (b) The determination referred to in sub-paragraph 7(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.

79. The last sentence of this text was borrowed from Article 3.4 of the Tokyo Round Dumping Code and provided an elaboration of the "causal link" requirement that precedes it. The second sentence requires Members to ensure that they distinguish between different causes of injury rather than simply making the assumption that increased imports are responsible for all of the injury that the industry has experienced. Stated otherwise, the second sentence instructs Members that they should not jump from the establishment of the "causal link" between increased imports and serious injury to the conclusion that the sole source of the industry 's injury is attributable to those imports.

[70] Negotiating Group on Safeguards, Draft Text of an Agreement, MTN.GNG/NG9/W/25/Rev.3 (31 October 1990).

80. In the course of the negotiations, no delegation suggested the introduction of a "sole cause" or "isolation" requirement. The parties could not agree on various proposals for imposing a specific modifier before "cause", thus leaving the preexisting differences in approach intact. Therefore, the second sentence of Article 4.2(b) cannot be understood as incorporating a requirement to isolate the effect of imports to determine whether they were the sole cause of serious injury. Rather, an antecedent of the second sentence may be seen in a May 30, 1988, communication from the Nordic countries:

> The causal link between imports and injury is reflected in Article XIX:1(a) by the reference to the "effect of the obligations incurred by a contracting party ...". While this causal link is an essential feature of the objective criteria for action, there are limitations to what extent it is possible to objectively quantify the degree of injury attributable to imports and other factors affecting the industry in question. Consequently, there may be arguments in favour of establishing the causal link in individual cases primarily on the basis of sufficient factual information regarding both the development of imports and other factors applied to determine injury to be provided when notifying the introduction of safeguard.[71]

81. The communication notes the impracticability of attempting to isolate the extent of injury attributable to particular causes. Instead, the Nordic countries proposed establishing the "causal link" between increased imports and injury by developing information on the range of factors that may be contributing to the overall injury the industry has experienced.

82. It is important to note that the safeguards regimes of other WTO Members – including Australia – reflect the US view that the Safeguards Agreement does not contain a "sole cause" requirement. For example, the Canadian global safeguards legislation requires that increased imports be "a principal cause" of serious injury or threat of serious injury.[72] The definition of "principal cause" in the Canadian law is "an important cause that is no less important than any other cause of the serious injury or threat."[73] This definition is virtually identical to the US definition of "substantial cause," which is "a cause which is important and not less than any other cause."[74]

83. Similarly, under Article 70 of the regulations pertaining to the Mexican safeguards regime, safeguards may be applied only if imports constitute a "substantial" cause of serious injury or threat, not a "sole" cause.[75]

84. Perhaps most instructive for purposes of this dispute is the causation analysis used by the Australian competent authority in a post-Uruguay Round safeguards investigation. In its November 1998 decision in *Pig and Pigmeat Industries: Safeguard Action Against Imports*, the Australian authority concluded as follows:

> The [Productivity] Commission considers that increased imports from Canada since mid-1996 have caused serious injury to the industry as defined above. Moreover, the Commission considers that increased imports were the *primary cause* of low pig prices and negative rates of return (lower than could be expected given rebuilding of domestic production over 1997-98) in 1998, which, in turn, caused a significant

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[71] Negotiating Group on Safeguards, Communication by the Nordic Countries, MTN.GNG/NG9/W/16, at ¶ 10 (30 May 1988).

[72] Canadian International Trade Tribunal Act, Sec. 20 (1994), attached hereto as US Exhibit 47.

[73] *Id*., Sec. 19.01(1).

[74] 19 U.S.C. 2252(b)(1)(B), attached hereto as US Exhibit 48.

[75] Committee on Safeguards, Replies to Questions Posed by the United States Concerning the Notification of Laws and Regulations of Mexico Under Article 12.6 of the Agreement, G/SG/W/131, at 3, question 7 (circulated 27 February 1996).

> overall impairment in the position of the domestic industry. There does not appear to be any other factor capable of explaining the large fall in demand for local pigmeat and consequent prolonged and pronounced fall in pigmeat prices which has occurred since October 1997.[76]

This approach is strikingly similar to that of the USITC in its lamb meat investigation.

85. The United States, Canada, Mexico, and Australia were all active participants in the negotiation of the Safeguards Agreement. The fact that none of these countries adopted a " sole cause" or "isolation" causation standard after the conclusion of the Safeguards Agreement suggests that they did not understand the Agreement to impose such a standard.

86. In sum, the negotiating history shows that the framers of the Safeguards Agreement declined to establish a requirement regarding whether increased imports should be a "substantial" cause of injury, an "important" cause, a "necessary" cause, a "principal" cause, and so forth. Moreover, no proposal was advanced during the negotiations requiring increased imports to be the "sole cause" of serious injury, or imposing an "isolation" requirement. Ultimately, the Negotiating Group chose not to address the issue of degree of causation. Instead, the negotiators established an evidentiary framework for establishing injury and causation, listing the factors to be considered and requiring competent authorities to develop and report on objective evidence establishing the causal relationship between increased imports and serious injury or threat. This approach is consistent with the longstanding US statutory causation standard, "substantial cause."

B. NEW ZEALAND PRESENTS NO COLOURABLE ARGUMENT WHY AN AUTHORITY MUST "ISOLATE" THE EFFECTS OF IMPORTS AND DETERMINE THAT THEY ALONE ARE THE CAUSE OF SERIOUS INJURY

87. The United States has discussed in Section IV.B of this submission why New Zealand's exhibit NZ13 is inadmissible, and therefore not relevant to this proceeding. It is worth noting, however, that the analysis contained therein contradicts New Zealand's position on the appropriate standard for causation under the Safeguards Agreement. The author of NZ13 admits therein that, in real world markets, it may not always be easy to distinguish between import growth and domestic supply considerations as causes of injury. Indeed, the author admits that developments in the real world can be a combination of both sets of factors. Although he asserts that a price analysis such as the one he proposes "can help" to identify which may have prevailed, he does not contend that it can help identify more than which was "the primary factor" or that it can do so reliably.[77]

88. Thus, the most that the author of NZ13 claims is that economic analysis of the kind it advocates can help discern which of two purported causes of injury is primary.[78] Yet New Zealand claims that such an analysis would be legally inadequate, because it considers that the effects of increased imports must be "isolated" from other factors causing injury. The views of the author in NZ13 support the scepticism of the GATT panel in *United States -- Atlantic Salmon*, noted in the United States' answers to the Panel's questions, that an "isolation " analysis is practicable.

89. Accordingly, although New Zealand contends that the effects of increased imports must be "isolated" and, when viewed in isolation, found sufficient to cause serious injury, it has not alleged that there is a method for doing so in many cases (or that such a method, if available, is required by the Safeguards Agreement). New Zealand has failed to provide analysis of the ordinary meaning of the terms of the Agreement on which it relies for its insistence on an isolation analysis or the legal

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[76] Productivity Commission, *Pig and Pigmeat Industries: Safeguard Action Against Imports*, Inquiry Report No. 3, at section 4.6 (11 November 1998) (emphasis added), attached hereto as US Exhibit 46.

[77] NZ13 at § 3.1.

[78] The author of NZ13 does not attempt to extend his analysis to multiple causes.

precedent applicable to the interpretation of the relevant provisions. In short, New Zealand has provided no basis for holding that the United States' interpretation of its obligations under Article 4.2 is incorrect.

C. AUSTRALIA PRESENTS NO COLOURABLE ARGUMENT WHY AN AUTHORITY MUST OBTAIN A "PROSPECTIVE ANALYSIS" OF EFFECTS OF IMPORTS IN ORDER TO REACH A THREAT DETERMINATION

90. Although it has contended that the USITC's determination is flawed for failure to rely on a "prospective analysis", Australia fails to respond to Panel Question 7 regarding how a prospective analysis might be conducted and which factors, if any, would be more important to a finding of threat. Instead, Australia merely asserts that the USITC effort was insufficient. Australia ignores the extensive evaluation in the USITC report with respect to the required factors and the evidence with respect to each of those factors, the evidence about projected further increases in imports made by Australian and New Zealand firms, and the effect that such increases are likely to have on US lamb meat prices and production.[79]

91. Australia does not answer the question of which factors might be more important. Instead, it asserts that a safeguard measure should not be applied "[i]f firms in the 'domestic industry' are unable to come forward with prospective facts to allow an evaluation to determine that serious injury will occur imminently." Australia does not state what prospective facts would be relevant to such an evaluation, or indicate a basis in the Safeguards Agreement for concluding that "firms in the domestic industry" have an obligation to come forward with such facts. Nor does Australia indicate how an authority might rely on such "prospective facts" supplied by firms in the industry without basing its determination "on allegation, conjecture or remote possibility" in violation of Article 4.1(b) of the Agreement.

92. Indeed, New Zealand's description of its steps in analyzing the evidence in making threat determinations contradicts Australia's position and supports the US position. At page 11 of its response to the Panel's questions, New Zealand states that its competent authorities:

> would examine the factual evidence of the position of the domestic industry in the past and extrapolate how it was likely to develop in the future. They would pay particular regard to trends in the domestic and imported prices of the product and, based on these past trends and on any evidence of forward contract prices, how prices were likely to develop in the future.

93. Thus, New Zealand, like the United States, relies primarily on demonstrable trends based on the evidence to extrapolate what will be done in the future. Both countries, then, take an approach contrary to the one that Australia claims is required.

VI. THE US SAFEGUARD MEASURE COMPLIES WITH US OBLIGATIONS UNDER ARTICLE 5.1 OF THE SAFEGUARDS AGREEMENT AND ARTICLE XIX OF THE GATT 1994

94. The United States has discussed (in its first written submission and its first appearance before the Panel) why New Zealand and Australia have failed to meet their burden of establishing a *prima facie* case that the US safeguard measure is inconsistent with Article 5.1 of the Safeguards Agreement.[80] Nothing in the complainants' responses to the Panel 's questions regarding the US measure change the fact that their burden remains unmet.

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[79] USITC Report at I-23-26.

[80] *See* United States' First Written Submission at ¶¶ 172-209 (15 May 2000); United States' Opening Statement to the Panel at ¶ 30 (25 May 2000).

A. BURDEN OF PROOF

95. In response to the Panel's Question 15, New Zealand concedes the burden is on Australia and New Zealand to demonstrate that the US safeguard measure is not being applied consistently with Article 5.1.[81] Australia, on the other hand, argues that the burden of proof "depends on the obligation" and that, in this case, the United States has the burden of proving that its safeguard measure complies with Article 5.1.[82] Australia's argument is similar to the conclusion of the Panel in *Hormones* that the *SPS Agreement* allocated the "evidentiary burden" to the Member imposing an SPS measure. The Appellate Body rejected this conclusion on the grounds that:

> [i]t does not appear to us that there is any necessary (i.e. logical) or other connection between the undertaking of Members to ensure, for example, that SPS measures are "applied only to the extent necessary to protect human, animal or plant life or health . . .", and the allocation of burden of proof in a dispute settlement proceeding. Article 5.8 [of the SPS Agreement] does not purport to address burden of proof problems; it does not deal with a dispute settlement situation. . . [83]

96. Like Article 5.8 of the SPS Agreement, Article 5.1 of the Safeguards Agreement "does not purport to address burden of proof problems; it does not deal with a dispute settlement situation." Therefore, the United States submits that the Appellate Body's ruling with respect to Article 5.8 of the SPS Agreement is equally valid with respect to Article 5.1 of the Safeguards Agreement. As the Appellate Body stated in *Wool Shirts* (at 19), "a party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim."

97. In the view of the United States, New Zealand and Australia have not begun to meet their burden of proof on this issue. Their claim that the US safeguard measure is inconsistent with Article 5.1 rests almost exclusively on the claim that the United States was precluded from applying any import relief that, in the complainants' view, is more trade restrictive than that the USITC plurality recommended. Thus far, the complainants have pointed to no provision of the Safeguards Agreement that requires a Member to apply import relief at the level recommended by the Member's competent authority, or demonstrated why the relief that the plurality recommended was adequate.[84]

B. "NECESSARY" DOES NOT MEAN "LEAST TRADE RESTRICTIVE"

98. Both New Zealand and Australia are incorrect in reading into Article 5.1 of the Safeguards Agreement a "least trade restrictive" requirement as a matter of law. They appear to base their interpretation on the use of the word "necessary" in Article 5.1. As the United States has noted previously, in Article 5.1 the term "necessary" refers to the application of a measure, not the initial choice of the measure. Furthermore, there is no basis in the text of Article 5.1 to substitute "least trade restrictive" for the term "necessary," nor do the complainants offer any textual basis to support their interpretation.

99. The Appellate Body has made it clear on numerous occasions that the rights and obligations of WTO Members are to be found in the actual text of the WTO Agreement and not in layers of "interpretation" that are "read into" that text. As they have stated:

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[81] New Zealand's Response to Panel Question Fifteen at 19.

[82] Australia's Response to Panel Question Fifteen at 18.

[83] *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body, 16 January 1998, at ¶ 102.

[84] New Zealand's claim that the United States violated Article 12.2 of the Safeguards Agreement is simply an attempt to make the United States "justify" its safeguard measure. The United States explained in its first written submission (at ¶¶ 269-78) that Article 12.2 imposes no such requirement.

> "The legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation *neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended* ."[85]

100. Yet complainants ask the Panel to do precisely what the Appellate Body has cautioned against. They ask the Panel to impute into Article 5.1 words that simply are not there ("least trade restrictive") and to import into the Safeguards Agreement concepts from other WTO texts (in particular, as noted below, the *Agreement on the Application of Sanitary and Phytosanitary Measures* and *Agreement on Technical Barriers to Trade*) that do not appear in the Safeguards Agreement and were not intended to be there.

101. In addition, the interpretation of treaty text is to begin with the ordinary meaning of the terms used, in their context and in light of the text's object and purpose. If the ordinary meaning of the term "necessary" was "least trade restrictive" then it would appear redundant that the drafters of both the *Agreement on the Application of Sanitary and Phytosanitary Measures* ("SPS Agreement") and the *Agreement on Technical Barriers to Trade* ("TBT Agreement") included both the term "necessary" and a separate obligation that measures not be "more trade restrictive than" required or necessary[86] Accordingly, interpreting "necessary" as meaning "least trade restrictive" would not only be contrary to the ordinary meaning of "necessary", it would also be contrary to the principle of interpretation known as the principle of treaty effectiveness whereby an interpreter is not to assume that terms in a text are purely redundant and have no meaning. The SPS and TBT Agreements also demonstrate that where WTO drafters intended to impose a "least trade restrictive" obligation, they did so explicitly. The absence of these terms in the Safeguards Agreement is significant and should not be ignored by the interpreter.

C. NEW ZEALAND AND AUSTRALIA HAVE FAILED TO ESTABLISH A *PRIMA FACIE* CASE

1. New Zealand's arguments are based on a false premise

102. In response to a question from the Panel about how a Member could ever identify the single "least trade restrictive" safeguard measure[87], New Zealand now allows that there may be several measures in any given case that achieve the objectives set out in Article 5.1 and that "more than one" of these measures may be equally least trade restrictive.[88]

103. As an initial matter, New Zealand's claim that there may be more than one "equally least trade restrictive" safeguard measure is a *non sequitur*. The term "least" connotes an absolute: the *New*

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[85] India - Patent Protection for Pharmaceutical and Agricultural Chemical Products (AB-1997-5)(WT/DS50/AB/R), para. 45 (emphasis added).

[86] For the SPS Agreement, compare Article 2.2 which contains language similar to Article 5.1 SA ("ensure that any sanitary or phytosanitary measure is applied only to the extent necessary...") and Article 5.6 ("shall ensure that measures are not more trade-restrictive than required..."). For the TBT Agreement, compare Article 2.2's prohibition on technical regulations being "unnecessary" obstacles to trade with its additional requirement that technical regulations "not be more trade-restrictive than necessary."

[87] *See* Question 16 by the Panel to New Zealand and Australia.

[88] Notably, Australia disagrees with New Zealand's claim that a Member is required to identify the least trade restrictive safeguard measure, noting that a Member "could not" make such a determination. *See* Australia's Response to Panel Question Sixteen at 19.

Shorter Oxford English Dictionary defines the term as "Smallest; less than any other in size or degree; *colloq*. fewest". It is not clear how several different measures could be "least" trade restrictive.

104. More importantly, New Zealand's view that there may be several "least trade restrictive" potential safeguard measures is based on a false assumption. New Zealand assumes that Members can identify from among the potentially huge range of permutations and combinations of potential safeguard measures those that are at once:

(1) trade-restrictive enough to meet the objectives of Article 5.1;

(2) precisely equivalent in trade restrictiveness to other such measures; and

(3) less restrictive than the entire remaining field of potential measures.

105. New Zealand assumes that Members can identify from among all potential safeguard measures those that perfectly straddle the line between excess trade restrictiveness and ineffectuality. That degree of scientific perfection is simply unachievable. That is because identifying an appropriate safeguard measure is an inherently uncertain enterprise. It requires Members to make forecasts of future market conditions and to predict firm behaviour in response to a measure that has yet to be imposed.

106. The Committee that reviewed the US measure in the *Hatters' Fur* case recognized this point:

> the Working Party considered that it is impossible to determine in advance with any degree of precision the level of import duty necessary to enable the United States industry to compete with overseas suppliers in the current competitive conditions of the United States market, and that it would be desirable that the position be reviewed by the United States from time to time in the light of experience of the actual effect of the higher import duties . . . [89]

107. Not surprisingly, New Zealand provides no standards by which a Member could ferret out the least trade restrictive safeguard measure(s). In this proceeding, New Zealand has not identified the least trade restrictive measure(s) available to the United States but instead has condemned the US safeguard measure simply by comparing it to the USITC plurality recommendation. But New Zealand has never demonstrated why the USITC plurality recommendation (assuming, without agreeing with New Zealand, that it is less trade restrictive)[90] would have been both: (1) sufficient to

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[89] Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade, GATT/CP/106, report adopted on 22 October 1951, ¶ 35.

[90] New Zealand argues that the US measure is more trade restrictive than the plurality's proposed remedy despite the fact that the former is one year shorter in duration than the latter. New Zealand argues that the difference in duration is irrelevant since the United States is free under US law and the Safeguards Agreement to extend the measure by an additional year. As a preliminary matter, it should be noted that the President is also authorized under US law, and the Agreement, to shorten the duration of the measure. So it is possible that the US measure may ultimately prove even less restrictive than it is at the present. Both eventualities – lengthening and shortening the measure – depend on speculation about future events. If review of safeguards measures is to be meaningful, they must be judged in terms of the measure as imposed.

Furthermore, New Zealand is wrong in suggesting that the United States can simply "extend" the duration of the US measure. Under Article 7.2 of the Safeguards Agreement, a Member cannot extend a measure unless its competent authorities determine through a new investigation that the measure "continues to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting." Similarly, before the President may extend a safeguard measure under US law, the USITC must conduct a new investigation to determine whether safeguards relief "continues to be necessary to prevent or remedy serious injury and whether there is evidence that the industry is making a positive adjustment to import competition." 19 U.S.C. § 2254(c)(1), attached hereto as US Exhibit 48. The USITC must publish a notice of its investigation,

prevent serious injury and facilitate industry adjustment; and (2) less trade restrictive than any other possible effective remedy.

108. On the first point, New Zealand simply offers the bald assertion that "a recommendation by a Member's competent authorities, familiar with all the facts, must be considered to be a measure that will achieve the goals of preventing injury and facilitating adjustment."[91] The Panel rightly questioned this assumption in Question 17 to the United States. In response, the United States explained that there were ample grounds for concluding (as the three other USITC commissioners did) that the plurality recommendation would have done little to shield the domestic lamb meat industry from serious injury or to facilitate its adjustment to import competition.[92] Thus, there is no basis for assuming that the import relief that the plurality proposed was adequate.[93]

109. Moreover, there is nothing in the USITC record to suggest that the plurality considered, much less ruled out, every other alternative remedy that might have prevented serious injury to the domestic lamb industry and assisted in the industry's adjustment efforts. Thus, there is no assurance that had it

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hold a public hearing, give interested parties an opportunity to appear and be heard, and issue a new report. 19 U.S.C. § 2254(c)(2)-(3). The President must then review the report and, if it is affirmative, decide whether to extend the measure. 19 U.S.C. § 2253(e)(1)(B), attached hereto as US Exhibit 48. Given all of the legal and procedural prerequisites for extending a safeguard measure, the likelihood of the United States doing so in this case is conjectural at best.

The US measure has a duration of three years and a day, while the plurality recommended that its proposed remedy remain in effect for four years. In this sense, the US measure is indisputably less restrictive than the USITC plurality recommendation.

To bolster its claim that the US measure is more trade restrictive than the USITC plurality recommendation, New Zealand points to the fact that the US measure establishes higher out-of-quota duty rates and contains an in-quota tariff above the normal bound rate. Neither argument conclusively establishes that the shorter US measure is more trade restrictive than four-year USITC plurality recommendation.

With respect to the out-of-quota tariff, New Zealand takes issue with the United States' observation that there is no effective difference between the 20 per cent *ad valorem* rate proposed by the plurality and the 40 per cent rate imposed under the US measure. New Zealand argues that out-of-quota imports are more likely with a 20 per cent rate than with a 40 per cent rate. This argument fails to recognize that both tariff rates were designed to be import-preclusive and thus, by definition, were expected to result in no over-quota imports.

New Zealand attacks the in-quota aspect of the US measure on the ground that it will impose costs on lamb imports not contemplated under the plurality recommendation. New Zealand bases this argument on the unsupported and economically dubious assumption that all or most of these duty costs will be borne by New Zealand producers and exporters, rather than by US importers and consumers. Moreover, contrary to New Zealand's apparent further assumption, duty payments cannot be directly translated into "trade restrictions." The United States has estimated that the actual trade restrictive effect of its declining in-quota tariffs on lamb imports will be very small. *See* United States' First Written Submission at ¶¶ 217-219. Nothing in New Zealand's analysis suggests that this small restraint on imports over three years would be more restrictive than the effect of the plurality's remedy, which has a duration of four years.

[91] New Zealand' s Response to Panel Question Sixteen at 20.

[92] *See* US Responses to Questions by the Panel at ¶¶ 111-117.

[93] Indeed, there is no presumption in New Zealand's own safeguard law that the remedy recommendation of its competent authorities are to be adopted, or even accorded any particular weight, in the remedy that the New Zealand Minister of Economic Development applies. *See, e.g.*, Ministry of Commerce, Wellington, *Trade Remedies in New Zealand, A Discussion Paper*, at 19 (1998) ("Following receipt of a recommendation from an Authority, it is up to the Minister of Commerce to determine what action, if any, shall be taken, i.e. an Authority's recommendations are not binding."), attached hereto as US Exhibit 49; *Replies to Questions Posed by Canada, the European Community, Korea, and the United States to New Zealand Concerning the Latter's Notification of Laws and Regulations Under Article 12.6 of the Agreement*, G/SG/W/175, at 2 (circulated 5 June 1996) ("The decision whether temporary safeguard action should be taken, the nature of any such action and its duration, is at the discretion of the Minister of Commerce.") (The Ministry of Commerce was renamed the Ministry of Economic Development in February 2000).

imposed the plurality's recommended import relief the United States would have satisfied New Zealand's standard for applying Article 5.1.

110. In the US view, Article 5.1 does not mandate a comparison between the safeguard measure that a Member applies and the vast range of other potential measures that the Member might have selected. Rather, it calls for an examination of whether the measure the Member has chosen to apply is appropriately gauged to the specific injury and causation findings that the competent authorities have made – both as the measure addresses serious injury and industry adjustment efforts. As the United States has demonstrated, the US safeguard measure fully meets this test.

2. Australia's further argument fails to demonstrate that the US measure is being applied beyond "the extent necessary"

111. While Australia properly rejects the view that Members are required to identify the "least trade restrictive" safeguard measure, its complaints regarding the extent of the US safeguard measure otherwise largely track those of New Zealand. However, Australia makes the further argument in response to Question 15 from the Panel that the US measure was more restrictive than necessary because it restricted first-year imports to 1998 levels or below.

112. In Australia's view, since the domestic industry had not yet experienced serious injury at 1998 import levels, there was no reason for the United States to cap imports there. For the same reason, Australia asserts that there could be no justification for an in-quota tariff that might reduce imports to below 1998 levels.

113. At the outset, it is worth observing that even the USITC plurality sought to limit first year imports to 1998 levels. Thus, Australia's criticism of the import cap established by the US measure is equally a condemnation of the USITC plurality recommendation that Australia elsewhere embraces. This criticism reinforces the US view that the compliance with Article 5.1 cannot be measured by reference to the competent authority's recommendation, or any other potential safeguard measure.

114. More pointedly, as the United States explained in its first written submission, three of the six USITC commissioners concluded that the US lamb meat industry would suffer serious injury even if import levels remained at 1998 levels. Commissioners Miller and Hillman stated that:

> It is our view that the industry would experience serious injury caused by imports if import levels and prices continue at now-existing levels, even if no further price declines occur.[94]

Commissioner Koplan found, similarly, that a remedy set at existing import levels "would not stave off the threatened serious injury, much less provide the industry with the opportunity to make a positive adjustment to prepare for the import competition."[95]

115. The USITC plurality did not address these arguments or demonstrate how, if it continued to face imports at low prices and record levels, the industry would be a position to recover its competitiveness. Under these circumstances, the United States had ample grounds for selecting an alternative form of import relief that held out at least some promise of being effective.

[94] USITC Report at I-40.
[95] USITC Report at I-49.

VII. THE UNITED STATES PROPERLY EXCLUDED CANADIAN AND MEXICAN IMPORTS FROM ITS SAFEGUARD MEASURE

116. New Zealand and Australia do not contest the fact that participants in free-trade arrangements may exclude from their safeguard measures, consistent with their obligations under the Safeguards Agreement and *GATT 1994*, imports from their free-trade partners.[96] Instead, the complainants suggest that the United States applied the wrong procedure in excluding Mexican and Canadian imports from its lamb meat tariff-rate quota.

117. New Zealand and Australia claim that the sole procedure under which imports from a free-trade partner may be excluded from a safeguard measure is by excluding them from the competent authority's injury and causation investigation. However, the complainants point to no provision of the Safeguards Agreement that calls for the exclusion of any imports – regardless of source – from the competent authority's investigation.

118. In fact, the opposite is true. Article 4.2(a) requires the competent authorities to examine "all relevant factors" having a bearing on the condition of the industry "including the rate and amount of the increase in imports of the product concerned" and "the share of the domestic market taken by increased imports". Plainly, imports from free-trade partners may have a direct effect on the rate, amount, and market share of increased imports, and thus may have a significant impact on the industry's condition. For that reason, Article 4.2(a) requires that they be included, rather than excluded, from the competent authorities' injury and causation investigation.

119. Australia and New Zealand have not cited any provision of the Safeguards Agreement that creates an exception to the requirement imposed by Article 4.2(a). Moreover, any such exception would have to take account of Article 9.1, which requires Members to exclude imports from developing countries for so long as they have a minor share of the domestic market, both individually and collectively. Presumably, any requirement in the Safeguards Agreement to exclude free-trade imports from the competent authorities' investigation where they are excluded from the ultimate safeguard measure would apply with equal force to imports from these developing countries. But there would be no way for the competent authorities to know during the course of their investigation which developing countries, individually or collectively, would remain (or become) eligible for exclusion from the safeguard remedy over its full lifetime.

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[96] Since Australia and New Zealand agree with the United States that members of free trade agreements are entitled to exclude each others' imports from safeguard measures, the United States will not elaborate in this text its view of why such an exclusion is permissible. Australia and New Zealand both appear to no longer challenge the exclusion of products from Israel. To avoid any implication that the United States has not invoked footnote 1, Article XXIV of *GATT 1994*, and its status as a participant in a free-trade agreement with Canada and Mexico for purposes of making exclusions in this case, the United States appends and makes a part of its argument in this proceeding its discussion of this issue in the context of the ongoing panel proceeding on *Wheat Gluten*. *See United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166, Response of the United States to Questions from the Panel and the European Communities, at Question 30 (17 January 2000), attached hereto as US Exhibit 50. The NAFTA is a free-trade area for purposes of Article XXIV of the GATT that was notified as such to the CONTRACTING PARTIES to the GATT 1947 on 1 February 1993 and referred to the Committee on Regional Trade Agreements under the WTO. As the United States has demonstrated in this proceeding, requiring the inclusion of products from Canada and Mexico would prevent the formation of the free-trade area. The following documentation was provided to the Committee:

L/7176	Notification of the Agreement (trade in goods)
L/7176/Add.1	Text of the Agreement
S/C/N/4	Notification of the Agreement (trade in services)
WT/REG4/	Questions and replies and related documents.

120. In sum, nothing in the Safeguards Agreement suggests that its framers sought to mandate the exclusion from the competent authorities' investigation of those imports eventually excluded from a Member's safeguard remedy. The plain language of the Agreement makes clear that the competent authorities must examine all sources of imports in order to make an objective assessment of the industry's condition and the reasons for that condition. Indeed, excluding products originating from certain sources could skew the relative importance of other factors, in particular imports from third countries, in affecting the industry's condition.

121. By contrast, the procedure that the United States employs with regard to imports from its NAFTA partners ensures that neither imports from third countries nor other non-import factors are held responsible for injury attributable to imports from Canada and Mexico. Using this case as an example, the USITC determined increased imports from all sources were threatening to cause serious injury to the domestic lamb meat industry. Having reached an affirmative determination, the USITC then considered whether imports from Canada or Mexico (1) accounted for a substantial share of total imports; and (2) contributed importantly to the serious injury or threat. Since imports from Canada were negligible throughout the period of investigation (reaching a high point of 0.3 per cent of total imports in 1997), and there were no imports from Mexico after 1995, the USITC reached negative determinations on both questions.[97]

122. Thus, Australian or New Zealand can mount no serious claim in this case that their imports were subject to a safeguard measure based on injury attributable to imports from Mexico or Canada.[98] Moreover, the US legislation prevents such a result in other cases as well, since it contemplates that imports from a NAFTA country will be included in the safeguard remedy whenever they are substantial and a significant factor in the injury or threat of injury the industry has sustained. The legislation further provides that NAFTA imports may be considered collectively in appropriate cases.[99] This avoids the possibility that NAFTA imports might be excluded from a safeguard measure in the unusual case in which they are individually insignificant in scale and impact but together have an appreciable effect.

123. In sum, nothing in the Safeguards Agreement compelled the United States to exclude NAFTA imports from the investigation of its competent authorities. Indeed, when it included those imports in its investigation the USITC was fulfilling the requirement of Article 4.2(a) to examine all relevant factors having a bearing on the industry's condition. The USITC's examination of the scale and effect of NAFTA imports at the conclusion of its primary investigation and its determination that they were not significant in either respect satisfy any concern that Australian and New Zealand lamb imports were – or could have been – restricted based on the injurious effects of NAFTA imports. In this way, the US procedure fully satisfied the principle of "parallelism" that Australia and New Zealand seek to read into the Safeguards Agreement.

124. Finally, it is worth observing that Members that participate in free-trade areas are subject to the relevant provisions of Article XXIV of *GATT 1994*. Article XXIV:5(b) provides that the creation of a free-trade area must not result in the imposition of higher or more restrictive "duties and other regulations of commerce" on the trade of Members that are not part of the free-trade area than would

[97] USITC Report at I-27.

[98] It is worth noting that US law protects against the possibility that imports from excluded free trade agreement partners will surge to fill demand previously filled by third country imports. If the President were to determine that a "surge" in imports of Canadian lamb meat was undermining the effectiveness of the lamb meat safeguard measure, he could include those imports under the TRQ. 19 U.S.C. §3372(c), attached hereto as US Exhibit 51. Canadian imports were negligible throughout the period of investigation, and US law defines the term "surge" as "a significant increase in imports over the trend for a recent representative base period". 19 U.S.C. §3372(c)(3). Thus, any appreciable increase in imports of Canadian lamb meat could subject those imports to inclusion in the US safeguard measure.

[99] 19 U.S.C. § 3371(a)(2).

have been the case in the absence of the free-trade agreement. By virtue of footnote 1 of the Safeguards Agreement, it is the relevant provisions of Article XXIV, rather than any provision of the Safeguards Agreement, that govern issues related to the application by participants in free-trade areas of safeguard measures.

125. In the US view, Article XXIV:5(b) would prevent a Member from applying a safeguard measure exclusively against third countries in a situation in which the serious injury or threat of serious injury the domestic industry was experiencing was attributable to increased imports from its free-trade partners. Article XXIV:5(b) does not mandate any particular procedure for ensuring such a result. The US legislation applicable to the treatment of NAFTA imports for safeguards purposes fully ensures that third party imports will not be penalized for serious injury or threat of serious injury attributable to imports from NAFTA countries. US law accomplishes this objective by requiring the USITC to determine whether NAFTA imports have played an important role in any serious injury or threat of serious injury the USITC found and by limiting the exclusion of NAFTA imports from safeguard measures to situations in which those imports have not made an important contribution.

VIII. CONCLUSION

126. For the foregoing reasons, the United States respectfully submits that its safeguard measure applied to imports of lamb meat satisfies US obligations under Article XIX of *GATT 1994* and the Safeguards Agreement. Australia's and New Zealand's claims to the contrary are without merit and the Panel should reject them.

LIST OF US EXHIBITS

United States – Safeguards Measures on Imports
of Lamb Meat from New Zealand and Australia

US Exhibit	Description
43	Report of the International Law Commission at 221
44	Leddy, *The Escape Clause*, at 136
45	USITC Transcript at 130-31, 217, 258-59
46	Productivity Commission, *Pig Meat*, at xxi, xxiii, Section 4.6
47	Canadian International Trade Tribunal Act, Secs. 19.01(1), 20
48	19 U.S.C. §§ 2252(b)(1)(B), 2253(e)(1)(B), 2254(c)(1)-(3),
49	Ministry of Commerce, Wellington, *Trade Remedies in New Zealand, A Discussion Paper*, at 19 (1998)
50	*United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166, Response of the United States to Questions from the Panel and the European Communities, Question 30 (17 January 2000)

ANNEX 3-9

ORAL STATEMENT OF THE UNITED STATES AT
THE SECOND MEETING OF THE PANEL

(26 July 2000)

1. On behalf of the United States delegation, I would like to thank the Panel for giving us this second opportunity to appear before you to comment further on the matters at issue in this dispute. In our written submissions and answers to the Panel's questions, the United States has explained in considerable detail why New Zealand and Australia have failed to meet their burden of proof that the conduct of the USITC's investigation and the implementation of the US safeguard measure fail to satisfy US obligations under the Safeguards Agreement and the GATT 1994. For this reason, we will focus today on a few key issues, and not simply reiterate all that we have said before. We will be pleased to receive any questions you may have at the conclusion of our statement.

2. For the convenience of the Panel, our statement today – like our second written submission – will follow the format that the Panel used in setting out its written questions to the United States. Thus, Mr. Gearhart of the USITC will first discuss the issues relating to the USITC's investigation, including unforeseen developments, the USITC's definition of the domestic industry, its threat of serious injury determination, and its causation determination. I will then discuss Australia's and New Zealand's claims regarding the safeguard measure that the United States applied. For brevity, we will refer to Australia and New Zealand together as the "complainants."

3. I will now ask Mr. Gearhart to address the USITC's determination.

1. Unforeseen Developments

4. The Appellate Body has stated that unforeseen developments are not an independent condition for the application of safeguard measures, but rather "circumstances that must be demonstrated as a matter of fact". The Appellate Body's statement suggests that, in demonstrating such circumstances, competent authorities are not required to conduct a separate inquiry or make a separate "unforeseen developments" finding. In other words, the unforeseen developments language of Article XIX addresses circumstances that will normally be demonstrated through the competent authority's injury and causation investigation and determination.

5. Mr. Chairman, the USITC's determination demonstrates the existence of unforeseen developments. New Zealand continues to misread the United States' argument as to what was unforeseen.[1] What was unforeseen by the United States was not just the surge in imports, but also both the significant change in product mix from frozen to fresh, chilled, and the increase in cut size. These changes allowed the increase in imports and resulted in importation of lamb meat products more like, and thus more competitive with, those traditionally produced by US lamb meat producers. Neither New Zealand nor Australia contests that such a shift in product mix from frozen to fresh, chilled occurred, nor does either seriously contest the fact that imported lamb meat cuts increased in size.

6. Contrary to New Zealand's contention[2], hard evidence before the USITC showed that a change in product mix from frozen to fresh, chilled made the imported product more directly competitive with the domestic product, and the USITC also had hard evidence that the imported product became more comparable in size with the domestic product. While nine of 16 purchasers

[1] See New Zealand's Second Written Submission at ¶ 2.11.
[2] New Zealand's Second Written Submission at ¶¶ 2.19-2.20.

who responded to the USITC questionnaire reported that frozen and fresh lamb meat are used in the same way, seven of the nine said that quality decreases with freezing and that fresh commands a higher price, while frozen is sold as a "B-class" item. Other purchasers stated that customers prefer fresh, and that grocery stores generally purchase fresh.[3]

7. Similarly, ten of the 16 responding purchasers said that the various grades, cuts, and sizes were available from more than one source. The USITC Commissioners also examined this issue during its public hearing, and they heard live testimony from an official of a domestic breaker that supported a finding that the size of imported lamb meat cuts was increasing and that imported cuts were becoming more directly competitive with domestic cuts. The Commissioners examined samples of Australian and domestic lamb loins presented at the hearing.[4]

8. New Zealand's assertion that the USITC pricing data undercut the USITC's finding that the imported products became more similar to the domestic products misses the point of the pricing data.[5] The fact that three of the eight products on which the USITC gathered pricing data were identified either as imported or domestic products has nothing to do with product similarity or dissimilarity. The USITC gathered information on specific cuts to make direct price comparisons. These data have nothing to do with whether imported cuts generally were becoming larger.

9. New Zealand's response that certain lamb meat products from New Zealand, such as racks, have been "commonly" smaller than domestic racks does not mean that all New Zealand *or all imported racks* were smaller, or that the average size of racks exported to the United States from New Zealand and other sources was not increasing, or that the size of New Zealand racks was representative of all US imports of racks. In fact, purchasers told the USITC that Australian cuts tend to be larger in size than New Zealand cuts.[6] And even New Zealand acknowledges that evidence before the USITC showed that the size of Australian lamb carcasses increased between 1993 and 1997.[7] In summary, the important point here is not whether New Zealand and Australian cuts were smaller than US cuts, but whether the evidence before the USITC supported its finding that the imported cuts were becoming larger in size and thus more directly competitive with the domestic cuts. The USITC record contained just such evidence.

10. New Zealand makes the unsupported claim that much of the increase in imports of fresh and chilled lamb meat was the result of "new demand" in the US market for New Zealand lamb meat as a result of the decision of a major US restaurant chain and of grocery store "warehouse clubs" to purchase New Zealand lamb meat. New Zealand points to no evidence that such purchases were due solely to any specific quality of the New Zealand product. While the USITC found that imports had found new customers for lamb meat, nothing in the record shows that the US industry could not compete for those customers for lamb meat. Moreover, the USITC also found that previously established domestic customers were increasing their purchases of imported lamb meat.

11. New Zealand's claim is contrary to the evidence before the USITC with respect to the importance of price, and does not explain the overall surge in imports, from Australia as well as New Zealand. The USITC heard live testimony from an official of a domestic breaker firm who recounted how his firm had lost a major grocery chain account in January 1998 because his company could not match substantially lower prices offered by importers. He said that the grocery chain was able to buy imported loins at $1.80 to $2.00 a pound, at less than half his price of $4.04 to $4.41 a pound. He said that while his firm kept a few of the grocery chain's smaller divisions as customers, at

[3] USITC Report at II-72.
[4] Transcript of USITC injury hearing at 20, 73 (Mr. Casper).
[5] New Zealand's Second Written Submission at ¶ 2.18.
[6] USITC Report at II-72.
[7] New Zealand's Second Written Submission at ¶ 2.19.

reduced volumes, the major accounts switched entirely to imports because of the price differential.[8] Moreover, the whole notion of "new demand" raised here by New Zealand is a complete misnomer, as restaurants and grocery stores have always been among the principal purchasers of lamb meat. While New Zealand and Australia may wish the USITC had found otherwise, the USITC's objective examination is supported by evidence gathered in its investigation.

12. Finally, New Zealand's argument here that the surge in New Zealand imports supplied "new demand" is inconsistent with arguments made by economist Susan Manning on behalf of Meat and Livestock Australia, Ltd. ("MLA") at the USITC injury hearing that the surge in imports satisfied a shortfall in domestic supply caused by the exit of domestic lamb growers from the market due to the termination of the US Wool Act support programme.[9]

13. Mr. Chairman, the USITC's report fully satisfies the requirements of Article XIX with regard to unforeseen developments. The United States explained in its previous submissions that past GATT practice supports the US view that there is no requirement to make a separate finding on this issue. In the time since the United States filed its second written submission, it has reviewed the Article XIX notifications that GATT parties made under the GATT 1947. In 145 notifications, there was no description of "unforeseen developments". The absence of such descriptions reflects the fact that Article XIX does not require a separate finding.

14. The conditions for imposing safeguard measures set out in Article XIX:1(a) are elaborated and expanded upon in considerable detail in the Safeguards Agreement. Notably, the unforeseen developments language is not only *not* elaborated upon, it is not even mentioned in the Safeguards Agreement. The decision of the drafters not to address unforeseen developments indicates that they did not intend to depart from existing GATT practice on that subject.

15. In *Hatters' Fur*, the Tariff Commission – the forerunner to the USITC – made a series of factual findings that led it to conclude that increased imports were causing serious injury to the domestic industry. The Commission found that a particular change in hat style, which occurred after the tariff concession was made, had greatly favoured a type of hat in which imports had a comparative advantage. The Tariff Commission did not, however, make a separate finding that this change (or any other change) was an "unforeseen development". Although Czechoslovakia claimed that the United States should have foreseen the style change, because hat styles were known to change, it did not object that the Tariff Commission had failed to identify which facts constituted "unforeseen developments". This suggests that there was no expectation that the existence of unforeseen developments needed to be demonstrated as a separate finding.

16. Furthermore, as the United States showed in its previous submissions, the *Hatters' Fur* working party concluded the United States could not have been expected to anticipate changes in market conditions influencing the sale of felt hats of a scale and duration that would lead to an injurious import surge. Those market changes, the working party concluded, constituted "unforeseen developments" – despite the fact that US negotiators were specifically aware of the propensity for hat fashions to change. The working party's report suggests that even if a Member has direct knowledge of how a particular marketplace functions it cannot be held to anticipate a change in the market conditions of a type that leads to an injurious import surge.

17. In sum, Article XIX does not require a competent authority to independently find and report on the developments that led to the injurious import surge, or threat of serious injury, and explain why they were "unforeseen". The USITC's determination is thus fully consistent with the requirements of Article XIX.

[8] Transcript of USITC injury hearing at 21-22.
[9] Transcript of USITC injury hearing at 177-179.

2. Definition of Domestic Industry

18. In their second submissions, New Zealand and Australia continue to misrepresent the USITC's definition of the domestic industry. The USITC's finding in the lamb meat case does not, as New Zealand claims, mean that the domestic industry will include the producers of inputs in every case.[10] Indeed, both the strict requirements of the test employed by the USITC and USITC practice show that this is not the case. The USITC must find that both elements of the test are met – there must be a continuous line of production from the raw to the processed product, and there must be a substantial coincidence of economic interest between the producers of the raw product and the processors. In 70 investigations under the US Trade Act of 1974, the USITC has found such a test to be satisfied in only *three instances* – the other two were in 1976 and 1984. The USITC has not found the test to be satisfied when a significant portion of the raw product was sold in other markets. Contrary to New Zealand's claim[11], the USITC in the lamb meat case looked at other possible uses of lambs, and concluded that most sheep and lambs in the United States are meat-type animals kept primarily for the production of lambs for meat.[12] Had the USITC found to the contrary, the outcome would have been different.

19. New Zealand continues to suggest that the Panel in the unadopted report in *Canada – Manufacturing Beef*[13] suggested that producers of the raw product could be considered to be part of the industry producing the processed product only when common ownership between the producers of the raw and processed products makes it impossible to analyze each process separately. The Panel did not say this, and it is contrary to what Australia has argued and contrary to Australian practice in its most recent safeguard decision.

3. Threat of Serious Injury

20. On the question of threat of serious injury, the complainants' second submissions largely repeat arguments made earlier. New Zealand in particular continues to reject the finding of the panel in *Argentina – Footwear* that the increase in imports must be "sudden" and "recent," but it does so with some new twists. In urging the panel to find that the USITC should have based its finding on the impact of imports over a much longer time period than 1997-September 1998, New Zealand now claims that the threat finding must "reflect [the condition of] the industry as a whole over a representative period".[14] Nothing in the Safeguards Agreement requires anything of the sort, nor does New Zealand even attempt to provide a basis for this claim. Nor does anything in the Safeguards Agreement or the Appellate Body's decision in *Argentina – Footwear* require or even remotely suggest, as New Zealand claims, that an authority must consider a longer period in deciding whether a *threat* of serious injury exists than in deciding whether *present* serious injury exists.[15]

21. New Zealand adds a special twist for agricultural industries. It claims in effect that the Safeguards Agreement requires that authorities should view agricultural industries differently from other industries, on the premise that a recent period, such as the 21-month period on which the USITC finding was based, "can be no more than a measurement of a fluctuation".[16] A 21-month period would reflect far more than a "fluctuation." Moreover, the USITC found no evidence of a " lamb cycle" that might affect the length of the relevant period examined, and no party before the USITC alleged that such a cycle existed. Again, nothing in the Safeguards Agreement even remotely suggests a special test for agricultural industries, and New Zealand provides no basis for this claim.

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[10] New Zealand's Second Written Submission at ¶ 3.8.
[11] New Zealand's Second Written Submission at ¶ 3.7.
[12] USITC Report at I-13, citing for support additional evidence in the report at II-4.
[13] New Zealand's Second Written Submission at ¶ 3.5.
[14] New Zealand's Second Written Submission at ¶ 4.6.
[15] New Zealand's Second Written Submission at ¶ 4.7.
[16] New Zealand's Second Written Submission at ¶ 4.5.

Moreover, New Zealand's claim here and similar claims made by Australia are inconsistent with the approach that Australia took in its recent safeguard action involving the *Pig and Pigmeat Industries*. As the United States indicated in its Second Submission, the Australian authority in that case based its determination, made in November 1998, on a decline in prices from October 1997, and a decline in the condition of the domestic industry during the first half of 1998.[17] Thus, the decision of the Australian authority was based on developments during a period that was approximately half as long as the period upon which the USITC decision was based. The Safeguards Agreement does not specify a specific period. What the USITC did in making its threat determination was to rely on recent trends, which is precisely what the decision in *Argentina – Footwear* said was required.

23. Complainants' insistence that the USITC should have relied on long-term trends is paradoxical in view of their complaint that the USITC did not adequately find that serious injury is "imminent." As the United States has noted in previous submissions, the term "imminent" is not defined in the Safeguards Agreement . The Agreement does not require the national authority to project a date by which serious injury will occur, or require that it engage in any specific analysis in order to find that a threat exists. As is clear from the USITC's report, the USITC based its finding of threat of serious injury on the surge in imports that occurred in 1997 and interim 1998; the decline in industry indicators that coincided with this surge in imports; the projections of Australian and New Zealand exporters that this surge in exports to the United States would continue through 1999 at an even faster pace; and the conclusion that such increases in import volume would have further negative effects on the domestic industry's prices, shipment volumes, and financial condition in the imminent future.[18]

24. Most of the parties' remaining arguments are simply efforts to have the Panel reweigh the evidence. New Zealand's inference, based on a review of indexed USITC data, that packer/breaker operations were doing well in interim 1998 is both of little relevance and incorrect.[19] Packer/breaker operations involve just a subset of processor operations, so they do not reflect overall processor operations. Moreover, as to packer/breakers, the indexed data show operations in interim 1998 that are in very bad shape relative to the period prior to 1997.

25. New Zealand claims the USITC just looked at price gaps between imported and domestic lamb meat.[20] New Zealand ignores the fact that the USITC also looked at the decline in lamb meat prices that occurred during the surge in imports. The USITC found that US, Australian, and New Zealand lamb meat prices were in most cases lower for the products surveyed in the second half of 1997 and the first three quarters of 1998, when the surge in imports and decline in domestic industry indicators occurred, than in the comparable quarters in 1996 and the first half of 1997.[21]

26. New Zealand cites no evidence to support its claim that the decline in US lamb meat prices may have been due to a decline in domestic pork prices.[22] While New Zealand does not identify the year in which pork prices declined or the amount of the decline, New Zealand's claim completely ignores the impact of surging lamb meat imports in 1997 and interim 1998. Moreover, New Zealand makes no effort to explain why Australian and New Zealand exporters of lamb meat would have accelerated their shipments to the United States at the time domestic lamb meat prices were falling. New Zealand fails to support its claim.

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[17] United States Second Written Submission at ¶ 32, note 40.
[18] USITC Report at I-23-24.
[19] New Zealand's Second Written Submission at ¶ 4.23.
[20] New Zealand's Second Written Submission at ¶ 4.11.
[21] USITC Report at I-24.
[22] New Zealand's Second Written Submission at ¶ 4.12.

27. New Zealand's claim that the USITC relied on the stabilization of US lamb meat consumption in 1996-1998 as an indication of the domestic industry' s health is simply not correct.[23] What the USITC said was that the domestic lamb meat industry had experienced "some recovery" since full termination of the Wool Act payments in 1996.[24] The USITC found that imports surged in 1997 and interim 1998 and that this surge resulted in a sharp deterioration of the condition of the domestic industry and caused the threat of serious injury. The USITC thus found a direct link between the surge in imports in 1997 and interim 1998 and the threat of serious injury.

28. There is simply no requirement in the Safeguards Agreement that an authority "determine how prices would develop in the future," as New Zealand claims.[25] Prices are not even one of the factors listed in Article 4.2(a) that an authority must evaluate. The USITC found that any further increases in the volume of imports would be likely to put further downward pressure on US prices in the imminent future in the US market.[26] The USITC did all that it was required to do, and more. The USITC analysis properly avoided reliance on "allegation, conjecture or remote possibility ", which Article 4.1(b) expressly prohibits.

29. Also, contrary to New Zealand's contention[27], as the United States indicated in its response to the Panel's written question 9, the USITC made a finding of threat of serious injury for each of the four industry sectors and found that the requisite causal link existed. Thus, as to each sector, the USITC made the findings that would be required if each were an entire industry.

4. Causation

30. I would like to turn now to the issue of causation. As the United States has demonstrated in its written submissions and in its answers to the written questions from the Panel, the USITC's causation determination was consistent with the Safeguards Agreement and the GATT 1994.

31. Mr. Chairman, neither the text of the Safeguards Agreement nor its negotiating history suggest that the drafters intended to mandate a specific degree of causation that Members must find. Nor did the framers impose, or even discuss, a requirement under which Members must determine what quantum of injury should be assigned to each "cause". In the real world, in which no event is truly "isolated", such artificial analysis does not lead to a reliable result.

32. I will turn first to the issue of whether the Safeguards Agreement specifies a particular degree of causation. It is apparent from the negotiating history of the Safeguards Agreement, which the United States set out in its second written submission, that the negotiators held differing views of the degree of causation that it might be appropriate to enshrine in a new Safeguards Agreement. These included "a cause", "a primary cause", "a substantial cause ", "an essential cause", and so forth. It is equally clear from the record that the negotiators were not able to reach agreement on any particular level of causation. Consequently, nothing in the Safeguards Agreement dictates a specific level of causation that Members must apply.

33. New Zealand attempts to derive a degree of causation standard from the reference in Article 4.2(b) to "the causal link" between increased imports and serious injury. New Zealand argues that this language establishes that imports must be "the" cause or the "sole" cause of serious injury. But New Zealand's interpretation rewrites history. The debate in the Negotiating Group over the appropriate degree of causation was never resolved.

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[23] New Zealand's Second Written Submission at ¶ 4.15.
[24] USITC Report at I-24-25.
[25] New Zealand's Second Written Submission at ¶ 4.18.
[26] USITC Report at I-24.
[27] New Zealand's Second Written Submission at ¶ 4.19.

34. That debate contrasted with, and was quite separate from, the discussion in the Negotiating Group regarding the causal link. That discussion concerned the need to provide objective evidence establishing the connection – the link – between increased imports and serious injury or threat. As a result, the first sentence of Article 4.2(b) requires the competent authorities to provide detailed evidence of that connection. It does not address, and was never intended to address, the required degree of causation. Indeed, in the debate over degree of causation no party ever suggested that the appropriate degree should be "the cause" or the "sole cause" of serious injury, much less that the reference to "the causal link" was intended to accomplish such a purpose.

35. New Zealand's reliance on the phrase "the causal link" as establishing a degree of required causation is misplaced. In fact, the reference in the first sentence of Article 4.2(b) to "the causal link" (as opposed to "a" causal link) does not mean that increased imports must be the "sole cause" of serious injury. Rather, as a matter of English grammar, in the expression "the causal link", the word "the" modifies the noun "link", not the adjective "causal". Moreover, the dictionary definition of "link" is "a unifying element: a means of connecting or communicating." Thus, Article 4.2(b) does not address the required degree of causation. Article 4.2(b) simply requires a competent authority to demonstrate, through objective evidence, the connection between the increased imports and the injury it has found.[28]

36. Read in context, and given its plain meaning, the subject of the first sentence of Article 4.2(b) is the need for objective evidence of causation, not the degree of causation required. The sentence serves to preclude Members from simply assuming that where increased imports and serious injury occur at the same time, the former must have caused the latter.

37. New Zealand and Australia similarly misinterpret the second sentence of Article 4.2(b). They claim that this sentence creates an obligation for Members to consider the effects of imports in isolation – that is, to determine whether, standing alone, they are causing a degree of injury that is "serious". It makes little sense to read Article 4.2(b) as imposing an isolation requirement, however, because Article 4.2(a) requires Members to evaluate "all relevant factors" having a bearing on the situation of the industry. There would be no need to examine every factor responsible for the industry's condition if Article 4.2(b) required Members to isolate the specific injurious effects caused by imports and then decide whether that quantum of injury was "serious". By rendering Article 4.2(a) superfluous, the complainants' reading of the second sentence of Article 4.2(b) violates the principle of effectiveness in treaty interpretation.

38. Moreover, crediting the complainants' "isolation" argument would suggest that the United States and other governments agreed to abandon their traditional approaches to causation and embrace an entirely different paradigm. Under an isolation analysis, there would be no need for a Member to look at the overall condition of the industry or establish a degree of causation attributable to increased imports. Instead, the Member would look solely at the injurious effect of increased imports and determine whether they were "serious."

39. If the Negotiating Group had in fact agreed to impose such a different approach, there surely would be at least some evidence of discussion, debate, and competing textual provisions on this point in the negotiating record. Instead, the record of the Negotiating Group suggests the opposite. The participating governments framed the causation issue in front of the Negotiating Group as one of degree of causation, an approach that it not based on an "isolation" analysis.

40. The second sentence of Article 4.2(b) should be interpreted in light of its plain meaning and in its context. Read in that way, the second sentence simply completes the evidentiary requirement set out in the first sentence. That is, in addition to specifically documenting the connection between increased imports and serious injury or threat, the competent authorities must also examine the other

[28] *See* United States' Responses to Questions from the Panel at ¶¶ 48-49.

factors that may be causing injury to the industry and ensure that increased imports are not blamed for that injury. That, of course, is exactly what the USITC did in its lamb meat investigation.

41. Mr. Chairman, I have two final points on this issue. First, the United States is puzzled that New Zealand criticizes it for turning to the dictionary in seeking to determine the meaning of the term "cause". Under the customary rules of interpretation of public international law, reflected in Article 31 of the *Vienna Convention*, a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." It is well established that reference to dictionary definitions is an appropriate way to determine ordinary meaning.

42. Finally, New Zealand is simply wrong when it claims that the expression "to cause" invariably carries the meaning of being the "sole cause". Plainly there are circumstances in which "to cause" can apply to more than one cause. For example, design defects, operating errors, and substandard construction may all work together "to cause" a dam to collapse. Thus, the verb "to cause" as used in the Safeguards Agreement plainly embraces the concept of more than one cause.

43. Mr. Ross will now discuss Australia's and New Zealand's remaining claims.

44. Mr. Chairman, Members of the Panel, in the remainder of my presentation, I will focus on whether the lamb meat safeguard measure is being applied beyond the extent necessary, in contravention of Article 5.1 of the Safeguards Agreement, and the exclusion from the US measure of imports of lamb meat from Canada, Mexico, and Israel. I will focus primarily on arguments that New Zealand and Australia made in their second written submissions.

5. The US Measure is Commensurate with the Goals of Preventing or Remedying Serious Injury and Facilitating Adjustment

45. I would first like to discuss New Zealand's and Australia's argument that the lamb meat safeguard measure exceeds the limits prescribed by Article 5.1 for safeguard measures.

46. The Appellate Body stated in *Korea–Dairy* that a safeguard measure must be "commensurate" with the goals of preventing or remedying serious injury and facilitating adjustment. New Zealand and Australia have failed to demonstrate how the lamb meat safeguard measure can reasonably be considered "incommensurate" with the goals that the Appellate Body identified. That is not surprising given that the measure has a duration of just three years, permits imports in the first year at their second highest level ever, and allows imports to exceed surge levels in years two and three.

47. Rather than explain how the safeguard measure is excessive on its own merits, the complainants seek to show that the measure is more restrictive than the USITC plurality's recommended remedy would have been. Thus far, however, the complainants have not pointed to any provision of the Safeguards Agreement requiring a Member to apply the import relief its competent authorities recommend. Indeed, the Agreement does not require competent authorities to provide remedy recommendations in the first place. Nor have the complainants demonstrated that the relief that the USITC plurality recommended was adequate to prevent serious injury from occurring or to facilitate the industry's adjustment.

48. Moreover, both New Zealand and Australia ignore the fact that three of the six USITC commissioners disagreed with the plurality recommendation and suggested remedies that would have placed greater burdens on imports than the remedy that the President ultimately applied. It is not clear why, for purposes of the Safeguards Agreement, the US safeguard measure should be judged by comparison to the plurality's remedy recommendation, but the views of the other three commissioners are to be ignored.

49. New Zealand claims that the United States has placed the Panel on the "horns of a dilemma" by arguing, on one hand, that the Panel cannot engage in a *de novo* review of the USITC's investigation, and on the other hand that the Panel cannot presume that the USITC plurality's recommended remedy was adequate. But New Zealand mischaracterizes the US position. The US position is that the recommendations of the USITC (and it would have to be the recommendations of all six Commissioners, not just the plurality) do not constitute a benchmark for purposes of determining compliance with Article 5.1. Neither New Zealand nor Australia has provided any textual basis or evidence supporting the use of these recommendations as a benchmark.

50. New Zealand and Australia both claim that the burden is on the United States to demonstrate that the USITC plurality's recommended remedy was not adequate.[29] This is wrong for at least two reasons. First, as already noted, the USITC remedy recommendations are legally irrelevant under Article 5.1. The measure to be examined is the measure actually applied by the United States, not the measure proposed by the USITC. Second, even if such a comparison *were* appropriate, the burden of proof would be on complainants to demonstrate that the plurality's remedy *was* adequate to prevent serious injury and facilitate adjustment, not on the United States to demonstrate the opposite. Thus far, the complainants have made no effort to do so.

51. In any event, the United States has shown why the USITC plurality's remedy cannot be assumed to be adequate. Six USITC Commissioners – each equally familiar with the facts – examined the record and split three ways on an appropriate remedy. Three Commissioners concluded that the plurality's remedy was insufficient to prevent serious injury and facilitate adjustment. The fact that there was a split of views on an adequate remedy demonstrates that the plurality recommendation should not be presumptively regarded as adequate.[30]

52. New Zealand has shifted ground in its second written submission by stating that the "least trade restrictive" test it believes is written into Article 5.1 is really a "proportionality" standard. In fact, the two concepts are not the same. Of course, as the United States has already explained, the reference to "necessary" in Article 5.1 refers to the application of a measure, not the measure itself. A "least trade restrictive" test would require a comparison between the measure actually applied and some other "ideal" measure. According to New Zealand, its "proportionality" test would require a "degree of proportionality between ends and means". Even accepting, arguendo, New Zealand's proportionality test, New Zealand has provided no evidence to establish that the application of the US measure is not proportional. In any event, there is no "proportionality" test under Article 5.1. The term "proportional" is never used in Article 5.1, and there is no textual basis for reading it into that article.

53. Mr. Chairman, in its first written submission, and in its responses to the written questions from the Panel, the United States explained why the measure it put in place was an appropriate one.[31] By contrast, New Zealand and Australia have provided virtually no analysis of the measure. New Zealand has limited itself to comparing the measure to the USITC plurality's recommended remedy. Australia criticizes the measure for reducing first year imports to below the surge level, but ignores the findings of the three USITC Commissioners who concluded that serious injury would occur if imports continued at surge levels.

54. Moreover, both complainants ignore the USITC's unanimous finding that the industry's worsening condition was largely due to falling prices. Given the USITC's findings, it was reasonable for the United States to conclude that if imports continued at 1997 - interim 1998 surge levels and prices, the US lamb meat industry would quickly decline into serious injury. The US measure is

[29] New Zealand's Second Written Submission at ¶ 6.8; Australia' s Second Written Submission at ¶ 55.
[30] *See* US Responses to Questions from the Panel at ¶¶ 111-117.
[31] *See* United States' First Written Submission at ¶¶ 213-224; US Responses to Questions from the Panel at ¶¶ 121-139, 165-170.

designed to address these findings by capping first-year imports at just below surge levels, and by addressing the falling prices.

55. In sum, because New Zealand and Australia have not pointed to any way in which the TRQ is excessive in the manner in which it addresses the USITC's findings for purposes of preventing serious injury and facilitating adjustment, whether in terms of degree, scope, or duration, they have failed to meet their burden of proof to demonstrate that the US measure is inconsistent with Article 5.1.

6. The Exclusion of Imports from Canada, Mexico, and Israel

56. Finally, I would like to address the question of how the United States treated lamb meat imports from Canada, Mexico, and Israel for purposes of the USITC's investigation and the safeguard measure. New Zealand and Australia agree with the United States that parties to a free-trade agreement are entitled to exclude each other's products from safeguard measures. Accordingly, the only remaining claim for the Panel is their challenge to the procedure that the United States used in deciding to exclude products of its free trade partners. However, as footnote 1 to the Safeguards Agreement makes clear, this issue is governed by the GATT 1994, not by the Safeguards Agreement. Therefore, complainants' reliance on Article 2.2 of the Safeguards Agreement is misplaced. That article cannot be read to require any particular procedure for deciding to exclude the products of free trade partners.

57. New Zealand and Australia appear to attach great importance to this issue, which is surprising given that there were no imports of lamb meat from Israel during the period of investigation, no imports from Mexico after 1995, and Canadian imports *peaked* in 1997 at approximately one third of one per cent of total imports that year. By contrast, imports from Australia and New Zealand constituted some 98.3-99.9 per cent of total imports over the period of the investigation. The United States does not believe that it committed any procedural errors in the way it treated imports from the three countries. But even if it did, they plainly could not have affected the outcome of the USITC's investigation and thus the Panel need not address this issue.

58. In essence, Australia's and New Zealand's procedural complaint is that the United States used the wrong approach for excluding imports from its free trade agreement partners from the safeguard measure. In the complainants' view, the USITC should first have excluded those imports from its injury and causation investigation. But the United States does not understand how they reconcile their position with Article 4.2(a), which requires competent authorities to examine "all relevant factors" in making their determinations.

59. New Zealand and Australia say that the US procedures for dealing with imports from its free-trade agreement partners fails to achieve "parallelism" . The United States questions whether the Safeguards Agreement sets out a rule of "parallelism" as such. But the United States does not disagree with the notion that a Member must ensure that if imports from its free-trade agreement partners are excluded from a safeguard measure, the affirmative injury determination that its competent authorities have reached was not predicated on injury attributable to increased imports from those sources.

60. The relevant US safeguards procedures accomplish this result. In this case, after making its initial affirmative threat of serious injury determination, the USITC considered whether imports from Canada or Mexico accounted for a substantial share of total imports and contributed importantly to the serious injury or threat. Since imports from Canada never amounted to more than 0.3 per cent of total imports and there were no imports from Mexico after 1995, the USITC reached negative determinations on both questions. It also considered whether, and to what extent, any of its findings or recommendations applied to imports from Israel, and determined that they did not, because there were no imports from Israel during the period of the investigation. Thus, Australia and New Zealand

can mount no serious claim in this case that their imports were subject to a safeguard measure based on injury attributable to increased imports from Mexico, Canada, or Israel.

7. Conclusion

61. Mr. Chairman, I have a few final points to make today. A principal objective of the Uruguay Round was to negotiate a workable safeguards agreement. Ultimately, those negotiations were successful. Members agreed that grey-area measures would be prohibited, but they also agreed that if they followed the rules set out in the Safeguards Agreement, Members would have a right to take short-term steps to provide their industries with a modicum of relief from injurious import surges.

62. In this proceeding, New Zealand and Australia have sought to convince the Panel that the framers of the Safeguards Agreement mandated a series of radically new standards and requirements that are not embodied in Article XIX. These include a new "isolation" requirement for injury causation, an impossibly burdensome "least trade restrictive" test for safeguard measures, and a new safeguard "justification" requirement. None of these purported obligations appears in the plain language of the Safeguards Agreement.

63. By attempting to convince the Panel to read their new standards into the agreement, and by seeking to shift the burden of proof in this proceeding to the United States, New Zealand and Australia are urging the Panel in effect to deny Members the right to impose safeguard measures under the terms set forth in the Safeguards Agreement and Article XIX. We urge the Panel to reject the approach that the complainants are proposing in this case. Instead Article XIX and the Safeguards Agreement should be given effect based on their plain meaning, their context, and the object and purpose they serve, which, we'd recall, includes an important trade liberalization component, by giving Members the assurance they need to be able to accept tariff cuts.

64. This concludes our presentation. As we noted at the outset, we will be pleased to receive any questions you may have.

ANNEX 4-1

WRITTEN SUBMISSION OF CANADA

(19 May 2000)

I. INTRODUCTION

1. Canada is a third party in these proceedings and is appreciative of the opportunity to provide its views to the Panel on certain matters arising in the dispute.

2. The dispute concerns a safeguard measure imposed by the United States in the form of a tariff quota on imports of fresh, chilled, and frozen lamb meat effective as of 22 July 1999.[1]

3. The dispute was initiated by the requests for consultations submitted by New Zealand[2] on 16 July 1999, and Australia[3] on 23 July 1999, in respect of the safeguard measure imposed by the United States on imports of lamb meat. Such consultations with the United States were held in Geneva on 26 August 1999, but no mutually satisfactory solution was reached.

4. On 14 October 1999, New Zealand and Australia requested the establishment of a panel.[4] Pursuant to these requests, the Dispute Settlement Body (DSB) established a single Panel on 19 November 1999, with the standard terms of reference.[5] The Panel was constituted on 21 March 2000.

5. Canada, Australia (in respect of New Zealand's complaint), the European Communities (EC), Iceland, Japan and New Zealand (in respect of Australia's complaint) reserved their rights to participate as third parties pursuant to Article 10.3 of the DSU.

6. Canada has a substantial interest in the matter, particularly with respect to the Complaining Parties' claims regarding the exclusion of Canada from the application of the safeguard measure imposed by the United States.

7. Canada has had an opportunity to review those portions of the First Submission of the United States pertaining to this particular issue, and is fully supportive of the points made by the United States.

8. Canada maintains that the United States International Trade Commission (USITC) findings and recommendations regarding imports of lamb meat from Canada, as well as the subsequent US decision to exempt Canada from the safeguard measure on lamb meat, are consistent with US obligations under the WTO agreements, in particular Article 2 of the *Agreement on Safeguards*.

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[1] Proclamation 7208 of 7 July 1999 – To Facilitate Positive Adjustment to Competition from Imports of Lamb Meat, amended by Proclamation 7214 of 30 July 1999 - To provide for the Efficient and Fair Administration of Action Taken With regard to Imports of Lamb Meat and for Other Purposes, submitted as US Exhibit 2.

[2] WT/DS177/1.

[3] WT/DS178/1 and Corr.1.

[4] WT/DS177/4; WT/DS178/5 and Corr.1.

[5] WT/DS177/5; WT/DS178/6.

Canada further maintains that the Complaining Parties' claim to the contrary is unfounded and as such should be rejected by the Panel.

II. EXEMPTION OF CANADA FROM THE US SAFEGUARD MEASURE ON LAMB MEAT

9. Pursuant to the obligations of the United States under the *North American Free Trade Agreement* (NAFTA), Canada was exempted from the safeguard measure imposed by the United States after the USITC found that imports of lamb meat from Canada and Mexico did not individually account for a substantial share of the total imports of lamb meat and were not contributing importantly to the threat of serious injury.[6] Article 802 of the NAFTA provides that "any [NAFTA] Party taking an emergency action under Article XIX or any such agreement shall exclude imports of a good from each other Party from the action unless:

> (a) imports from a [NAFTA] Party, considered individually, account for a substantial share of total imports; and
>
> (b) imports from a [NAFTA] Party, considered individually, or in exceptional circumstances imports from Parties considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports."[7]

Thus, unless affirmative findings on both conditions are made, NAFTA Parties must be exempted from a safeguard measure taken by another NAFTA Party. Article 802 of the NAFTA was incorporated into US law through Sections 311 and 312 of the NAFTA Implementation Act.[8]

10. The USITR found that imports from Canada and Mexico during the period of investigation were negligible. Indeed, the USITC explicitly stated:

> Imports from Canada accounted for less than 1 per cent of total lamb meat imports in each year of the period of investigation. At their highest level of the period of investigation, 209,000 pounds, in 1997, imports from Canada accounted for only 0.3 per cent of total US lamb meat imports.[9]

Therefore, the USITC concluded that imports from Canada did not account for a substantial share of the total imports of lamb meat and were not contributing importantly to the threat of serious injury caused by imports, and recommended that the President exclude Canada (and Mexico[10]) from any relief action. The definitive safeguard measure imposed by the United States in the form of tariff-rate quota on imports of fresh, chilled, or frozen lamb meat, effective as of 22 July 1999, excluded imports of lamb meat from Canada, as well as imports from certain other countries.[11]

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[6] Proclamation 7208 of 7 July 1999, amended by Proclamation 7214 of 30 July 1999, submitted as US Exhibit 2; USITC Report, Investigation No. TA-201-68, Publication 3176, April 1999, submitted as US Exhibit 1, pp. I-3/5 and I-26/27.

[7] NAFTA, Art. 802. The full text is reproduced in Annex 1.

[8] 19 U.S.C. 3371, 3372 (Supp. 1993).

[9] USITC Report, submitted as US Exhibit 1, pp. I-27 and II-18, n. 73.

[10] USITC Report, submitted as US Exhibit 1, pp. I-27 and II-18, n. 73; the USITC investigation noted that imports of lamb meat from Mexico accounted for less than 1 per cent of total imports in the year during the period of investigation for which the data was available (1995); the USITC therefore found that imports of lamb meat from Mexico did not account for a substantial share of the total imports of lamb meat and were not contributing importantly to the threat of serious injury and recommended that the President exclude Mexico from any relief action.

[11] Proclamation 7208 of 7 July 1999, amended by Proclamation 7214 of 30 July 1999, submitted as US Exhibit 2.

III. ARGUMENT

11. The Complaining Parties raise legal claims under both the GATT 1994 and the *Agreement on Safeguards* regarding the US decision to exclude imports from Canada from the application of the safeguard measure on lamb meat. The Complaining Parties assert that, by doing so, the United States has failed to apply the safeguard measure to all imports irrespective of source as required by Article 2.2 of the *Agreement on Safeguards*. New Zealand adds that this failure contravenes also the basic "most favoured nation" obligation of Article I of the GATT 1994.[12] Australia further claims that the inclusion of imports from Canada, Mexico, and Israel in the injury determination was inconsistent with Article 4 of the *Agreement on Safeguards*.[13]

12. Neither Australia nor New Zealand can be suggesting that the *Agreement on Safeguards* or the GATT 1994 precludes members of a free trade area from excluding each other's imports from the application of their safeguard measures. This is consistent with the provisions of the *Australia New Zealand Closer Economic Relations Agreement* (ANZCERTA), which prohibit Australia and New Zealand from taking safeguard actions in regard to goods covered by ANZCERTA. This is also consistent with the provisions of the *Agreement on Safeguards*, which leave open the possibility that members of an FTA may exclude other members from the application of a safeguard measure. We wish to underscore that the Complaining Parties cannot be challenging this possibility since they are themselves bound by it.[14]

13. The interpretation of any particular article of a WTO Agreement cannot be conducted in isolation. It is a well-established principle that the WTO Agreements form a single undertaking. Therefore, all WTO obligations are cumulative and Members must comply with all of them simultaneously.[15]

14. The text of the *Agreement on Safeguards* itself indicates that its provisions, and its Article 2.2 in particular, are not to be considered in isolation from Articles XIX and XXIV of GATT 1994. Footnote 1 to Article 2.1 of the Agreement states, inter alia, that "Nothing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994."[16] The negotiators of the *Agreement on Safeguards* clearly recognized that there was a special relationship between Articles XIX and XXIV:8 of GATT 1994 and that the *Agreement on Safeguards* was to be interpreted consistently with that relationship as it stood. Thus the *Agreement on Safeguards*, read in conjunction with the other relevant WTO provisions, leaves open the

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[12] New Zealand First Submission, para. 1.8, 6.1(V) and 7.112-7.114.

[13] Australia First Submission, para. 11 and 259-265.

[14] The Appellate Body, faced with a similar situation, stated that, "as the issue is not raised in this appeal, we make no ruling on whether, as a general principle, a member of a customs union can exclude other members of that customs union from the application of a safeguard measure"; *Argentina - Safeguard Measures on Imports of Footwear* (*Argentina – Footwear*), Report of the Appellate Body, WT/DS121/AB/R, adopted on 12 January 2000, para. 114.

[15] *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Appellate Body, WT/DS98/AB/R, 14 December 1999, para. 74; *Argentina – Footwear* , Report of the Appellate Body, para. 76-98. This finding of the Appellate Body is of course consistent with the fundamental rule of treaty interpretation as set out in Article 31(1) of the *Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1969, 1155 U.N.T.S. 331.

[16] We note that the Appellate Body in *Argentina - Footwear*, para. 106-108, commented that the footnote only applies where customs unions take action, not the Member State. A plain reading of the text indicates that these comments would not apply to the last sentence of the Footnote, the language of which clearly suggests a general application to all provisions of the *Agreement on Safeguards*, with no exception. In any event, the Appellate Body's reasoning in para. 84-95 in *Argentina – Footwear* would confirm that the *Agreement on Safeguards* does not change or overrule the established meaning of Article XIX of GATT 1994, including its relationship with to Article XXIV:8.

possibility that, as the United States has done in this case pursuant to Article 802 of the NAFTA, members of an FTA may exclude other members from the application of a safeguard measure.

15. Both Complaining Parties rely on a specific passage from the recent decision of the Appellate Body in *Argentina - Safeguard Measures on Imports of Footwear*[17] (*Argentina - Footwear*) to sustain their claim that the United States has failed to apply the safeguard measure to all imports irrespective of source as required by Article 2.2 of the *Agreement on Safeguards*.

16. Canada's view is that the facts in the *Argentina – Footwear* case are fundamentally different from those under consideration here.[18] In *Argentina - Footwear*, MERCOSUR members were excluded from the safeguard action despite the fact that they were the source of more that half of the imports used to determine the injury. The Appellate Body decision in the *Argentina – Footwear* case concluded that:

> "In applying safeguard measures on the basis of *this investigation in this case*, Argentina was also required under Article 2.2 to apply those measures to imports from all sources, including those from other MERCOSUR states. On the basis of this reasoning, and on the facts of this case, we find that Argentina's investigation, which evaluated whether serious injury or the threat thereof was caused by imports from *all* sources, could only lead to the imposition of safeguard measures on imports from *all* sources. Therefore, we conclude that Argentina's investigation, in this case, cannot serve as a basis for excluding imports from other MERCOSUR member States from the application of the safeguard measures."[19] (*emphasis added*)

17. "This investigation in this case" refers to the fact that Argentina had investigated and found injury from all sources, including and in particular, MERCOSUR sources. Argentina did not conduct any separate analysis with respect to its MERCOSUR partners. Therefore, under Article 2.2 of the *Agreement on Safeguards*, Argentina had to apply its safeguard measure to injury from those sources. In contrast, in the present case, the United States found, on the basis of its investigations, that Canadian imports were negligible and, therefore, did not account for the threat of serious injury. Accordingly, it is fully consistent with Article 2.2 of the *Agreement on Safeguards*, interpreted in accordance with Footnote 1 and the decision in *Argentina - Footwear*, for the United States to exclude Canadian imports from the application of its safeguard measure on lamb meat.

IV. CONCLUSION

18. Accordingly, Canada respectfully submits that the USITC findings and recommendations regarding imports of lamb meat from Canada, as well as the subsequent US decision to exempt Canada from the safeguard measure on lamb meat, are fully consistent with the WTO obligations of the United States.

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[17] *Argentina - Footwear*, Report of the Appellate Body, para. 113-114.

[18] MERCOSUR imports of footwear in Argentina accounted in 1991 for only 1.90 million pairs of 8.86 million total imports (i.e. 21.4 per cent) and in 1995, for roughly 1/4 of the total imports, i.e. 5.83 of 19.84 million pairs; in 1996, MERCOSUR supplied the largest percentage (55.7 per cent) of total imports of 13.47 million pairs, i.e. 7.5. million pairs (as oppose to 5.97 million pairs from third countries); *Argentina - Footwear*, Report of the Panel, WT/DS121/R, adopted on 12 January 2000, as modified by the Report of the Appellate Body, footnote 474.

[19] *Argentina - Footwear*, Report of the Appellate Body, para. 113.

ANNEX 1

FULL TEXT OF ARTICLE 802 OF THE NAFTA

Article 802: Global Actions

1. Each Party retains its rights and obligations under Article XIX of the GATT or any safeguard agreement pursuant thereto except those regarding compensation or retaliation and exclusion from an action to the extent that such rights or obligations are inconsistent with this Article. Any Party taking an emergency action under Article XIX or any such agreement shall exclude imports of a good from each other Party from the action unless:

(a) imports from a Party, considered individually, account for a substantial share of total imports; and

(b) imports from a Party, considered individually, or in exceptional circumstances imports from Parties considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports.

2. In determining whether:

(a) imports from a Party, considered individually, account for a substantial share of total imports, those imports normally shall not be considered to account for a substantial share of total imports if that Party is not among the top five suppliers of the good subject to the proceeding, measured in terms of import share during the most recent three-year period; and

(b) imports from a Party or Parties contribute importantly to the serious injury, or threat thereof, the competent investigating authority shall consider such factors as the change in the import share of each Party, and the level and change in the level of imports of each Party. In this regard, imports from a Party normally shall not be deemed to contribute importantly to serious injury, or the threat thereof, if the growth rate of imports from a Party during the period in which the injurious surge in imports occurred is appreciably lower than the growth rate of total imports from all sources over the same period.

3. A Party taking such action, from which a good from another Party or Parties is initially excluded pursuant to paragraph 1, shall have the right subsequently to include that good from the other Party or Parties in the action in the event that the competent investigating authority determines that a surge in imports of such good from the other Party or Parties undermines the effectiveness of the action.

4. A Party shall, without delay, deliver written notice to the other Parties of the institution of a proceeding that may result in emergency action under paragraph 1 or 3.

5. No Party may impose restrictions on a good in an action under paragraph 1 or 3:

(a) without delivery of prior written notice to the Commission, and without adequate opportunity for consultation with the Party or Parties against whose good the action is proposed to be taken, as far in advance of taking the action as practicable; and

(b) that would have the effect of reducing imports of such good from a Party below the trend of imports of the good from that Party over a recent representative base period with allowance for reasonable growth.

6. The Party taking an action pursuant to this Article shall provide to the Party or Parties against whose good the action is taken mutually agreed trade liberalizing compensation in the form of concessions having substantially equivalent trade effects or equivalent to the value of the additional duties expected to result from the action. If the Parties concerned are unable to agree on compensation, the Party against whose good the action is taken may take action having trade effects substantially equivalent to the action taken under paragraph 1 or 3.

ANNEX 4-2

WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

(19 May 2000)

SECTION I – INTRODUCTION

1. The European Communities (hereafter " the EC") welcomes this opportunity to present its views in the proceeding brought by Australia and New Zealand over the consistency with Articles I, II and XIX of the GATT 1994 and with Articles 2, 3, 4, 5, 11 and 12 of the *Agreement on Safeguards* with regard to the definitive safeguard measure imposed by the United States (hereafter "the US") on imports of lamb meat.

2. The EC has decided to intervene as third party in the present case because of its systemic interest in the correct interpretation of provisions of the GATT 1994 and the *Agreement on Safeguards*, as well as in the correct application of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereafter "DSU"). Many of the issues in dispute relate to questions of fact on which the EC is not in a position to comment. Accordingly, the EC will limit its submission to a number of issues of legal interpretation which it considers to be of particular interest.

3. As a general matter, it is the view of the EC that the safeguard mechanism should only be relied upon in exceptional circumstances and thus in *emergency* situations only, as the title of Article XIX GATT 1994 already sets out clearly. In the Appellate Body's words, « Article XIX is clearly, and in every way, an extraordinary remedy ». [1] It should only be invoked when all of the strict requirements which are set out in WTO law have been fulfilled, in particular because the reliance on the safeguard mechanism interferes with the fair conduct of trade performed by competitive exporters. It is against this general background that the EC intends to make certain comments regarding the present case. The EC therefore concurs with the statement in New Zealand's First Written Submission, at paragraph 7.19 that "the safeguard provisions be interpreted strictly".

4. With regard to the appropriate standard of review, the EC considers that the role of the Panel is not to engage itself in a *de novo* exercise. Instead, what the EC expects from the Panel is that it make an objective assessment of the matter in accordance with Article 11 DSU. [2] In line with the Appellate Body's recent interpretation of this provision, this would mean that the Panel's review should be limited to an objective assessment of whether the USITC had considered all relevant facts in its possession or which it should have obtained in accordance with Article 4 of the Agreement on Safeguards (including facts which might detract from an affirmative determination in accordance with the last sentence of Article 4.2 of the *Agreement on Safeguards*), including an examination of each factor listed in Article 4.2(a), of whether the published report on the investigation contained adequate explanation of how the facts supported the determination made, and consequently of whether the

[1] Report by the Appellate Body on *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 14 December 1999, at paragraph 93 (hereinafter also *Argentina – Footwear*); Report by the Appellate Body on *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, 14 December 1999 at paragraph 86 (hereinafter also *Korea – Dairy Products*).

[2] Report by the Appellate Body on *EC Measures Concerning Meat and Meat Products (Hormones)*, AB-1997-4, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, at paragraph 117.

determination made was consistent with the US's obligations under the *Agreement on Safeguards* and the GATT 1994. [3]

5. Section II addresses the requests for preliminary rulings by the parties. Section III considers some of the claims submitted by Australia and New Zealand.

SECTION II -- REQUESTS FOR PRELIMINARY RULINGS

The Article 6.2 DSU standard for requests for the establishment of a panel

6. In its letter dated 5 May 2000 the US has requested the Panel to issue a preliminary ruling with regard to the requests for the establishment of a Panel by Australia and New Zealand, because these requests were in its view "insufficient as a matter of law" to satisfy the requirement of Article 6.2 DSU, given that the complaining parties failed to provide any indication of the legal basis for their claims. In particular, the US objects to the fact that neither Australia nor New Zealand in its request provides "any other information that would in itself further clarify exactly which of the obligations in [Articles 2, 3 and 4 of the *Agreement on Safeguards* [4]] is alleged to be infringed." [5]

7. Article 6.2 DSU sets the standards for the request for the establishment of a panel. It provides, in the relevant part, that:

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

8. In *Korea - Dairy Products*, [6] the Appellate Body has recently refined its previous findings on the exact requirements of Article 6.2 DSU. In *EC - Bananas*, in fact, it had held that it was sufficient for the complainants "to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements". [7] On that occasion the Appellate Body had also specified that the panel request needs to be "sufficiently precise" for two reasons: because it forms the basis for the terms of reference of the panel, and because "it informs the defending party and the third parties of the legal basis of the complaint" . [8]

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[3] Report by the Appellate Body on *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 14 December 1999, at paragraph 121. Report by the Panel on *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, 21 June 1999, at paragraph 7.30 (hereinafter *Korea – Dairy Products*).

[4] The US does not assert substantial prejudice to the US with respect to the claims of the complainants under Articles I, II and XIX of the GATT 1994 and Articles 5, 11 and 12 of the *Agreement on Safeguards*, as it was possible for the US to discern those subprovisions that would be implicated on the basis of the context of this proceeding (see US letter dated 5 May, at page 3, paragraph 6). Therefore, the EC's comments above relate only to the three provisions of the *Agreement on Safeguards* to which the US referred to (*i.e.* Articles 2, 3 and 4).

[5] Letter by US dated 5 May 2000, at page 2, paragraph 1.

[6] Report by the Appellate Body on *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, 14 December 1999.

[7] Report by the Appellate Body on *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, AB-1997-3, WT/DS27/AB/R, 9 September 1997, at paragraph 141 (hereinafter *EC - Bananas*).

[8] Id., at paragraph 142.

9. Revisiting the same issue in *Korea - Dairy Products*, the Appellate Body has clarified that the identification of the treaty provisions alleged to be violated is "always necessary" and constitutes a "minimum prerequisite" to present the legal basis of the complaint. If this might, in some cases, be enough to meet the standard of Article 6.2 DSU, in other cases, for instance when an article contains more than one distinct obligation, the mere listing of articles of an agreement is likely to be not sufficient to inform the defending party and any third parties of the legal basis of the complaint. [9] In *Korea - Dairy Products*, these considerations led the Appellate Body to find that, although the articles listed contained each several distinct obligations and the request of the panel by the complainant should have been more detailed, the defendant had failed to demonstrate that the mere listing of the articles alleged to have been violated had prejudiced its ability to defend itself.

10. In their requests for the establishment of this Panel, both New Zealand and Australia have merely listed the relevant articles claimed to have been violated by the US, without taking into account the fact that each of the articles listed, in particular Articles 2, 3 and 4 of the *Agreement on Safeguards* , are all composed of many paragraphs, each of them setting out distinct obligations.

11. As it could only rely on the panel establishment requests, the EC has not been able to know the exact legal basis of Australia's and New Zealand's claims under Articles 2, 3 and 4 until it received their First Written Submissions. This has impaired the EC's ability to exercise its procedural rights in this proceeding to the fullest extent.

12. The EC has had by definition no knowledge of the developments prior to the request for the establishment of the panel, in particular the conduct of the consultations between the main parties to the dispute, and of other specific circumstances of this case that suggest that the United States was informed of the exact legal basis of the complaint in keeping with Article 6.2 *DSU*. Those circumstances, therefore, cannot have improved at all the possibility for the EC to effectively protect its rights as third party. Given the Appellate Body's finding in *EC – Bananas* that the objective of panel requests is to inform both the defending party *and third parties*, [10] it is clear that that objective needs to be fulfilled for the benefit of *all participants* in dispute settlement proceedings.

Finally, with regard to the exact time when the US should have raised the issue, the EC notes that rule 13 of the working procedures for the Panel sets out that "[a] party shall submit any requests for preliminary rulings not later than in its first submission to the Panel." Therefore, the US has been given the opportunity to submit preliminary rulings up until and including the day that it had to submit its First Written Submission. The EC notes that the US submitted its request before that date, i.e. on 5 May 2000.

Having submitted the above legal considerations with respect to Article 6.2 *DSU*, the EC leaves it to the Panel to come to an appropriate conclusion for the present case.

Exclusion of US Statute from Panel Terms of Reference

12. In Section B of its letter dated 5 May 2000 the US raises another issue on which it requests the Panel to rule as a preliminary matter. In particular, the US requests that the Panel rule that "the consistency of the US Statute with US obligations under the *Agreement on Safeguards* is not within the Panel's terms of reference and is thus outside the scope of this dispute". [11]

13. Article 6.2 of the DSU requires identification of the measure alleged to violate the WTO. This requirement is concerned with *claims*. The Appellate Body has recalled how this obligation applies

[9] Report by the Appellate Body on *Korea - Dairy Products*, at paragraphs 114 ff.
[10] Report by the Appellate Body on *EC - Bananas*, at paragraph 141.
[11] Letter by US dated 5 May 2000, at page 2.

not only to individual implementing measures but also to normative measures.[12] Neither in New Zealand's nor in Australia's request for the establishment of the Panel does the EC read a claim made in respect of the US Safeguard Statute *as such*. Instead, both complainants limit their claims to the specific safeguard measure imposed on imports of lamb meat. Therefore, the EC agrees with the United States' view [13] that the WTO-consistency of the US Safeguard Statute is not within the Panel's terms of reference. The EC submits however that this in no way prevents a complainant from *referring to* the text of the US Statute constituting the legal basis of the challenged measure in order to support a claim with respect to the latter. In the present case, therefore, the application of the "substantial cause" test by the USITC falls within the Panel's terms of reference, even though the US Safeguard Statute is not mentioned in the request for the establishment of the Panel.

14. New Zealand and Australia seem to agree with the EC on this matter. New Zealand in its reaction to the letter by the US dated 5 May 2000 first states that it "requests no finding from the Panel on the consistency of the United States' statute with the Safeguard Agreement." [14] However, New Zealand considers that "the issue of consistency of the substantial cause test used by the USITC with the Safeguard Agreement falls squarely within the Panel's terms of reference." [15] Australia too makes clear that it "is not asking the Panel to make a finding that the US legislation itself is inconsistent with the USA's obligations under the Safeguard Agreement, GATT 1994 and WTO Article XVI:4." [16] Like New Zealand, Australia asks the Panel to find that *this measure* is inconsistent with the requirements of the Safeguard Agreement and GATT 1994 Articles II and XIX.

Business Confidential Information

15. Some of the data on which the USITC findings are based have been omitted from the public report which is available for scrutiny. In certain parts of the report where facts are discussed which may be relevant for determining whether a WTO consistent safeguard measure is taken (or not) 'stars' replace actual figures and data, making the USITC's findings -- which are based on these secret data -- unverifiable for the parties and third parties in this dispute as well as for the Panel.

16. Australia has asked the Panel to give a preliminary ruling on whether the US should produce certain confidential information omitted from the USITC Report. [17] Australia argues that if the US is not prepared to provide such information, then the Panel should draw adverse inferences from the unwillingness of the US to co-operate in the provision of information. New Zealand, although not requesting the Panel to make a preliminary ruling, argues that "a Member cannot rely on undisclosed information to show that it is complying with its obligations under the Safeguard Agreement or under GATT 1994." [18]

17. The EC submits that a Member should, as a matter of legal principle, not be allowed to rely on undisclosed facts as a basis for taking a safeguard measure if those facts cannot be reviewed by the parties, third parties and a Panel within a dispute settlement procedure. The EC agrees with New Zealand's comment that Article 3.2 *Agreement on Safeguards* does not absolve a Member from disclosing information in the course of proceedings under the DSU when a safeguard measure that it

[12] Panel Report, *European Communities - Customs Classification of Certain Computer Equipment*, WT/DS62/R, WT/DS67/R, WT/DS68/R, 5 February 1998, at paragraph 65.

[13] US' request for preliminary ruling, 5 May 2000, at paragraph 17.

[14] New Zealand's reaction dated 17 May 2000, at paragraph 47.

[15] Id., at paragraph 53.

[16] Australia's reaction dated 17 May 2000, at paragraph 49.

[17] Australia's First Written Submission, at paragraphs 15-18.

[18] New Zealand's First Written Submission, at paragraphs 7.22 - 7.25.

has imposed is challenged by another Member. [19] The US authorities are required to provide "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined" (Article 4.2(c) *Agreement on Safeguards*) and the United States cannot escape this multilateral obligation by referring to domestic law requirements.

18. The EC considers that a Panel is free, if it is convinced that the DSU rule on confidentiality is insufficient in the present case, to adopt Supplemental Working Procedures -- including on the basis of reasonable proposals made by the parties to this dispute. The EC considers that the adoption of such procedures, if needed, could be a means of balancing the US concerns relative to confidential information with the need to respect due process and the principle of equality of arms. The EC submits that if such Supplemental Working Procedures are not adopted by the Panel in the present case, the Panel should proceed with its examination on the basis of the record as it stands, which has the logical consequence that facts or other information which is not disclosed should be considered as "not examined" by domestic authorities.

19. Finally, the EC notes that the US has requested the aid of New Zealand and Australia in obtaining consent from the producers which have provided confidential information to the USITC. [20] Even if the complaining parties were to accept this request by the US, it is clear that they cannot subsequently be held responsible or otherwise be put in a more disadvantageous position if the consent of the relevant producers is not given.

SECTION III -- LEGAL CLAIMS AND ARGUMENTS

The US has not demonstrated "unforeseen developments"

20. The EC submits that it fully supports the reasoning set out by the Appellate Body in *Argentina - Footwear* and *Korea - Dairy Products* with regard to the "unforeseen developments" requirement contained in Article XIX:1(a) GATT 1994. As the Appellate Body stated, "the developments which led to [lamb meat] being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been 'unexpected'." [21] Also, according to the Appellate Body "the first clause [in Article XIX:1(a) of the GATT 1994] 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." [22]

21. Therefore, the USITC was under an obligation to *demonstrate* in its investigation that the increased imports in this case occurred "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions…". [23] It is the view of the EC that such a *demonstration* requires a verifiable description, *i.e.* a determination in the record of the investigation, stating clearly which "unforeseen developments" had caused ("led to" in the words of the Appellate Body) an increase in imports of lamb meat, which in turn caused the

[19] Id., at paragraph 7.23.

[20] US' request for preliminary ruling, 5 May 2000, paragraph 23.

[21] Report by the Appellate Body on *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 14 December 1999, at paragraph 91; Report by the Appellate Body on *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, AB-1999-9, WT/DS98/AB/R, 14 December 1999, at paragraph 84.

[22] Report by the Appellate Body on *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, AB-1999-9, WT/DS98/AB/R, 14 December 1999, at paragraph 85; Report by the Appellate Body on *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 14 December 1999, at paragraph 92 [emphasis added].

[23] Report by the Appellate Body on *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 14 December 1999, at paragraph 98 [emphasis added].

(alleged) threat of serious injury. The Appellate Body's finding makes clear that such a demonstration can not be made *ex post facto*, for example in a written submission in the framework of a dispute settlement procedure. In addition, Article 3.1 *Agreement on Safeguards* requires the competent authorities to set out in their report 'their findings and reasoned conclusions reached on all pertinent issues of fact and law'. The EC has found no specific reference in the USITC Report of a determination setting out which "unforeseen developments" caused the surge in imports of lamb meat.

22. Even if the Panel were to come to the conclusion that the USITC Report did contain such a determination, the developments cited by the US do not, in the EC's view, support such a determination: the US in its First Written Submission essentially points to an increase in imports in a different mix in the later period as compared to the beginning period, [24] resulting in a higher market share for importers. The EC submits that a surge in lamb meat imports (in whatever mix) cannot be the cause of an increase in lamb meat imports. The US authorities cannot comply with their obligations under Article XIX GATT 1994 by referring to the nature of the increased imports themselves. To conclude otherwise would lead to a circular reasoning.

23. The complaining parties have put forward arguments as to developments that took place that could have been foreseen in 1995, such as a long-term decline in domestic lamb production and the elimination of the subsidies under the Wool Act. As a Third Party to the present dispute the EC does not need to take a position on whether *these* developments could be regarded as "unforeseen" or "unexpected".

The US has incorrectly determined its "domestic industry"

24. The EC submits that the textual structure of Articles 2.1 and 4.1(c) of the *Agreement on Safeguards* makes clear that the relevant domestic industry is determined solely by the imported product at issue. Thus, in order to confirm which industry can be included in the injury analysis, the basic starting point is to determine the relevant "product" which is imported in increased quantities. The second step is to analyse, on the basis of this product, which industry produces either "like" products or "directly competitive" products. The text of the above-mentioned articles should be read strictly (as has been argued earlier by the EC) in the sense that *only those* producers can be considered as constituting the "domestic industry" if they produce either "like" or "directly competitive" products. Thus, if a producer does not produce either of those, it can *by definition* not be considered relevant for the "domestic industry".

25. In the present case, imports of New Zealand and Australian lamb meat have increased during the period of investigation. Therefore, the relevant question is what US "domestic industry" produces a product which is "like" or "directly competitive" with imported lamb meat. The USITC found that the "domestic product 'like' the imported lamb meat is domestically produced lamb meat." [25] However, when turning to examine the live-lamb industry, the USITC did not continue by determining whether that industry also produced "like" or "directly competitive products" but instead applied a test not found in the *Agreement on Safeguards*. It examined whether (1) there is a continuous line of production from the raw to the processed product, and (2) there is a substantial coincidence of economic interest between the growers and the processors.

26. The EC is unable to find such a test in the *Agreement on Safeguards* and considers that the wide interpretation of Article 4.1(c) as suggested by the US in paragraph 69 of its First Written Submission is not in line with the strict wording of the Agreement, which simply refers to 'the producers as a whole of the like or directly competitive products'. Therefore, the test to apply is whether a producer

[24] Between 1995 and 1997 imports of fresh or chilled lamb meat increased 101 per cent while imports of frozen lamb increased by 11 per cent. See paragraph 56 of the US First Written Submission.

[25] USITC Report, at I-12.

produces either a 'like' product or a 'directly competitive product'. The EC cannot but conclude that the USITC in its Report did not conduct this analysis in respect of the live-lamb industry.

The standard to be set for "threat of serious injury" should be high

27. The EC will not comment on the highly factual arguments which are put forward by the parties in the present dispute with respect to the USITC finding of "threat of injury" and the underlying analysis. However, the EC would like to use the opportunity presented by this Third Party Submission to make a general comment with regard to the standard that the Panel will set with respect to this issue.

28. The EC submits that, since a safeguard measure is an extraordinary measure which negatively interferes with the fair trade conducted by competitive exporters, any interpretation given by the Panel of the term "threat of serious injury" should reflect the highest standard. As the Appellate Body stated in *Argentina - Footwear*: "In perceiving and applying this object and purpose to the interpretation of this provision of the *WTO Agreement*, it is essential to keep in mind that a safeguard action is a "fair" trade remedy. The 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." [26]

29. The EC requests the Panel to consider that the standard which it will set in the present case will strongly influence the interpretation that future Panels will give to the notion of 'threat of serious injury', which is defined in the *Agreement on Safeguards* as 'serious injury that is clearly imminent'. The EC urges the Panel to decide on this matter in light of the above-mentioned statements by the Appellate Body.

USITC has incorrectly applied the "causation" test

30. The EC will limit its comments regarding causation to a concern it has with respect to the application by the USITC of Article 4.2(b) *Agreement on Safeguards*, which sets out requirements regarding causality. This provision reads as follows:

> "The determination referred to in subparagraph (a) shall not be made unless the 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."

31. In the present case the USITC has proceeded as follows: it has first determined that increased imports are "an important cause of the threat of serious injury" and second, it has determined whether increased imports are "a cause that is equal to or greater than any other cause". The EC is concerned that these determinations are not sufficient to show that the high standard set by Article 4.2(b) is met.

32. This provision requires that the threat of serious injury which the safeguard measure is to remedy is caused by increased imports *in isolation*. Although other causes may aggravate the threat of serious injury, if those other causes are subtracted, increased imports *by themselves* must still be shown to cause a threat of serious injury. Article 5.1 *Agreement on Safeguards* imposes that the

[26] Report by the Appellate Body on *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 14 December 1999, at paragraph 94.

safeguard measure is confined to prevent or remedy the serious injury caused by imports, to the exclusion of other factors contributing to the injury.

33. Indeed, in case of concurring causes of injury, the USITC is prevented from investigating the only important issue, *i.e.* whether increased imports are in isolation the cause of threat of serious injury. The USITC however investigates a different issue, *i.e.* whether there is a single cause "more important" than increased imports.

34. If increased imports are no more than a "substantial cause" of the threat of serious injury, even if more important than any other cause, there is at least a possibility that the threshold level of "causation" as required by the *Agreement on Safeguards* is not met. The legislative history cited by the US in its First Written Submission [27] does not eliminate the EC's concern, since an "important" cause of injury could still fall short of the threshold that increased imports *by themselves* cause serious injury or the threat thereof. Accordingly, the EC supports the argument set out by New Zealand [28] that the US has applied a *less stringent test* irrespective of whether, in the present case, the end result might be that no actual violation of Article 4.2(b) *Agreement on Safeguards* is found, an issue on which the EC does not take a position here.

The correct interpretation of the term "Necessary" in Article 5.1

35. The main parties to this dispute disagree with respect to the meaning of the term "necessary" in the first sentence of Article 5.1 *Agreement on Safeguards*. Article 5.1 provides that: "A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment." [29] The EC submits that from the wording of this provision it is clear that it is the *application* of the measure -- not the measure as such -- which should be kept within the limits of what is "necessary" to prevent or remedy serious injury and to facilitate adjustment.

36. The EC notes that the term "necessary" is used elsewhere in the WTO Agreement -- notably in provisions derogating from the liberalization principle embodied therein. Article XIX itself embodies virtually identical language and authorises safeguard measures "to the extent and for such time as may be necessary to prevent or remedy serious injury". Furthermore, Article XX of GATT 1994 allows measures to be taken if e.g. "(a) necessary to protect public morals" , "(b) necessary to protect human, animal or plant life or health".

37. The EC submits that the purpose of the "necessity" requirement is to avoid that safeguard measures, which are recognized as "limitative and deprivational in character or tenor and impact upon Member Countries and their rights and privileges and upon private persons and their acts" [30] be abused. In the light of that characterisation, in *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, the Appellate Body drew the conclusion that an importing Member should not be allowed "an enhanced ability to restrict the entry into its territory of goods in the exportation of which no unfair trade such as dumping or fraud or deception of origin is alleged or proven" [31] by taking safeguard action beyond the strict limits laid down in the relevant WTO provisions, if that action would result in "excluding more goods from the territory of the importing Member." [32]

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[27] US First Written Submission, at paragraph 121.

[28] New Zealand's First Written Submission, at paragraph 7.73.

[29] Emphasis added.

[30] See Appellate Body Report in *United States - Restriction on Imports of Cotton and Man-Made Fibre Underwear*, 10 February 1997, WT/DS24/AB/R, p. 9 (emphasis added).

[31] Id. (emphasis added).

[32] Id. (emphasis added).

38. The Appellate Body set out in *Korea - Dairy Products* that a Member must apply a measure which in its totality is "not more restrictive than necessary." [33] Therefore, if the measure that was applied were to surpass the threshold level of what was necessary, the Member would violate Article 5.1 *Agreement on Safeguards*. In other words, if there were a measure available which would be less restrictive and would at the same time accomplish the goal of preventing or remedying serious injury, then that measure should be applied. This, in fact, is nothing more and nothing less than a "least trade restrictive test", which the EC has no difficulty in reading in the text of the first sentence of Article 5.1 *Agreement on Safeguards*.

39. An important question with respect to the "necessity" test in Article 5.1 is whether the US should have justified, explained or otherwise demonstrated that the measure it applied "is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment." [34] The complainants make the argument that the US was under such obligation as a result of Article 3.1 *Agreement on Safeguards*, which sets out that "[t]he competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law".

40. The EC considers that, although nothing prevents the competent authorities from doing so in their investigation report, the last sentence in Article 3.1 does not oblige these authorities to publish in that report information explaining how the measure applied falls within the requirements set out in the first sentence of Article 5.1. The title of Article 3.1, as well as its content, concern solely the investigation, not the measure itself nor its application. Furthermore, as the Appellate Body made clear in *Korea - Dairy Products*, the first sentence of Article 5.1 does not impose an obligation to present a "clear justification" of compliance with it in the framework of that provision. The Appellate Body stated "we reverse the Panel's broad finding […] that Article 5.1 requires a Member to explain, at the time it makes its recommendations and determinations concerning the application of a safeguard measure, that its measure is necessary to remedy serious injury and to facilitate adjustment." [35]

41. How then, are Members (or a Panel in the framework of a dispute settlement procedure) able to verify on what grounds the Member taking the safeguard measure has based itself in order to comply with the "necessity" test? The EC considers that relevant elements to that effect could usefully be contained in the notification document submitted to the Committee on Safeguards in the framework of Article 12.2 *Agreement on Safeguards*. This provision requires the Member which proposes to apply a safeguard measure to provide the Committee (and thus all WTO Members) with "all pertinent information", which includes -- but is not limited to -- information regarding the proposed measure, the proposed date of introduction, expected duration and timetable for progressive liberalization, so as to allow WTO Members to verify whether the proposed measure is in compliance with the *Agreement on Safeguards*. As the Panel in *Korea - Dairy Products* stated with respect to the object and purpose of Article 12:

> "… the notification serves essentially a transparency and information purpose. In ensuring transparency, Article 12 allows Members through the Committee on Safeguards to review the measures. Another purpose of the notification of the finding of serious injury and of the proposed measure is to inform Members of the circumstances of the case and the conclusions of the investigation together with the importing country's particular intentions. This allows any interested Member to

[33] Report by the Appellate Body on *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, AB-1999-8, WT/DS98/AB/R, 14 December 1999, at paragraph 103.

[34] Report by the Appellate Body on *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, AB-1999-8, WT/DS98/AB/R, 14 December 1999, at paragraph 96.

[35] Id., at paragraph 103.

> decide whether to request consultations with the importing country which may lead to modification of the proposed measure(s) and/or compensation." [36]

42. Therefore, the content of the Article 12.2 notification should allow Members to review the measure and *all* pertinent information regarding its application, which can certainly include information enabling Members to review whether the "necessity" requirement contained in Article 5.1 has been complied with. During subsequent consultations, which take place *before* the measure is applied, the information set out by the Member proposing to apply the measure can be further discussed, including with regard to why the Member considers it is "commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment" and thus considers it complies with the first sentence of Article 5.1. As recognized by the Appellate Body in *Korea - Dairy Products*, "[p]roviding [all pertinent information] to the Committee on Safeguards does not place an excessive burden on a Member proposing to apply a safeguard measure as such information is, or should be, readily available to it." [37]

Inappropriate exclusion of certain countries from the scope of the measure

43. The Appellate Body in its Report on *Argentina-Footwear* [38] concluded that "Argentina, on the facts of this case, cannot justify the imposition of its safeguard measures only on non-MERCOSUR third country sources of supply on the basis of an investigation that found serious injury or threat thereof caused by imports from all sources, including imports from other MERCOSUR member States."

44. The EC submits that the *principle of parallelism* as set out by the Appellate Body in the *Footwear* case should apply to the present case as well. The USITC investigation found that serious injury was threatened by imports from *all* sources, including imports from countries with which the US had concluded free trade areas, including Canada, Mexico and Israel. The US then imposed its safeguard measure only on non-FTA countries, thus excluding Canada, Mexico and Israel.

45. The EC submits that, as a consequence of the above-mentioned reasoning of the Appellate Body, the US could either have found a threat of serious injury based on *all* imports or, in the alternative, exclude imports from those countries with which the US has constituted a free trade area from the scope of the investigation and find a threat based on the imports from all other countries. If a causal link is established, then the issue of the application of the safeguard measure consistent with the *principle of parallelism* is relevant [39]. Under the first option, the safeguard measure will have to be applied also vis-à-vis the products originating from the other members of the free trade area. Under the second option, the products originating from the other members of the free trade area will not be subject to the measure.

46. The EC considers that a determination of threat of serious injury caused by imports from all sources, followed by an exclusion of certain countries from the safeguard measure based on the importance of their individual contribution has no basis in the *Agreement on Safeguards*. The only exception in this respect is with regard to developing country members, as set out in Article 9.1. No similar exception however can be found for countries which are members of a free trade area. The EC

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[36] Report by the Panel on *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, 21 June 1999, at paragraph 7.126.

[37] Id., at paragraph 111.

[38] Report by the Appellate Body on *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 14 December 1999, at paragraph 114.

[39] See, confirming this approach, Report by the Appellate Body on *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 14 December 1999, at paragraph 111 ff.

submits that the Panel has no reason to take a different decision in the present case than the Appellate Body took in the *Argentina - Footwear* case.

US misinterprets the obligation contained in Article 8.1 *Agreement on Safeguards*

47. The US claims in its First Written Submission that "the only obligation that Article 8.1 imposes on a Member considering a safeguard measure is to provide an opportunity for prior consultations. The United States satisfied that obligation." [40] The EC disagrees with such narrow reading of this provision. The obligation to provide an opportunity for prior consultations is contained in Article 12.3, which requires a Member proposing to apply a safeguard measure "to provide adequate opportunity for prior consultations …". Article 8.1 obliges ("shall") a Member to endeavour to maintain a substantially equivalent level of concessions and other obligations […] to exporting Members which would be affected by such a measure."

48. The EC submits that the term "endeavour" must have some meaning -- a meaning which goes further than the pure procedural requirement of offering consultations, which is already contained in Article 12.3. The New Shorter Oxford English Dictionary [41] explains this term as "to exert oneself", "try, make an effort for a specified object, attempt strenuously", underlining that a Member is required in good faith to make an effort to maintain a substantially equivalent level of concessions and other obligations […] to exporting Members which would be affected by such a measure. The EC considers that such an effort should be more than merely offering consultations, and thus should constitute a clear indication (which entails at least an initial offer) of how the Member proposing to take the measure would suggest to maintain a substantially equivalent level of concessions and other obligations […] to exporting Members which would be affected by such a measure."

49. Finally, the EC does not consider that this interpretation of the requirement contained in Article 8.1 would, as the US suggests, in any way "encourage Members to find methods outside of the Safeguard Agreement to protect their injured domestic industries." [42] Indeed, if their industries were seriously injured or were facing a threat of being seriously injured, an initial offer of how the Member proposing to take the measure would suggest to maintain a substantially equivalent level of concessions and other obligations to exporting Members which would be affected by such a measure would rather *strengthen* the multilateral support for the safeguard mechanism.

[40] US First Written Submission, at paragraph 262.

[41] New Shorter Oxford English Dictionary (1993), at page 816.

[42] US' First Written Submission, at paragraph 266.

ANNEX 4-3

ORAL STATEMENT OF CANADA

(25 May 2000)

INTRODUCTION

The Government of Canada appreciates this opportunity to provide its views to the Panel on certain issues arising in this dispute. Canada reserved its right to participate as third party in these proceedings because of its substantial interest in the matter, particularly with respect to the claim of the Complaining Parties regarding the exclusion of Canada from the application of the safeguard measure on lamb meat imposed by the United States.

We are fully supportive of the position of the United States on this particular issue. We maintain that the United States International Trade Commission (USITC) findings and recommendations regarding imports of lamb meat from Canada, as well as the subsequent US decision to exempt Canada from the safeguard measure on lamb meat, are consistent with US obligations under the WTO agreements, in particular Article 2 of the *Agreement on Safeguards*. We further maintain that the Complaining Parties' claim to the contrary is unfounded and as such should be rejected by the Panel.

ARGUMENT

The Complaining Parties raise legal claims under both GATT 1994 and the *Agreement on Safeguards* regarding the US decision to exclude imports from Canada from the application of the safeguard measure on lamb meat. The Complaining Parties assert that, by so doing, the United States breached its obligations under Article 2 of the *Agreement on Safeguards*. In addition, Australia claims a breach of Article 4 of the *Agreement on Safeguards* while New Zealand further alleges a breach of Article I of the GATT 1994.

Canada was exempted from the safeguard measure imposed by the United States, after the USITC found that imports of lamb meat from Canada and Mexico did not individually account for a substantial share of the total imports of lamb meat and were not contributing importantly to the threat of serious injury. This was done in accordance with US obligations under the *North American Free Trade Agreement* (NAFTA), more particularly Article 802.

For the reasons explained fully in our written submission, Canada asserts that neither the *Agreement on Safeguards* nor the GATT 1994 precludes members of a free trade area from excluding each other's imports from the application of their safeguard measures. We doubt that the Complaining Parties would dispute this assertion, given that such an exclusion is consistent with the provisions of the *Australia New Zealand Closer Economic Relations Agreement*.

To sustain their claim that the United States failed to apply its safeguard measure to all imports irrespective of source as required by Article 2.2 of the *Agreement on Safeguards*, Canada notes that the Complaining Parties rely on a specific passage from the recent decision of the Appellate Body in *Argentina - Safeguard Measures on Imports of Footwear* (*Argentina – Footwear).*[1]

[1] Report of the Appellate Body on *Argentina - Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted on 12 January 2000, at paragraphs 113-114.

As set out clearly in our written submission, Canada's view is that the facts in the *Argentina - Footwear* case are fundamentally different from those under consideration here. Allow us to take this opportunity to highlight the key differences.

In *Argentina - Footwear*, Argentina had investigated and found injury from all sources, including and in particular, MERCOSUR sources. However, Argentina did not conduct a separate analysis with respect to its MERCOSUR partners. As a result, pursuant to Article 2.2 of the *Agreement on Safeguards*, the Appellate Body found that, "on the basis of this investigation in this case"[2], Argentina had to apply its safeguard measure to imports from all sources, including those from MERCOSUR. In contrast, in the present case, the United States found, on the basis of a separate analysis, that Canadian imports were negligible and, therefore, did not account for the threat of serious injury. Accordingly, Canada submits that it is fully consistent with Article 2.2 of the *Agreement on Safeguards*, interpreted in light of Article XXIV of the GATT 1994 and the decision in *Argentina - Footwear*, for the United States to exclude Canadian imports from the application of its safeguard measure on lamb meat.

Finally, we noted that the EC, in its third party submission, asserts that the *principle of parallelism* - a legal test proposed by the EC in another dispute - should apply to the present case. The EC maintains that the Appellate Body confirmed this so called *principle* in its *Argentina - Footwear* Report. However, it is clear that the Appellate Body's legal conclusions regarding this issue are directly linked to the particular facts of the *Argentina - Footwear* case, and therefore cannot be the basis of such confirmation.

CONCLUSION

Accordingly, we respectfully submit to the Panel that the USITC findings and recommendations regarding imports of lamb meat from Canada, as well as the subsequent US decision to exempt Canada from the safeguard measure on lamb meat, are fully consistent with the WTO obligations of the United States.

[2] Report of the Appellate Body on *Argentina - Footwear*, *supra*, at paragraph 112.

ANNEX 4-4

ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

(25 May 2000)

Mr. Chairman, distinguished Members of the Panel,

Thank you for providing the European Communities [EC] with a chance to present its views in this proceeding today.

1. This case provides an opportunity to draw the appropriate consequences from the Appellate Body's broad statement that

> "[I]t is essential to keep in mind that a safeguard action is a "fair" trade remedy. The 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 *extraordinary*. And, *when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account*." [1]

2. This case raises several systemic issues relating to the interpretation of the Agreement on Safeguards as well as of the WTO Agreement's annexes at large. The EC has addressed the most important ones its Third Party Submission and refers the Panel to its argumentation therein. The EC further regrets that, after having its deadline for commenting on the 80 page US First Written Submission curtailed from 7 to 4 days given the additional unexpected and extremely late change in the Panel's schedule, it is not in a position to elaborate further before you today.

3. There is, however, one aspect on which the EC would like to comment today, in view of Canada's Third Party Submission. In its submission Canada first argues that

> "the *Agreement on Safeguards*, read in conjunction with the other relevant WTO provisions, leaves open the possibility that, as the United States has done in this case pursuant to Article 802 of the NAFTA, members of an FTA may exclude other members from the application of a safeguard measure." [2]

The "other relevant WTO provisions" to which Canada refers are Articles XIX and XXIV:8 of GATT 1994.

4. Canada further argues that the facts in *Argentina – Footwear* were different from those at issue in this dispute. [3]

5. The EC strongly disagrees with both points. The EC would like to recall that in *Argentina - Footwear* the Appellate Body found that

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[1] Report by the Appellate Body on *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 14 December 1999, at paragraph 76 (emphasis added).

[2] Canada's First Written Submission, paragraph 14.

[3] Canada's First Written Submission, paragraph 17.

> "Argentina, on the facts of this case, cannot justify the *imposition of its safeguard measures* only on non-MERCOSUR third country sources of supply on the basis of an *investigation* that found serious injury or threat thereof caused by imports from all sources, including imports from other MERCOSUR member States." [4]

6. The EC submits that the *principle of parallelism* as set out by the Appellate Body in the *Footwear* case stands and applies in this case too, irrespective of the question as to the relationship between the Agreement on Safeguards and GATT Articles XIX and XXIV. In making the above finding the Appellate Body also made clear that the issue of the relationship between the Agreement on Safeguards and GATT 1994 is a separate one which it considered was not necessary to address in that case. To recall, the Appellate Body found that

> "we also are not persuaded that an analysis of Article XXIV of the GATT 1994 was relevant to the specific issue that was before the Panel. This issue, as the Panel itself observed, is whether Argentina, *after including imports from all sources in its investigation of "increased imports"* of footwear products into its territory and the consequent effects of such imports on its domestic footwear industry, *was justified in excluding other MERCOSUR member States from the application of the safeguard measures*." [5]

7. Contrary to Canada's assertion the facts of this case are strikingly similar to the ones at issue in *Argentina – Footwear*, on the basis of which the Appellate Body ruled. In fact, the USITC investigation was based on imports from *all* sources,[6] including imports from countries with which the US had concluded free trade agreements, like Canada, Mexico and Israel. The US then imposed its safeguard measure only on non-FTA countries, thus excluding Canada, Mexico and Israel.

8. Canada suggests that this case is different from the one reviewed in *Argentina – Footwear* because the USITC made a separate analysis with respect to its FTA partners, and notably "found, on the basis of the investigations, that Canadian imports were *negligible* and, *therefore*, did not account for the threat of serious injury." [7]

9. Whether imports from FTA partners accounted for a larger or a smaller share of total imports is not a relevant fact which can distinguish this case from the factual and the legal arguments set forth in *Argentina – Footwear*.

10. In the first place, the Argentine authorities did not exclude imports from MERCOSUR from the safeguard measure on the basis of their relative importance, they did not even weigh that factor to make their decision. They simply spared MERCOSUR imports from the measure after including imports from all sources in their investigation of "increased imports".

11. Likewise, the USITC investigated imports from all sources and then excluded FTA partners imports from its measure. If imports from FTA countries were considered not to threaten serious injury, it was only because the USITC applied the WTO-inconsistent "substantial cause" test, on which the EC has already commented in its Third Party Submission.

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[4] Report by the Appellate Body on *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 14 December 1999, at paragraph 114 (emphasis added).

[5] Report by the Appellate Body on *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 14 December 1999, at paragraph 109 (emphasis added).

[6] See USITC Report, at page I-15 (last paragraph) and USITC Report, Table 7, at page II-21. The figures on which the 'increased imports' finding on page 15 is based are the 'total US imports' in Table 7.

[7] Canada's First Written Submission, paragraph 17 (emphasis added).

12. In any event, even if imports from MERCOSUR had been more than "negligible", this fact was given no relevance by the Appellate Body in its finding.

13. The only relevant factor is whether the investigating authority concluded that the requirements for the imposition of a measure are met by investigating and taking into account the effect of *inter alia* imports from countries with which it has a FTA.

14. In view of the foregoing, Canada's arguments can in no way support the USITC's omission of imports from FTA partners from the scope of its measure. Accordingly, the EC confirms the position expressed in its Third Party Submission and submits that the US measure is not consistent with WTO law.

15. Mr. Chairman, distinguished Members of the Panel, this concludes the EC's intervention. The EC will be happy to reply in writing to any further questions that may be addressed to it.

Thank you for your attention.

ANNEX 5-1

(WT/DS177/4)

UNITED STATES – SAFEGUARD MEASURE ON IMPORTS OF FRESH, CHILLED OR FROZEN LAMB FROM NEW ZEALAND

Request for the Establishment of a Panel by New Zealand

The following communication, dated 14 October 1999, from the Permanent Mission of New Zealand to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

My authorities have asked me to submit the following request on behalf of New Zealand for consideration at the next meeting of the Dispute Settlement Body.

Under the "Proclamation 7208 of 7 July 1999 - To Facilitate Positive Adjustment to Competition From Imports of Lamb Meat" and the "Memorandum of 7 July 1999 - Action Under Section 203 of the Trade Act of 1974 Concerning Lamb Meat" by the President of the United States of America, published in the Federal Register Vol. 64, No. 131, pp. 37389 to 37392 on 9 July 1999 and the Federal Register Vol. 64, No. 132, pp. 37393 to 37394 on 12 July 1999 respectively, the United States of America imposed a definitive safeguard measure in the form of a tariff-rate quota on imports of fresh, chilled, or frozen lamb meat[8] effective as of 22 July 1999.[9]

New Zealand considers that this measure is inconsistent with the obligations of the United States of America under the following provisions:

(i) Articles 2, 3, 4, 5, 11 and 12 of the Agreement on Safeguards; and

(ii) Articles I, II and XIX of the GATT 1994.

In a communication dated 16 July 1999 (as circulated in WT/DS177/1), the Government of New Zealand requested consultations with the Government of the United States of America pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 14 of the Agreement on Safeguards and Article XXII:1 of the GATT 1994 with regard to the safeguard measure imposed by the United States of America on imports of lamb meat. Consultations were held on 26 August 1999, but did not result in a resolution of the dispute.

Accordingly, New Zealand requests the establishment of a panel pursuant to Article 6 of the DSU and Article 14 of the Agreement on Safeguards to examine the measure in question, with the standard terms of reference as set out in Article 7 of the DSU.

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[8] As provided for in subheadings 0204.10.00, 0204.22.20, 0204.23.20, 0204.30.00, 0204.42.20, and 0204.43.20 of the Harmonised Tariff Schedule of the United States.

[9] Some of this information has also been contained in the United States Article 12.1(c) Notification to the Committee on Safeguards (G/SG/N/10/USA/3, G/SG/N/10/USA/3/Suppl.1, G/SG/N/11/USA/3 and G/SG/N/11/USA/3/Suppl.1).

As indicated above, New Zealand asks that this request for the establishment of a panel be considered at the next meeting of the Dispute Settlement Body scheduled for 27 October 1999.

ANNEX 5-2

(WT/DS178/5)

UNITED STATES – SAFEGUARD MEASURE ON IMPORTS OF LAMB MEAT FROM AUSTRALIA

Request for the Establishment of a Panel by Australia

The following communication, dated 14 October 1999, from the Permanent Mission of Australia, to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

My authorities have instructed me to request the establishment of a panel pursuant to Article XXIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), Articles 4 and 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and Article 14 of the Agreement on Safeguards, with regard to the definitive safeguard measure imposed by the United States of America (USA) on imports of lamb meat.[10], [11]

Under the "Proclamation 7208 of 7 July 1999 – To Facilitate Positive Adjustment to Competition From Imports of Lamb Meat" and the "Memorandum of 7 July 1999 – Action Under Section 203 of the Trade Act of 1974 Concerning Lamb Meat" by the President of the United States of America, published in the Federal Register Vol. 64, No. 131, pp. 37389-37392 on 9 July 1999 and the Federal Register Vol. 64, No. 132, pp. 37393-37394 on 12 July 1999 respectively, the United States of America introduced a definitive safeguard measure in the form of a tariff-rate quota on imports of lamb meat effective as of 22 July 1999.[12]

On 23 July 1999 Australia requested consultations with the USA with a view to reaching a mutually satisfactory solution. The request was circulated in Document WT/DS178/1 (and Corr.1) dated 29 July 1999. Such consultations, which were held on 26 August 1999 in Geneva, did not lead to a satisfactory resolution of the matter.

Australia considers that the measure, and associated actions and decisions taken by the USA, are inconsistent with the obligations of the USA under the Agreement on Safeguards and GATT 1994, in particular:

(b) Articles 2, 3, 4, 5, 6, 11, and 12 of the Agreement on Safeguards, and

(c) Articles I, II, and XIX of GATT 1994.

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[10] G/SG/N/10/USA/3-G/SG/N/11/USA/3, and G/SG/N/10/USA/3/Suppl.1-G/SG/N/11/USA/3/Suppl.1.

[11] Covering fresh, chilled, or frozen lamb meat, provided for in subheadings 0204.10.00, 0204.22.20, 0204.23.20, 0204.30.00, 0204.42.20, and 0204.43.20 of the Harmonized Tariff Schedule of the United States.

[12] Subsequently modified by the "Proclamation 7214 of 30 July 1999 – To Provide for the Efficient and Fair Administration of Action Taken With Regard to Imports of Lamb Meat and for Other Purposes" by the President of the United States of America published in the Federal Register Vol. 64, No. 149, pp. 42265-42267 on 4 August 1999.

Australia requests that the panel to examine the matter be established with the standard terms of reference.

Australia asks that this request be placed on the agenda for the meeting of the Dispute Settlement Body to be held on 27 October 1999.