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

AB-2000-10

Report of the Appellate Body

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

3. The Panel considered claims by the European Communities that, in imposing the safeguard measure on imports of wheat gluten, the United States acted inconsistently with Articles I and XIX of the

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

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

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

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

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

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[10]Panel Report, para. 9.3.

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

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

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

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

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

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

II. Arguments of the Participants and the Third Participants

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

2. Article 2.1 of the *Agreement on Safeguards*

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

13. In the view of the United States, the Panel's finding that, under Articles 2.1 and 4.2 of the *Agreement on Safeguards*, "there is an implied symmetry with respect to the product that falls within the scope of a safeguard *investigation* and the product that falls within the scope of the *application* of the safeguard measure"[21]

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

B. *Arguments of the European Communities – Appellee*

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

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

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

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

2. Article 2.1 of the *Agreement on Safeguards*

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

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

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

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

2. Article 11 of the DSU

24. The European Communities argues that the Panel erred in its interpretation and application of Article 11 of the DSU. The Appellate Body has established that, pursuant to Article 11 of the DSU, the Panel was obliged to examine *all* the relevant facts and evidence, and to assess whether the USITC provided a reasoned or adequate explanation of how the facts supported the determinations that were made. The Panel, however, applied an inappropriate standard of deference, and failed to provide an adequate and reasonable explanation for its findings. The European Communities asserts

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

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

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

D. *Arguments of the United States – Appellee*

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

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

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

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

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

2. Article 11 of the DSU

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

2. Canada

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

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

3. New Zealand

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

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

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

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

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

III. Issues Raised in this Appeal

44. This appeal raises the following issues:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[36]Panel Report, para. 8.69.

[37]*Ibid*.

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

[39]*Ibid*.

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

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

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

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

53. We turn, therefore, for context, to Article 3.1 of *Agreement on Safeguards*, which is entitled "*Investigation*". Article 3.1 provides that "A Member may apply a safeguard measure only following an *investigation* by the competent authorities of that Member …". (emphasis added) The ordinary

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

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

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

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

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

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

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[47]Panel Report, para. 8.69.

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

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

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

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

factor merits "evaluation" as a "relevant factor" because it is only in that situation that the protein

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

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

> … where a number of factors, one of which is increased imports, are sufficient *collectively* to cause a "significant overall impairment of the position of the domestic industry", but increased imports alone are not causing injury that achieves the threshold of "serious" within the meaning of Article 4.1(a) of the Agreement, the conditions for imposing a safeguard measure are not satisfied.[56] (underlining added)

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

64. The United States argues, on appeal, that the Panel erred in interpreting Article 4.2(b) to mean that increased imports must be sufficient, in and of themselves, to cause injury that is "serious". It

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

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

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

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[60]Panel Report, para. 8.139.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[73]*Supra*, para. 66.

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

[75]*Ibid*., paras. 8.147 – 8.150.

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

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

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

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

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

90. The data before the USITC, therefore, suggest that the increases in average available capacity in the domestic industry *may* have been very important to the overall situation of the domestic industry in 1997. We do not suggest that the increase in capacity utilization was *the sole* cause of the serious injury sustained by the domestic industry.

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

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

VI. Article 2.1 of the *Agreement on Safeguards*

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

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

94.

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

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

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

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

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

[95]*Ibid*.

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

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

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

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

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

101. The United States appeals the Panel's findings that the United States acted inconsistently with Articles 12.1(a), 12.1(b), 12.1(c), 12.3 and Article 8.1 of the *Agreement on Safeguards.* The United States contends that the Panel misinterpreted the requirement of "immediate" notification set forth in Article 12.1, erred in its analysis of the relationship between the v6Ts75 Tc 0 Tw us under Articl *c), 12.3 and Article 8.1 of the*

97Ibid101.

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

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

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

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

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

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[99]Panel Report, para. 8.194.

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

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

123. Article 12.2 is related to, and complements, Article 12.1 of the *A( )-4481 kh19 T86(c),3) mustexpw (Iand*

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

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

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

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

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

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

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

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[118]Panel Report, para. 8.207.

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

[120]Panel Report, para. 8.207.

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

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

B. *Article 12.3 of the Agreement on Safeguards*

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

> A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product

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

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

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

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

provided under" Article 12.2, indicates th[redacted]2 identifies the information that is needed to enable meaningful consultations to oc[redacted]rticle 12.3. Among the list of "mandatory components"[125] regarding information id[redacted]rticle 12.2 are: a precise description of the *proposed* measure, and its *proposed* dat[redacted]on.

137. Thus, in our view, an exporting [redacted]l not have an "adequate opportunity" under Article 12.3 to negotiate overall equivale[redacted]s through consultations unless, prior to those consultations, it has obtained, *inter alia*, [redacted]tailed information on the form of the proposed measure, including the nature of the reme[redacted]

138. With these considerations in mi[redacted]ne whether, in this case, the Panel erred in finding that the United States did not [redacted] European Communities with an "adequate opportunity for prior consultations" on the [redacted]eguard measure, as required by Article 12.3 of the *Agreement on Safeguards*.

139. The [redacted]d consultations [redacted] 24 April 199[redacted]*n the basis of t*[redacted]

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

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

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

VIII. Article 11 of the DSU

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

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

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

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

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

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

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

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

151. We have also stated previously that, although the task of panels under Article 11 relates, in part, to its assessment of the *facts*, the question whether a panel has made an "objective assessment" of the facts is a *legal*

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

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

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

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

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

[150]*Ibid*.

[151]Panel Report, para. 8.45.

[152]*Ibid*.

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

[154]Panel Report, para. 8.47.

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

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

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

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

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

[156]Panel Report, para. 8.61.

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

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

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

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

160. We recall that, under Article 3.1 of the *Agreement on Safeguards*, *the competent authorities* must "publish a *report*" which provides "reasoned conclusions" on "all pertinent issues". (emphasis added) Under Article 4.2(c), that *report* must also contain "a detailed analysis", including "a demonstration of the relevance of the factors examined". We observe that the Panel concluded, on the allocation methodologies, that it was "the *USITC Report*" which "provides an adequate, reasoned and reasonable explanation with respect to 'profits and losses'

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

163. As a result we conclude that the Panel acted inconsistently with Article 11 in finding, in

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

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

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

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

175. In reviewing the inferences the Panel drew from the facts of record, our task on appeal is not to redo afresh the Panel's assessment of those facts, and decide for ourselves what inferences we would draw from them. Rather, we must determine whether the Panel improperly exercised its discretion, under Article 11, by failing to draw certain inferences from the facts before it. In asking us to conduct such a review, an appellant must indicate clearly the manner in which a panel has improperly exercised its discretion. Taking into account the full *ensemble*

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

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

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

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

180. However, the "discretion" that a panel enjoys to determine which claims it should address is not without limits.[185] In *Australia – Salmon*, we stated that a "panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings …".[186]

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[182]Panel Report, para. 8.220.

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

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

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

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

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

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

X. Findings and Conclusions

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

(a) upholds the Panel's conclusion, in paragraph 8.127 of the Panel Report, that the United States has not acted inconsistently with its obligations under Articles 4.2(a) and 4.2(b) of the *Agreement on Safeguards*, by declining to evaluate the overall relationship between the protein content of wheat and the price of wheat gluten as a "relevant factor" under Article 4.2(a) of that Agreement; but, in so doing, reverses the Panel's interpretation of Article 4.2(a) of the *Agreement on Safeguards*, in paragraph 8.69 of the Panel Report, that the competent authorities are required to evaluate only the "relevant factors" listed in Article 4.2(a) of that Agreement as well as any other "factors" which were "*clearly* raised before [the competent authorities] as relevant by the interested parties in the domestic investigation";:(a)Panel's ieguard25

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

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

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

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

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

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

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

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

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

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Julio Lacarte-Muró
Presiding Member

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Georges Michel Abi-Saab
Member

Yasuhei Taniguchi
Member