WORLD TRADE ORGANIZATION

WT/DS177/R
WT/DS178/R
21 December 2000

(00-5361)

Original: English

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

Report of the Panel

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

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

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I. INTRODUCTION

A. COMPLAINT OF NEW ZEALAND

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

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

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

B. COMPLAINT OF AUSTRALIA

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

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

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

C. ESTABLISHMENT AND COMPOSITION OF THE PANEL

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

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

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

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

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

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

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

D. PANEL PROCEEDINGS

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

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

II. FACTUAL ASPECTS

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

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

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

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

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

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

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

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

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

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

2.6 On 7 July 1999, the United States imposed a definitive safeguard measure, effective 22 July 1999,

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

(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

C. UNITED STATES

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

IV. ARGUMENTS OF THE PARTIES

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

V. PRELIMINARY ISSUES

A. PARTIES' REQUESTS FOR PRELIMINARY RULINGS BY THE PANEL

1. Australia

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

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

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

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

2. New Zealand

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

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

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

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

3. The United States

5.4 In a letter, dated 5 May 2000, the United States requests preliminary rulings on the following

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

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 Safi2tl, 3fal stann e0.134 any oth6hi Tc 0mhis case, it

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

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

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

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*

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 20

VI. INTERIM REVIEW

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

A. AUSTRALIA'S REQUESTS FOR INTERIM REVIEW

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

B. NEW ZEALAND'S REQUESTS FOR INTERIM REVIEW

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

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

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

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

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

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

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

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

6.10

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

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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

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*

"1709 concerning "unforeseen developments" in Article Tc

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 countr uld not be

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

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 ap4t8 ind-0.23irr5birements that thius not find snts tht this lopments

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

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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

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)

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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.

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(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

"*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 degree of injury [illegible]

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

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

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

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 ny5ror 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 ablinssertion, especis"ure"

7.131 In particular, AD Article 3.7 and

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 lism11 Tw (inves bess or de591ss dome) Tj 64.5ss dss or de591ss dome 50 TD /F5

7.138 As we noted above, in view of our findings in respect of industry definition, we could

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

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)USITC by breakers.

(vi) Inventories

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

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

(vii) Financial performance (profit and loss)

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

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

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

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

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

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

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

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

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

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

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

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

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

(viii) Difficulty of generating capital

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

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

(ix) Prices and price trends

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

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

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

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

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

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

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

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

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

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

(c) Evaluation by the Panel

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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.

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

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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*

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.

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 fnrs, feeders and

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

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

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

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

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

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

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

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

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

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

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

7.225 However, we are not persuaded that the data used as a basis for the USITC's determination in this case were sufficiently *representative*

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 *others6id*

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 produciTf 0de wifficient cause is the sole caus0.62636 Tc 0.518s that

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 Antiduh0145 Tc 0.3325 Tw (under thg/dade) Tj 3263 Tw 5 Tc (257) Tj -33.
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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

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)

(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

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 represent Tw (hthrucers6 -24ie40.00