

**BEFORE THE APPELLATE BODY
OF THE WORLD TRADE ORGANIZATION**

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

Appellee Submission by Australia

Geneva, 26 February 2001

TABLE OF CONTENTS

I. EXECUTIVE SUMMARY

II. UNFORESEEN DEVELOPMENTS

Overview

The Legal Interpretation of “Unforeseen Developments”

- Article XIX.1(a) of GATT 1994 must be read cumulatively with the Safeguards Agreement
- Article 11.1(a) of the Safeguards Agreement
- The Panel interpreted Article XIX:1(a) of GATT 1994 and the Safeguards Agreement in a manner that gave meaning and effect to “unforeseen developments”
- Competent authority required to reach a conclusion demonstrating the existence of “unforeseen developments”

The Panel’s Findings of Fact

- The United States failed to demonstrate “unforeseen developments”

Conclusion

III. DOMESTIC INDUSTRY

Overview

Interpretation of “Domestic Industry”

- Interpretation of Article 4.1(c) of the Safeguards Agreement
- Past panel reports

The Panel’s Findings of Fact

Conclusion

IV. DATA REPRESENTATIVENESS

Overview

- Data relied upon by the USITC was inadequate
- The United States did not meet the requirements of Article 4.2 of the Safeguards Agreement

Conclusion

V. CAUSATION

Overview

The Panel’s Findings on “Necessary and Sufficient” Cause

- The Panel’s findings are consistent with the Appellate Body’s test in *Wheat Gluten* that there be a “genuine and substantial relationship”
- The United States failed to demonstrate a “genuine and substantial relationship” between increased imports and threat of serious injury

Causal Link Between Increased Imports and Threat of Serious Injury

- The United States failed to demonstrate that any threat of serious injury caused by other factors had not been attributed to imports
- The USITC did not make a valid determination on “causal link” or “genuine and substantial relationship” of cause and effect
- The United States’ causation analysis was inconsistent with a proper interpretation of Article 4.2(b) in terms of “threat of serious injury”

Conclusion

VI. ARTICLE 2.1 OF THE SAFEGUARDS AGREEMENT

VII. CONCLUSIONS

I. EXECUTIVE SUMMARY

- 1 In response to the issues raised by the United States in its appeal of the findings of the Panel, Australia will demonstrate that:
 - (a) the Panel reached a legally correct conclusion in finding that the United States failed to demonstrate as a matter of fact “unforeseen developments” and, therefore, acted inconsistently with Article XIX:1(a) of GATT 1994;
 - (b) the Panel was correct in finding that the USITC’s inclusion of growers and feeders of live lambs in the definition of producers of lamb meat was inconsistent with Article 4.1(c) of the Safeguards Agreement;
 - (c) the Panel correctly found that the data used by the USITC as the basis for its determination was not sufficiently representative contrary to Article 2.1 of the Safeguards Agreement;
 - (d) the Panel was correct in finding that the USITC’s causation analysis did not comply with Article 4.2(b) of the Safeguards Agreement; and
 - (e) the Panel was correct in its finding that the United States acted inconsistently with Article 2.1 of the Safeguards Agreement.
2. Australia requests the Appellate Body to uphold these findings by the Panel.

Unforeseen Developments

3. The United States claims that there is no requirement to reach a reasoned conclusion or even investigate “unforeseen developments”. Its appeal is based on the view that the Panel failed to respect the

proper relationship between Article XIX of GATT 1994 and the Safeguards Agreement.

4. It is clear from the general architecture of the WTO Agreement, the plain language of the Safeguards Agreement and past Appellate Body reports that Article XIX:1(a) of GATT 1994 must be interpreted cumulatively with the Safeguards Agreement rather than dividing the two into separate compartments. Such a compartmentalised approach would void the term “unforeseen developments” of any meaning or legal effect contrary to the principle of effectiveness in the interpretation of treaties.
5. Article 11.1(a) of the Safeguards Agreement requires Members taking safeguard action under Article XIX of GATT 1994 to ensure that such measures conform with the provisions of the Safeguards Agreement. Members applying safeguard measures must, therefore, satisfy the requirements of both Article XIX of GATT 1994 and the Safeguards Agreement, including Article 3.1 of the Safeguards Agreement, which requires investigating authorities to provide “reasoned conclusions”. The Appellate Body has found that “unforeseen developments” are “circumstances that must be demonstrated as a matter of fact”. The failure of the USITC to demonstrate such a conclusion is inconsistent with Article XIX:1(a) of GATT 1994.
6. The United States argues in the alternative that it demonstrated the existence of “unforeseen developments” as a matter of fact. This implies that an issue that was not investigated, examined or articulated by the USITC in its report can be discerned, presumably by making assumptions about the content of the report in its entirety. Such an approach suggests a high level of subjectivity that is at odds with the requirement to demonstrate “unforeseen developments”.
7. On this basis, Australia requests the Appellate Body to uphold the finding of the Panel that the United States acted inconsistently with Article XIX:1(a) of GATT 1994.

Domestic Industry

8. The United States claims that its test to define “domestic industry” with reference to the existence of a “continuous line of production” or a “substantial coincidence of economic interest” was appropriate in this case given the circumstances of the industry.
9. The United States’ test has no support either in the plain language of Article 4.1(c) of the Safeguards Agreement, interpreted in its context and in light of its object and purpose, or by previous panel decisions.
10. The meaning of “producer of a like product” is clear. The producers of *an article* are simply those who make *that* article. The United States also seeks to rely on the term producers “as a whole” to support its interpretation. This term, however, refers to the standard of the threat of serious injury or serious injury investigation that must be conducted *once the domestic industry has been identified*. It does not go to the issue of how to define the scope of the domestic industry.
11. The United States puts forward several additional tests, including “to bring into existence”, as alternatives. It remains a fact, however, that the United States’ tests fail to provide an objective standard that would ensure a high degree of certainty in relation to the definition of domestic industry.
12. Previous panel reports explicitly rejected considerations such as coincidence of economic interests or vertical integration as determining the scope of domestic industry.
13. The United States’ standard would lead to an open-ended approach which leaves to the discretion of importing Members how far upstream and/or downstream the production chain of a given “like” end product constitutes the “domestic industry”. It would provide for vague and highly subjective disciplines that could not serve as general principles of application.

14. Even if considerations such as vertical integration, continuous lines of production, economic interdependence or substantial coincidence of economic interests are relevant, the United States failed to demonstrate this as a matter of fact for growers and feeders of live lambs in relation to the domestic industry of lamb meat.
15. Australia, accordingly, requests that the Appellate Body uphold the Panel's finding that the USITC's definition of domestic industry was inconsistent with Article 4.1(c) of the Safeguards Agreement.

Data Representativeness

16. The United States claims that the Panel erroneously relieved Australia of the burden of establishing a violation of Article 4.1(c); that the Panel imposed a standard of data representativeness that does not exist in the Safeguards Agreement; and that the United States data collection was consistent with the provisions in the Safeguards Agreement.
17. Australia argues that the Panel's finding relates to the representativeness of the data rather than to data collection. The Panel concluded that the data used by the USITC in making its determination was not sufficiently representative of "those producers whose collective output...constitutes a major proportion of the total domestic production of those products" within the meaning of Article 4.1(c) and that its determination was, as a result, inconsistent with Article 2.1 of the Safeguards Agreement.
18. Australia claimed in its submission to the Panel that the safeguard measures imposed by the United States breached Article 4.2 of the Safeguards Agreement and, therefore, also breached Article 2.1 of the Safeguards Agreement. The inadequacy of the data was noted in Australia's submission, was acknowledged by the USITC and was reflected in the Panel's report. On this basis, it is clear that Australia did establish a prima facie case that the data relied upon was not sufficiently representative of the domestic industry. The Panel concluded that the violation of Article 2.1 had occurred and Australia

claims that the finding by the Panel in relation to Article 4.1(c) was related to the identification of the group for which the data needed to be representative.

19. The second claim by the United States amounts to an assertion that the Safeguards Agreement does not include a requirement that the data should be representative. Australia interprets the Panel’s finding as focused on the requirement implicit in Article 4.1(c) that the sample data used must be of a sufficient quantum to be representative of the producers as a whole.
20. The failure of the United States to consider sufficiently representative data means that “domestic industry” has, in the same way, not been considered. The terms “objective” and “quantifiable” imply a threshold on data representativeness. The Panel found, and the USITC acknowledged, that the sample it used was not statistically valid.
21. Even in light of what the United States argues is the relevant question – that the information gathered be objective and bear on the state of the industry – reliance on statistically invalid, incomplete and lacking data, as was the case in the USITC’s report, cannot be objective or have any meaningful bearing on the factors that must be considered under Article 4.2 (a).
22. Australia accordingly requests the Appellate Body to uphold the finding of the Panel that the data used as a basis for the USITC’s determination was not sufficiently representative within the meaning of Article 4.1(c) and that, as a result the United States was also in breach of Article 2.1 of the Safeguards Agreement.

Causation

23. The United States claims that the Panel erred in finding that the USITC’s causation analysis violated Article 4.2 (b) of the Safeguards Agreement. The main claim by the United States was that, as the *United States - Wheat Gluten* panel adopted the same approach to

causation as the Panel it should, therefore, be overturned on the basis of the Appellate Body’s report on *Wheat Gluten*.

24. Australia claims that the Panel’s findings are consistent with the Appellate Body’s causation test in *Wheat Gluten*. The requirement that there be a “genuine and substantial relationship” between increased imports and threat of serious injury implies more than a mere contribution to threat of serious injury. The Panel’s test of “necessary and sufficient cause” seeks to articulate such a standard, even if imports need not *by themselves* constitute threat of serious injury.
25. In any event, the United States failed to meet the causation standard set by the Appellate Body in *Wheat Gluten*. First, the United States failed to demonstrate as a matter of fact that any threat of serious injury caused by other factors had not been attributed to imports. Second, the USITC’s “substantial cause” approach could not, and in the circumstances of this case, did not, result in a valid determination of whether a “causal link” exists between increased imports and threat of serious injury, and whether this involved a “genuine and substantial relationship of cause and effect”.
26. On this basis, Australia requests the Appellate Body to uphold the Panel’s finding that the USITC’s causation analysis failed to comply with Article 4.2(b) of the Safeguards Agreement.

Article 2.1 of the Safeguards Agreement

27. Australia requests that, by virtue of its violations of Article 4 of the Safeguards Agreement, the Appellate Body uphold the Panel’s finding that the United States also acted inconsistently with Article 2.1 of the Safeguards Agreement.

II. UNFORESEEN DEVELOPMENTS

OVERVIEW

28. Australia submits that the Panel reached a legally correct conclusion at paragraph 8.1(a) of its report in relation to the issue of “unforeseen developments” and that its finding 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 1994¹ should be upheld.
29. The United States claims that the Panel erred in finding that it acted inconsistently with Article XIX:1(a) of GATT 1994 with respect to the issue of “unforeseen developments”. In the United States’ view: (i) the Panel’s determination that a competent authority must “reach a conclusion” demonstrating the existence of unforeseen developments was based on a misinterpretation of Article XIX:1(a) of GATT 1994 and Article 3.1 of the Safeguards Agreement; and (ii) the USITC investigation demonstrates the existence of “unforeseen developments”.²
30. The United States argues that a requirement to reach a conclusion is not found in the text of Article XIX:1(a) of GATT 1994, nor can such a requirement be read into Article XIX:1(a) by reference to Article 3.1 of the Safeguards Agreement. The United States considers that the Panel failed to respect the plain text of Article XIX:1(a), as well as the proper relationship between Article XIX:1(a) and the Safeguards Agreement. The United States explains that a “proper interpretation” applying the relevant principles of treaty interpretation to Article XIX:1(a) of GATT 1994 would demonstrate that “Members are not required to have their competent authorities investigate and reach ‘conclusions’ on the issue of unforeseen developments” as a

¹ WT/DS177/R, para. 7.45.

precondition for the application of safeguard measures.³ In the United States' view, this conclusion is confirmed by the practice of the Contracting Parties under GATT 1947 and the negotiating history of the Safeguards Agreement;

31. Australia considers that the United States' general assertion and supporting claims and arguments are without legal merit and should be rejected. In Australia's view:
- (i) Article XIX:1(a) of GATT 1994 must be interpreted cumulatively with the Safeguards Agreement, including Articles 3.1 and 11.1(a) of the Safeguards Agreement;
 - (ii) Article 11.1(a) of the Safeguards Agreement expressly requires that Members shall not take safeguard action under Article XIX of GATT 1994 “unless such action conforms with the provisions of that Article applied in accordance with [the Safeguards Agreement]”;
 - (iii) the Panel properly interpreted Article XIX:1(a) of GATT 1994 and Article 3.1 of the Safeguards Agreement in a manner that gave meaning and effect to all of the applicable provisions, including the clause “unforeseen developments”;
 - (iv) the Panel correctly concluded that Article XIX:1(a) of GATT 1994, read in the context of Article 3.1 of the Safeguards Agreement, requires the competent national authority, in its determination, to reach a conclusion demonstrating the existence of “unforeseen developments”; and
 - (v) the Panel correctly concluded that the USITC report did not contain the required conclusion on unforeseen developments.

² United States Appellant submission, pages 3, 4 and 10. In fact, although the United States refers to the USITC investigation, the reasoning in its submission refers exclusively to the USITC report.

³ United States Appellant submission, paras. 24 and 25.

32. In the event the Appellate Body rules that the Panel erred in its legal interpretation of Article XIX:1(a) of GATT 1994 , Australia submits that there are sufficient factual findings by the Panel for the Appellate Body to complete the analysis and find that the United States failed to “demonstrate as a matter of fact” unforeseen developments.
33. In the event the Appellate Body finds the United States' arguments to be sufficiently well-founded so as to warrant consideration of a reversal of the Panel’s ultimate finding that the United States acted inconsistently with Article XIX:1(a) of GATT 1994, Australia requests the Appellate Body to consider its conditional appeal that the Panel erred in finding that a change in the product mix and/or cut size of imported lamb meat could qualify as “unforeseen developments”.⁴
34. Australia also requests the Appellate Body to consider its conditional appeal concerning the Panel’s exercise of judicial economy, particularly in regard to Australia’s claim under Article 11 of the Safeguards Agreement.⁵

THE LEGAL INTERPRETATION OF “UNFORESEEN DEVELOPMENTS”

Article XIX:1(a) of GATT 1994 must be interpreted cumulatively with the Safeguards Agreement

35. The United States’ claim - that the Panel's determination that a competent Authority must “reach a conclusion” demonstrating the existence of unforeseen developments was based on a misinterpretation of Article XIX:1(a) of GATT 1994 and Article 3.1 of the Safeguards Agreement - is contrary to the general architecture of the WTO Agreement, including the specific provisions of the Safeguards Agreement. The Panel's interpretative approach is based on the correct application of fundamental principles relating to the

⁴ Australia’s Other Appellant’s submission, para. 81-92.

⁵ Australia’s Other Appellant’s submission, para. 94-101.

interpretation of treaties, and is fully consistent with the approach taken by the Appellate Body in *Argentina - Footwear* and *Korea - Dairy*.

36. The basis of the United States' claim rests on its argument that there is no specific requirement in Article XIX:1(a) of GATT 1994 for a competent authority to reach a conclusion on unforeseen developments, and that such a requirement cannot be read into Article XIX:1(a) by reference to Article 3.1 of the Safeguards Agreement. This argument is premised on a flawed reading of the relationship between Article XIX:1(a) of GATT 1994 and the Safeguards Agreement.
37. The GATT 1994 and the Safeguards Agreement are both Multilateral Agreements on Trade in Goods contained in Annex 1A of the WTO Agreement, and as such are equally binding on all Members pursuant to Article II:2 of the WTO Agreement. Article II:2 expressly manifests the intention of the Uruguay Round negotiators that the provisions of the WTO Agreement and the Multilateral Trade Agreements included in Annexes 1, 2 and 3 must be read as a whole.⁶ The Appellate Body in *Korea – Dairy* emphasised that: “It is important to understand that the *WTO Agreement* is *one* treaty”⁷ and that in light of the interpretative principle of effectiveness, it is the duty of any treaty interpreter to read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously. General principles of treaty interpretation also require that the provisions of each WTO Agreement be interpreted in the context of other relevant provisions in the same Agreement or other WTO Agreements.⁸
38. In the present case, however, the United States seeks to divide the one treaty into separate compartments. It states that:

“The Safeguards Agreement adds nothing to Article XIX:1(a) of the GATT 1994 when it comes to the question of unforeseen

⁶ WT/DS98/AB/R, para. 81.

⁷ WT/DS98/AB/R, para. 75.

⁸ *Canada – Automotive*, WT/DS139/AB/R, para. 140.

developments. Consequently, the treaty interpreter is to look only to Article XIX:1(a) when applying this provision.”⁹

39. This statement departs from the fundamental principle of “one treaty” established in Article II:2 of the WTO Agreement. As stated by the Appellate Body in *Argentina – Footwear*:

“[T]he provisions of Article XIX of the GATT 1994 and the provisions of the *Agreement on Safeguards* are all provisions of one treaty, the *WTO Agreement*. They entered into force as part of that treaty at the same time. They apply equally and are equally binding on all WTO Members. And, as these provisions relate to the same thing, namely the application by Members of safeguard measures, the Panel was correct in saying that “Article XIX of GATT and the Safeguards Agreement must *a fortiori* be read as representing an *inseparable package* of rights and disciplines which have to be considered in conjunction.” [Footnote omitted] Yet a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously. [Footnote omitted] And, an appropriate reading of this “inseparable package of rights and disciplines” must, accordingly, be one that gives meaning to *all* the relevant provisions of these two equally binding agreements.”¹⁰

Article 11.1(a) of the Safeguards Agreement

40. Not only does the United States’ argument run contrary to the principle of “one treaty”, but it is also based on a flawed understanding of the relationship between the Safeguards Agreement and Article XIX of GATT 1994. As noted by the Appellate Body in *Argentina - Footwear*, “the precise nature of the relationship between Article XIX of the GATT

⁹ Ibid.

¹⁰ WT/DS121/AB/R, para. 81

1994 and the *Agreement on Safeguards* within the *WTO Agreement* is described in Articles 1 and 11.1(a) of the *Agreement on Safeguards*¹¹.

41. Article 11.1(a) of the Safeguards Agreement obliges Members taking safeguard action under Article XIX of GATT 1994 to also satisfy the provisions of the Safeguards Agreement, including the requirements of Article 3.1. The plain language of Article 11.1(a) of the Safeguards Agreement is clear:

“A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article *applied in accordance with this Agreement.*” (emphasis added)

42. Contrary to the United States' view, the Panel correctly relied upon the interpretation provided by the Appellate Body on the relationship between Article XIX of GATT 1994 and the Safeguards Agreement.¹² The Panel expressly referred to the Appellate Body's ruling in *Korea – Dairy* that the requirements of Article XIX of GATT 1994 and the Safeguards Agreement apply on a *cumulative* basis and that any safeguard measure must satisfy the provisions of *both* Agreements:

“Article 1 states that the purpose of the *Agreement on Safeguards* is to establish “rules for the application of safeguard measures which shall be understood to mean *those measures provided for in* Article XIX of GATT 1994.” (emphasis added)
The ordinary meaning of the language of Article 11.1(a) – “unless such action conforms with the provisions of that Article applied in accordance with this Agreement” – is that any safeguard action *must conform* with the provisions of Article XIX

¹¹ WT/DS121/AB/R, para. 82. The relationship between the Safeguards Agreement and Article XIX is also emphasised in the preamble to the former which refers to, *inter alia*: “improve and strengthen the international trading system based on GATT 1994”, “the need to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products)” and “a comprehensive agreement applicable to all Members and based on the basic principles of GATT 1994”.

of the GATT 1994 *as well as* with the provisions of the *Agreement on Safeguards*. Thus, any safeguard measure imposed after the entry into force of the *WTO Agreement* must comply with the provisions of *both* the *Agreement on Safeguards* and Article XIX of the GATT 1994.”¹³

43. The United States’ argument that a treaty interpreter can only look to Article XIX:1(a) of GATT 1994 when applying that provision¹⁴ ignores the fundamental status of the WTO Agreement as *one* treaty and runs contrary to relevant legal interpretations and reasoning of the Appellate Body. As noted above, the Appellate Body has emphasised that “a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously”.¹⁵ Article XIX of GATT 1994 and the Safeguards Agreement are not to be consigned to “separate compartments”.
44. If accepted, the United States’ interpretative approach in respect to Article XIX:1(a) of GATT 1994 and Article 3.1 of the Safeguards Agreement would have the practical effect of voiding the clause “unforeseen developments” of any meaning or legal effect. The Panel’s approach, on the other hand, ensures that the clause is given meaning and legal effect by reading all of the applicable provisions “in a way that gives meaning to *all* of them, harmoniously”.

The Panel properly interpreted Article XIX:1(a) of GATT 1994 and Article 3.1 of the Safeguards Agreement in a manner that gave meaning and effect to all of the applicable provisions, including the clause “unforeseen developments”

45. The United States’ various arguments about “conditions” and “circumstances” are unconvincing and amount to nothing more than a thinly disguised attempt to void the term “unforeseen developments” of

¹² WT/DS177/R, para. 7.10 - 7.11

¹³ WT/DS98/AB/R, para. 77.

¹⁴ United States Appellant submission, para. 19

¹⁵ WT/DS121/AB/R, para. 81.

any effective meaning. The United States argues that the “unforeseen developments” language in Article XIX:1(a) of GATT 1994 is not an “independent condition” and that the language “describes certain *circumstances* which must be demonstrated as a matter of fact” in order to apply a safeguard measure.¹⁶ Taken alone, these statements appear to accord with a harmonious interpretation of the applicable provisions. In *Korea – Dairy*, the Appellate Body report stated:

“Although we do not view the first clause in Article XIX:1(a) as establishing independent *conditions* for the application of a safeguard measure, additional to the *conditions* set forth in the second clause of that paragraph, we do believe that the first clause describes certain *circumstances* which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994. In this sense, we believe that there is a logical connection between the circumstances described in the first clause – “as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions ...” – and the conditions set forth in the second clause of Article XIX:1(a) for the imposition of a safeguard measure.”¹⁷

46. In developing its argument, however, the United States attempts to strip the “unforeseen developments” clause of any practical meaning by misconstruing the Appellate Body’s use of the term “circumstance”. The United States argues that:

“Because they are circumstances, the unforeseen developments that result in an injurious import surge will normally manifest themselves in the factual findings underlying the competent authority’s determination that the injurious surge exists. Stated differently, the factual findings and “reasoned conclusions”

¹⁶ United States Appellant submission, para. 10.

¹⁷ WT/DS98/AB/R, para. 85.

demonstrating the existence of increased imports, serious injury or threat and causal link will normally also demonstrate the unforeseen developments as a matter of fact. And if this is true in a particular case, then nothing more is required.”¹⁸

- 47 The United States seems to be arguing that provided relevant “circumstances” that qualify as “unforeseen developments” can be discerned in some way from factual findings underlying the competent authority’s determination pursuant to Article 4 of the Safeguards Agreement, then the requirement in Article XIX:1(a) of GATT 1994 to demonstrate “unforeseen developments” as a matter of fact will have been met.
48. The legal and logical flaws in this line of reasoning stem from the United States’ erroneous view that Members are only required to demonstrate the existence of unforeseen developments on an *ex post facto* basis.
49. The United States’ narrow construction of the scope and application of “unforeseen developments” finds no support in the relevant provisions, nor in the interpretation of those provisions by the Appellate Body. The existence of “unforeseen developments” is a threshold issue in launching a safeguards investigation, which the authority conducting the investigation must address. If an *ex post facto* approach is adopted, then it would be possible for a Member to proceed with the application of a safeguard measure not on the basis that it had properly addressed the issue of “unforeseen circumstances” but in the hope that it may be able to do so in the event of a dispute.
50. Australia submits that WTO Members cannot pick and choose the provisions of Article XIX of GATT 1994 and the Safeguards Agreement with which they will comply. This would run counter to the fundamental principle of treaty law expressed in Article 26 (*Pacta sunt servanda*) of the Vienna Convention on the Law of Treaties which provides that:

¹⁸ United States Appellant submission, para. 22.

“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

51. As a final observation on this aspect of the United States' arguments, Australia notes an apparent contradiction in the views that have been put forward by the United States. As indicated in the Panel Report, the United States appeared to consider during the Panel proceedings that in order to satisfy the “unforeseen developments” requirement of Article XIX of GATT 1994, it was “sufficient to demonstrate the existence of unforeseen developments upon challenge before a WTO panel provided that the relevant factual circumstances *were considered* by competent authorities *at the time of the determination* and that *such consideration is discernible* from the report published by the USITC”.¹⁹ (emphasis added)
52. However, as indicated above, the United States has argued in its Appellant submission that “Members are not required to have their competent authorities investigate and reach ‘conclusions’ on the issue of unforeseen developments” and that “the ‘unforeseen developments’ language in Article XIX:1(a) was not meant to require an investigation and ‘conclusion’ as a *precondition* for the application of safeguards measures”.²⁰ (emphasis added)
53. Indeed, in response to the Panel's written question asking the United States to explain its “apparent view that no finding of ‘unforeseen developments’ is necessary for this provision to be fulfilled” and “if no such finding is necessary, how can compliance with this provision be reviewed”, the United States confirmed its view that “the competent authorities are not required to find the existence of ‘unforeseen developments’ in the course of their investigation”.²¹ In a footnote to its response to this question, the United States explained that if there were

¹⁹ WT/DS177/R, para. 7.7

²⁰ United States Appellant submission, paras. 24 and 25

²¹ WT/DS177/R, pages A-367-88, para 14.

a requirement to conduct such an investigation, then this would take a “considerable time” and require “an entirely new investigation”.

54. On the basis of the United States’ own admissions, there would appear to be little doubt that the USITC does not generally *investigate, examine or even consider* the issue of “unforeseen developments” in the conduct of its usual investigation, and did not do so in the lamb meat investigation. If this observation is correct, then there would appear to be no possible factual basis for the United States’ claim that “the USITC investigation demonstrates the existence of unforeseen developments as a matter of fact”. Moreover, in the absence of any such consideration by the USITC, it is equally difficult to understand how “*such consideration*” could ever be “*discernible* from the report published by the USITC”.

The Panel correctly concluded that Article XIX:1(a) of GATT 1994, read in the context of Article 3.1 of the Safeguards Agreement, requires the competent national authority, in its determination, to reach a conclusion demonstrating the existence of "unforeseen developments"

55. The United States argues that a proper interpretation of Article XIX:1(a) of GATT 1994, in the context of the entirety of the Safeguards Agreement, confirms its views that competent authorities are not required to reach a “reasoned conclusion” on the issue of unforeseen developments as a condition for applying a safeguard measure. To support this argument, the United States applies an erroneously narrow interpretation of Article XIX of GATT 1994 read in the context of Article 3.1 of the Safeguards Agreement.
56. By setting out detailed requirements on the conduct of a safeguard investigation and the publication of a report setting out findings and reasoned conclusions on all pertinent issues of fact and law, Article 3.1 is a fundamental provision underpinning the multilateral enforcement of

obligations under Article XIX of GATT 1994 and the Safeguards Agreement.²²

57. In the absence of specific investigation and publication requirements, importing Members would not be required to provide any justification or explanation for the application of a safeguard measure. Indeed, in using such an approach the first time an exporting Member could expect to be provided reasons by the Member imposing the safeguard measure would be in a WTO panel process. It would also go against the certainty and predictability of the multilateral trading system if importing Members could unilaterally impose safeguard measures at will without providing any reasons or explanation.
58. The importance of the publication requirement in Article 3.1 of the Safeguards Agreement was acknowledged by the Panel in reaching its conclusion on this issue. The Panel observed that the “semantic structure of GATT Article XIX suggests that a demonstration of the existence of the circumstance of ‘unforeseen developments’ must be based on factual evidence which was before the competent authority *at the time* when the investigation was carried out and considered by that authority before the determination to apply a safeguard measure was made”.²³ Based on this reasoning, the Panel correctly concluded that “it must be clear from the published report that the investigating authorities examined the existence of unforeseen developments and came to a reasoned conclusion in this regard”.²⁴
59. The Panel’s reasoning in this regard is consistent with the approach that has been taken by the Appellate Body. In *Argentina – Footwear*, the Appellate Body interpreted the clause “as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions” to describe “certain

²² SG Article 4.2(c) also requires competent authorities to publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.

²³ WT/DS177/R, para. 7.27.

²⁴ WT/DS177/R, para. 7.29

circumstances which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994”.²⁵ The Appellate Body made it clear that the demonstration must take place in each and every case, and as such, falls within the meaning of the phrase “all pertinent issues of fact and law”.

60. In *Argentina – Footwear*, although the Appellate Body did not consider it necessary to complete the panel’s analysis on the EC’s claim regarding Article XIX of GATT 1994, it indicated clearly that it would have done so by “ruling on whether the Argentine Authorities have, *in their investigation*, demonstrated that the increased imports in this case occurred “as a result of unforeseen developments”.²⁶ The Appellate Body also observed in *Wheat Gluten*, that investigating authorities “should carry out a systematic inquiry” into the matter before them and must “actively seek out pertinent information”.²⁷
61. The Panel was, therefore, correct in concluding that the existence of “unforeseen developments” was a matter that should have been addressed by the USITC at the time of its investigation and included in its published report. Australia notes that the USITC report does, in fact, address the other “circumstance” that is required to be demonstrated pursuant to Article XIX:1(a) of GATT 1994, namely that “the importing Member has incurred obligations under the GATT 1994, including tariff concessions”.²⁸ If the existence of “unforeseen developments” was not addressed by the USITC during its lamb meat investigation then it is difficult to accept the United States’ contention that the existence of an issue that was *not* investigated, examined or even considered by the USITC can somehow be “discerned” from its published report.

²⁵ WT/DS121/AB/R, para. 92.

²⁶ WT/DS121/AB/R, para. 98.

²⁷ WT/DS166/AB/R, para. 53.

²⁸ USITC Report, at II-8

“Conditions” and “circumstances”

62. The United States has also erroneously claimed that the Panel's finding “effectively nullifies the distinction that the Appellate Body has recognised between ‘conditions’ for applying a safeguard measure and ‘circumstances’ that must be demonstrated as a matter of fact”.²⁹ The United States alleges that the Panel failed to appreciate the view expressed by the Appellate Body in *Argentina - Footwear* and *Korea - Dairy* that the “unforeseen developments language in GATT Article XIX:1(a) does not create an independent condition for applying a safeguard measure”.³⁰ The United States argues that by requiring a conclusion to be reached, the Panel had turned a “circumstance” that needs to be demonstrated into an independent “condition” for the application of a safeguard measure.
63. Australia submits that the argument of the United States is based on a false premise. First, the Panel clearly distinguishes between “independent conditions” and a “factual circumstance” and notes that the latter term could be read to imply a lesser threshold than the former.³¹ The Panel also notes that the parties do not dispute that “a demonstration of the existence of ‘unforeseen developments’ is a legal requirement”. Second, the Panel concluded that Article XIX:1(a) of GATT 1994, read in the context of Article 3.1 of the Safeguards Agreement, implies that it must be clear from the published report that the investigating authorities examined the existence of unforeseen developments and came to a reasoned conclusion in this regard. In confirming its conclusion on this point, the Panel stated that Article XIX:1(a) of GATT 1994 requires “the competent national authority, in its determination, to reach a conclusion demonstrating the existence of ‘unforeseen developments’”.³²

²⁹ United States Appellant submission, para. 10.

³⁰ United States Appellant submission, para. 20 and 21.

³¹ WT/DS177/R, para. 7.19.

³² WT/DS177/R, para. 7.31.

64. By interpreting Article XIX:1(a) of GATT 1994 in the context of Article 3.1 of the Safeguards Agreement as opposed to Article 4.2(c) (which also imposes a publication requirement), the Panel recognised the distinction between the different requirements set forth in those provisions. Article 3.1 of the Safeguards Agreement provides that Members may only apply a safeguard measure following an *investigation* by the competent authorities, and requires the competent authorities to *publish a report* setting forth their *findings and reasoned conclusions* reached on *all pertinent issues of fact and law*. Article 4 contains a narrower, but more onerous, obligation, that read in conjunction with Article 2, requires the competent authorities to “evaluate all relevant factors” in the context of “the investigation to determine whether increased imports have caused or are threatening to cause serious injury” and to publish a “detailed analysis of the case under investigation as well as a demonstration of the factors examined”.
65. The Appellate Body in *Argentina - Footwear* and *Korea - Dairy* noted that the second clause in GATT Article XIX:1(a) contained three conditions for the application of safeguard measures and that those conditions are reiterated in Article 2.1 of the Safeguards Agreement.³³ The Appellate Body has also correctly confirmed that the provisions of Articles 2 and 4 of the Safeguards Agreement, taken together, set forth the conditions for imposing a safeguard measure³⁴. In *Wheat Gluten*, the Appellate Body indicated that relevant provisions in Articles 2 and 4 lay down the rules governing “a single determination, made under Article 4.2(a)” that a competent authority must undertake.³⁵
66. Accordingly, there is a significant difference in the nature of the obligation with regard to “unforeseen developments” set forth in the first clause of Article XIX:1(a) of GATT 1994, read in the context of Article 3 of the Safeguards Agreement, and the obligation with regard to the

³³ WT/DS98/AB/R, para. 85, WT/DS121/AB/R, para. 92

³⁴ WT/DS166/AB/R, para. 71

³⁵ WT/DS166/AB/R, para. 73.

three “independent conditions” set forth in the second clause of Article XIX:1(a) of GATT 1994 and Articles 2 and 4 of the Safeguards Agreement. To satisfy the “*conditions*” imposed under Articles 2 and 4, the competent authority must make a *determination* that includes an “*evaluation*” of “*all relevant factors*” and must also publish a “detailed analysis of the case under investigation as well as a demonstration of the factors examined”.

67. On the other hand, in order to satisfy the “unforeseen developments” obligation, the Panel concluded that a competent authority is only required to examine the existence of unforeseen developments based on factual evidence before it at the time the investigation was made, and to reach a conclusion based on that evidence, that demonstrates the existence of “unforeseen developments” as a matter of fact. The Panel also found that this conclusion must be presented, in some manner, in the competent authority’s report.
68. The United States relies on the fact that the Panel found that “a *conclusion* was necessary” as the basis for its claim that the Panel’s finding effectively nullifies the distinction recognised by the Appellate Body between “conditions” and “circumstances”. This argument is unsustainable given the more onerous requirements imposed on competent authorities in relation to the three “independent conditions” as compared to the requirements to demonstrate that necessary circumstances exist, and the different approach taken by the Panel in assessing whether the United States had fulfilled its respective obligations with regard to these two different requirements. Accordingly, the United States’ claim is without merit and should be rejected.

Past practice under GATT 1947 and the negotiating history of the Safeguards Agreement

69. In support of its view on the “proper interpretation” of Article XIX of GATT 1994 and Article 3.1 of the Safeguards Agreement, the United States points to the practice of contracting parties under GATT 1947 and the negotiating history of the Safeguards Agreement.
70. The current issue is not a claim under GATT 1947, but under Article XIX of the GATT 1994 and the Safeguards Agreement. The relevance of the practice of Contracting Parties under GATT 1947 - when the multilateral rules on safeguards have been substantially clarified and reinforced by the WTO Safeguards Agreement is therefore highly questionable. As pointed out by the Appellate Body in *Korea – Dairy*, “any safeguard measure imposed after the entry into force of the WTO Agreement must comply with the provisions of *both* the *Agreement on Safeguards* and Article XIX of the GATT 1994”.³⁶
71. Australia also recalls that since there were no notification obligations under GATT 1947 beyond notifying the simple fact that a measure was to be imposed, the lack of detail on “unforeseen developments” and other issues in the notifications to the GATT Council is not indicative of what contracting parties considered to be obligations under Article XIX of GATT 1947.
72. The United States invokes Article 32 of the Vienna Convention on the Law of Treaties as a basis for its reference to the negotiating history of the Safeguards Agreement. Article 32 provides:

“Recourse may be had to *supplementary* means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, *in order to confirm the meaning resulting from the application of article 31*, or to determine the meaning when interpretation according to article

³⁶ WT/DS98/AB/R, para. 77.

31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”

[emphasis added]

73. Article 31.1 of the Vienna Convention on the Law of Treaties requires a treaty to be interpreted in good faith “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”.
74. The ordinary meaning in the present case is clear. Article 11.1(a) of the Safeguards Agreement provides that a Member cannot apply safeguard measures under Article XIX of GATT 1994 “unless such action conforms with the provisions of that Article *applied in accordance with this Agreement*”, including Article 3.1. This specific relationship between Article XIX of GATT 1994 and the provisions of the Safeguards Agreement is also confirmed by Article 1 and the preamble to the Safeguards Agreement. Supplementary means of interpretation such as negotiating history cannot be used to overturn the ordinary meaning of the terms.
75. In any event, the United States offers no evidence that Members have sought to affirmatively nullify “unforeseen developments” in either the Safeguards Agreement or Article XIX of GATT 1994. The mere fact that redundant language was dropped in negotiations is not dispositive. The Appellate Body in *Argentina – Footwear* also reversed the panel’s finding that the Uruguay Round negotiators “expressly omitted” the clause – “as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions” – from Article 2 of the Safeguards Agreement.³⁷

³⁷ WT/DS121/AB/R, para. 97.

The United States’ arguments on Article 2.1 of the Safeguards Agreement

76. The United States argues that Article 2.1 of the Safeguards Agreement does not refer to “unforeseen developments” and that the Appellate Body has recognised that the requirement for “unforeseen developments” is contained in Article XIX:1(a) of GATT 1994 and not Article 2.1 of the Safeguards Agreement.³⁸ This clearly misconstrues the Appellate Body’s reasoning in *Korea – Dairy*. The Appellate Body in that case stated that:

“The task before us in this appeal is *not* to interpret Article 2.1 of the *Agreement on Safeguards*, but *rather* to interpret Article XIX:1(a) of the GATT 1994. This appeal by the European Communities relates to the panel’s rejection of the claim by the European Communities that Korea violated the provisions of Article XIX:1(a) of the GATT 1994 by failing to examine whether the alleged increase in imports was “as a result of unforeseen developments”. ”³⁹

77. Similarly, the issue in the present dispute is *not* how Article 2.1 of the Safeguards Agreement should be interpreted, but whether the Panel correctly concluded that the United States failed to comply with the requirement of “unforeseen developments” in Article XIX:1(a) of GATT 1994.

78. The Appellate Body in *Argentina – Footwear* also reversed the panel’s finding that safeguard measures imposed after entry into force of the WTO Agreement which meet the requirements of the Agreement on Safeguards necessarily “satisfy” the requirements of Article XIX of GATT 1994.⁴⁰

³⁸ United States Appellant submission, para. 19.

³⁹ WT/DS98/AB/R, para. 79.

⁴⁰ WT/DS121/AB/R, para. 97.

THE PANEL'S FINDINGS OF FACT

The Panel correctly concluded that the United States failed to demonstrate as a matter of fact the existence of “unforeseen developments”

79. The United States makes the claim that “to the extent that the factual record in the instant case is clear and uncontested, it demonstrates the existence of unforeseen developments as matter of fact.”⁴¹ Australia notes that the United States does not claim that the USITC investigated or examined the existence of “unforeseen developments” nor that the USITC came to a reasoned conclusion in this regard. Presumably, the United States' claim is based on the alternative “proper interpretation” developed in its submission, i.e. that “Members are not required to have their competent authorities investigate and reach ‘conclusions’ on the issue of unforeseen developments” and that the role of a panel is simply to consider “whether the Member taking the safeguard measure has demonstrated the existence of unforeseen developments as a matter of fact”.
80. The United States claim is therefore conditional upon a reversal by the Appellate Body of the Panel's legal interpretation of Article XIX:1(a) of GATT 1994. Accordingly, if the Appellate Body upheld the Panel's legal interpretation, then there is no need to consider the matter further and the United States' claim must fail.
81. As explained above, Australia considers that the Panel correctly interpreted Article XIX of GATT 1994, and reached a correct conclusion of inconsistency based on its findings that the USITC report did not contain a conclusion on “unforeseen developments”.
82. In the event, however, that the Appellate Body finds a sufficient basis in the United States' argument to hold that the Panel erred in its legal interpretation of Article XIX of GATT 1994, Australia considers that

⁴¹ United States Appellant submission, para. 33.

there are sufficient factual findings of the Panel and undisputed facts in the Panel record for the Appellate Body to conclude that the United States failed to “demonstrate unforeseen developments as a matter of fact” on the basis of any alternative interpretation of that requirement.

83. The Panel’s factual findings are located at paragraphs 7.38-43 of its Report. In summary, the Panel found:
- (i) the United States did not identify 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 and was unforeseen;⁴²
 - (ii) 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;⁴³
 - (iii) the question of the change in product mix is also addressed in a purely descriptive manner in the section on “conditions of competition”. It is not characterised as unforeseen or unexpected, or in any other way, and seems only to address the degree of substitutability of imported and domestic lamb meat;⁴⁴ and
 - (iv) the increase in cut size of imported meat during the investigation period is addressed in a purely descriptive manner in the section on “conditions of competition”.⁴⁵
84. The Panel’s factual findings were not limited to whether the USITC report reached a reasoned conclusion on “unforeseen developments”. The Panel also found that the USITC statements concerning the change in product mix or the increase in cut size “*on their face, are*

⁴² WT/DS177/R, para. 7.39.

⁴³ WT/DS177/R, para. 7.39.

⁴⁴ WT/DS177/R, para. 7.40.

⁴⁵ WT/DS177/R, para. 7.41.

simple descriptive statements”.⁴⁶ Australia submits that the requirement in Article XIX:1(a) of GATT to “demonstrate as a matter of fact” unforeseen developments entails, at a minimum, something more than mere descriptive statements, and that the United States failed to meet this minimum requirement.

85. The United States argues in its submission that factual findings and reasoned conclusions demonstrating the existence of increased imports, serious injury or threat and causal link will normally also demonstrate the unforeseen developments as a matter of fact.⁴⁷ This clearly seeks to merge cause and effect in that every increase in imports and every of threat of serious injury is *presumed* to be unforeseen. Once again, the approach proposed by the United States would have the effect of voiding that clause in Article XIX of GATT 1994 of any meaning.
86. The United States refers in its submission to certain USITC findings that relate to the question of *remedy*, and not to findings made by the USITC in determining whether increased imports have caused or are threatening to cause serious injury to a domestic industry.⁴⁸ The United States also seeks to rely on the Panel’s statement that the statistics in the USITC report “may suggest that the USITC viewed these changes as unforeseen developments”. Australia submits that the Panel was simply speculating on what could or could not have been the case. The words “*may*” and “*suggest*” hardly indicate a definitive conclusion on the part of the Panel. Moreover, the fact that USITC may have “viewed” these changes as unforeseen developments does not mean that the USITC report *on its face* “demonstrated as a matter of fact” unforeseen developments.
87. Finally, Australia refers to the conditional appeal set out in its Other Appellant’s submission on this issue. In the event the Appellate Body

⁴⁶ WT/DS177/R, para. 7.43.

⁴⁷ United States Appellant submission, para. 22.

⁴⁸ United States Appellant submission, para. 37 and 38, footnotes 38 and 39.

finds the United States’ arguments to be sufficiently well-founded so as to warrant consideration of a reversal of the Panel’s ultimate finding of inconsistency with Article XIX:1(a) of GATT 1994, Australia requests the Appellate Body to consider its conditional appeal that the Panel erred in finding that a change in the product mix and/or cut size of imported lamb meat could qualify as “unforeseen developments”.

CONCLUSION

88. Australia submits that the United States’ claim that the Panel erred in finding it acted inconsistently with Article XIX:1(a) of GATT 1994 with respect to the issue of “unforeseen developments” is legally unfounded:
- (i) the Panel correctly concluded that prior to applying a safeguard measure, the United States was required to reach a reasoned conclusion on the existence of “unforeseen developments”, and that such a conclusion was required to be demonstrated in the report of its competent authority; and
 - (ii) the Panel correctly concluded that USITC report did not contain the required conclusion on unforeseen developments.
89. If the Appellate Body reverses the Panel’s interpretation of Article XIX of GATT 1994, Australia submits that there are sufficient factual findings of the Panel and undisputed facts in the Panel record for the Appellate Body to complete the analysis and find that the United States failed to satisfy the “unforeseen developments” requirement in Article XIX:1(a) of GATT 1994 on the basis of any alternative interpretation that might apply.
90. Accordingly, Australia requests the Appellate Body to uphold the Panel’s conclusion at paragraph 8(a) of its report that the United States acted inconsistently with Article XIX:1(a) of GATT 1994.
91. In the event that the Appellate Body finds the United States’ arguments to be sufficiently well-founded as to warrant consideration of a reversal

of the Panel’s ultimate conclusion that the United States acted inconsistently with Article XIX:1(a) of GATT 1994, Australia requests the Appellate Body to consider its conditional appeal that the Panel erred in finding that a change in the product mix and/or cut size of imported lamb meat could qualify as “unforeseen developments”.⁴⁹ Australia also requests the Appellate Body to consider its conditional appeal concerning the Panel’s exercise of judicial economy, particularly in regard to Australia’s claim under Article 11 of the Safeguards Agreement.⁵⁰

III. DOMESTIC INDUSTRY

OVERVIEW

92. Australia submits that the United States’ claim that the Panel made an error of law in its definition of the “domestic industry” producing lamb meat is legally unfounded. The United States’ reliance on a test to define “domestic industry” based on whether there is a “continuous line of production” or a “substantial coincidence of economic interest” has no support either in the plain language of Article 4.1(c) of the Safeguards Agreement, interpreted in its context and in light of its object and purpose, or by previous panel decisions. Australia submits it would also lead to an open-ended approach to industry definition.
93. In the event that the Appellate Body finds that considerations such as vertical integration, continuous lines of production, economic interdependence or substantial coincidence in economic interests are relevant to the definition of domestic industry, the Panel has made findings of fact that this was not demonstrated by growers and feeders of live lambs in relation to lamb meat.

⁴⁹ Australia’s Other Appellant’s submission, para. 81-92.

⁵⁰ Australia’s Other Appellant’s submission, paras. 94 - 101

94. On this basis, Australia requests the Appellate Body to uphold the Panel’s finding that the USITC’s inclusion of growers and feeders of live lambs in the definition of producers of lamb meat was inconsistent with Article 4.1(c) and also with Article 2.1 of the Safeguards Agreement.

INTERPRETATION OF “DOMESTIC INDUSTRY”

The interpretation of Article 4.1(c) of the Safeguards Agreement

95. Article 4.1(c) provides 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.”

96. The United States does not dispute that the “like product” in the present case is lamb meat. Nor did the USITC report make any finding concerning whether live lambs were “directly competitive” with imported lamb meat. The question is whether growers and feeders of live lambs are “producers” of the like product, lamb meat. This is a matter of interpretation to be addressed in accordance with the customary rules of treaty interpretation, and in particular with the principles contained in Article 31 and 32 of the Vienna Convention on the Law of Treaties.

The ordinary meaning of the terms

“Producer of a like product”

97. As stated by the Panel, the meaning of “producer of a like product” is clear. The producers *of an article* are simply those who make *that* article.
98. There is nothing in the plain language of Article 4.1(c) of the Safeguards Agreement that supports the test advocated by the United

States involving “continuous line of production” or “substantial coincidence of economic interest”. A producer of raw materials or inputs used in the production of further processed goods is a producer of those raw materials or inputs, and not of the final finished product that it does not ever produce.⁵¹

99. Australia submits that the Panel correctly concluded that growers and feeders were not part of the domestic industry producing lamb meat:

“Applying the 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.”⁵²

100. It is Australia’s view that this analysis alone would be conclusive of the issue in the present case. However, the Panel goes on to further articulate two relevant factors for determining the scope of domestic industry:

- (i) whether the products at various stages of production are *different forms of a single like product* or have become *different products*; and
- (ii) whether it is possible to *separately identify* the production process for the like product at issue, or whether instead common ownership results in *such complete integration* of

⁵¹ WT/DS177/R, para. 7.69-7.70.

⁵² WT/DS177/R, para. 7.71.

production processes that *separate identification and analysis of different production stages is impossible*.⁵³

101. The Panel found that in the present case, the product live lambs was transformed into a *different* end-product, i.e. lamb meat;⁵⁴ and that it was possible to *separately identify* the different physical stages of the production process.⁵⁵
102. The Panel also went on to find that, even if vertical integration and common ownership was relevant, the United States had failed to demonstrate this on the facts: there was little vertical integration of growing and feeding operations with packing and breaking operations; it was possible to separately identify the different physical stages of the production process; and there was relatively little vertical integration in the sense of common ownership between growers, feeders, packers and breakers of lamb.⁵⁶
103. The United States’ argument that, under this test producers who produce automobile bodies do not fall within the scope of the domestic industry producing automobiles, is therefore not apposite.⁵⁷ Most producers of automobiles would satisfy the Panel’s second test in relation to automobile bodies, i.e. common ownership results in such integration of production processes that separate identification and analysis of different production stages is impossible.

Producers “as a whole” and “relevant factors”

104. The United States seeks to rely on the term producers “*as a whole*” to support its interpretation. Australia submits that this term cannot, by itself, justify a broad definition of domestic industry as argued by the United States.⁵⁸ The provisions of Article XIX of GATT 1994 and the

⁵³ WT/DS177/R, para. 7.95.

⁵⁴ WT/DS177/R, para. 7.85.

⁵⁵ WT/DS177/R, para. 7.96.

⁵⁶ WT/DS177/R, para. 7.96.

⁵⁷ United States Appellant submission, para. 129.

⁵⁸ United States Appellant Submission, para. 123.

Safeguards Agreement must be interpreted narrowly in light of their objective of providing “extraordinary” remedies.

105. The United States also argues that the term “producer” must be referenced to Article 4.2(a) of the Safeguards Agreement, in particular the requirement that the competent authority examine “all relevant factors”.⁵⁹ Article 4.2(a) states *inter alia*: “the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of *that industry*”. The provision then goes on to list several factors such as the rate and amount of the increase in imports of the product, the share of the domestic market taken by increased imports, and changes in the level of sales, production and productivity.
106. Article 4.2(a) of the Safeguards Agreement, therefore, sets out the standard of the serious injury or threat of serious injury investigation that must be conducted, *once the domestic industry has been identified*. It has nothing to do with which firms or enterprises should be included in that industry. Moreover, factors such as the rate and amount of the increase in “imports of the product” support a narrow interpretation of domestic industry given that it is the *imports of the “like product”* which are relevant.

In light of the object and purpose of the treaty

107. The term “domestic industry” must be interpreted in light of the object and purpose of Article XIX of GATT 1994 and the Safeguards Agreement. Given that the remedy provided by Article XIX of GATT 1994 is the temporary suspension or modification of obligations and concessions, safeguard measures must be regarded as “emergency” measures providing for “extraordinary” remedies. As stated by the Appellate Body in *Argentina – Footwear*:

⁵⁹ United States Appellant Submission, para. 125.

“[T]he text of Article XIX:1(a) of the GATT 1994, read in its ordinary meaning and its context, demonstrates that safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, “emergency actions” ... The remedy that Article XIX:1(a) allows in this situation is temporary to “suspend the obligation in whole or in part or to withdraw or modify the concession”. Thus, Article XIX is clearly, and in every way, an extraordinary remedy.”⁶⁰

108. The Appellate Body goes on:

“In perceiving and applying this object and purpose to the interpretation of this provision of the *WTO Agreement*, it is essential to keep in mind that a safeguard action is a “fair” trade remedy. The application of a safeguard measure does not depend upon “unfair” trade actions, as is the case with anti-dumping or countervailing measures. Thus, the import restrictions that are imposed on products of exporting Members when a safeguard action is taken must be seen, as we have said, as extraordinary. And when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account.”⁶¹

109. The preamble to the Safeguards Agreement recognises the need, *inter alia*, to “clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX” and to “re-establish multilateral control over safeguards and eliminate measures that escape such control”. It also recognises the “importance of structural adjustment and the need to enhance rather than limit competition in international markets”.

⁶⁰ WT/DS121/AB/R, para. 93.

⁶¹ WT/DS121/AB/R, para. 94.

110. Accordingly, Australia submits that the terms “domestic industry” and “producers as a whole of the like ... products” must be interpreted *narrowly* in view of the extraordinary nature of safeguard measures.

The United States’ standard would lead to an open-ended approach to industry definition

111. An approach which leaves it to the discretion of importing Members how far upstream and/or downstream the production chain of a given “like” end product constitutes the “domestic industry” would not be consistent with the object and purpose of the Safeguards Agreement. It would result in an open-ended approach which would go against the security and predictability of multilateral control. Competent authorities would simply be able to tailor the scope of domestic industries as they saw fit to include a wide combination of upstream or downstream firms or enterprises.

112. Such a broad test would also significantly undermine the serious injury or threat of serious injury requirement for the application of safeguard measures. It would be open to importing Members to adjust the scope of domestic industry and then claim serious injury in terms of the *cumulative* number of upstream or downstream companies affected.

113. In its Appellant submission, the United States argues that the definition of “produce” includes “to bring into existence” and that “growers and feeders certainly bring lamb meat into existence”.⁶² None of the tests suggested by the United States - continuous lines of production, economic interdependence or substantial coincidence in economic interests - provide an objective or quantifiable standard which can serve to limit the definition of domestic industry.

114. The Panel noted that if a criterion for value-added at different stages of the production chain was relevant “we do not see how a cut-off percentage for such a test could be defined, nor at what level”.⁶³ In the

⁶² United States Appellant Submission, para. 128.

⁶³ WT/DS177/R, para. 7.108.

present case, the United States argued that live lambs constituted 88 per cent of the wholesale value of the final product (lamb meat). Would live lambs still constitute part of the lamb meat domestic industry if it comprised only 60 per cent of the wholesale value of lamb meat, or 40 per cent, or 20 per cent?

115. Similarly, it would be difficult to define an economic interdependence standard given that all upstream enterprises and downstream processors of a given product are to a certain extent interdependent. Would producers of the raw material be less interdependent if there were alternative uses for the raw material? If so, what percentage of an input producer’s sales must comprise these alternative uses for it to be no longer interdependent with processors of a given product? The essence of the United States’ arguments is that the inclusion of upstream enterprises is not mandatory but at the discretion of the Member.
116. This is demonstrated at paragraph 130 of the United States’ Appellant submission and the USITC report. The USITC report finds:
- “In the United States, *most* sheep and lambs are meat-type animals kept *primarily* for the production of lambs for meat ... Except for lambs withheld for breeding purposes, *virtually all* meat-type lambs are shipped to feeders in the fall, where they are fed for between 30 and 120 days. They are then *generally* shipped to lamb packers for slaughter.”⁶⁴ [emphasis added]
117. This includes highly subjective concepts. Do the terms “most”, “primarily”, “generally” and “virtually all” mean 70 per cent of production, or only over 50 per cent? Does “most” and “virtually all” imply a higher percentage than “primarily” or “generally”? Would the standard be satisfied where there were a number of alternative uses for the product, but where one was simply the most important in relative terms? Given this compounding of undefined probabilities, the actual

⁶⁴ USITC Report, at I-5.

percentage of lambs produced by lamb growers, that are finally processed and sold as lamb meat, is not able to be quantified.

118. The Panel notes that 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. Depending on the allocation of market power in the manufacturing and processing chain, the opposite may also be true and producers of the final product dependent on producers of raw materials or intermediate inputs.⁶⁵
119. Moreover, the interests of enterprises in different industry segments may coincide regardless of whether they are involved in a continuous line of production, whether there is one or more inputs into a final product, and whether an input is wholly dedicated to a single final product. Interests may coincide even if enterprises are engaged in *entirely unrelated* economic activities. There is also no certainty that economic interests of enterprises necessarily coincide even if there is a continuous line of production from an input which is wholly dedicated to one final product which is composed of only that input.⁶⁶
120. In summary, Australia submits that the definition of domestic industry suggested by the United States provides for vague and highly subjective disciplines which cannot serve as general principles of application. The fact that the USITC applies “continuous line of production” and “substantial coincidence of economic interests” as cumulative tests does not cure the open-endedness of these tests. The practical result would be that every safeguard measure would have to be tested by WTO dispute processes where the domestic industry in question was other than the producers of a basic raw material.
121. By contrast, the definition of domestic industry applied by the Panel provides “generally applicable principles”. They are consistent with the

⁶⁵ WT/DS177/R, para. 7.102.

⁶⁶ WT/DS177/R, para. 7.103.

object and purpose of the Safeguards Agreement of, on the one hand, providing a remedy for the effective, temporary protection from imports to an industry that is experiencing serious injury or threat of injury from imports; and on the other hand, clarifying and reinforcing GATT disciplines, re-establishing multilateral control over safeguards, encouraging structural adjustment, and enhancing rather than limiting competition in international markets.

Past panel reports

122. The United States’ construction of “domestic industry” is not supported by previous panel decisions, in particular the panel reports on *Canada – Beef*⁶⁷ and *United States – Wine and Grapes*⁶⁸. Indeed, these reports explicitly rejected arguments such as coincidence of economic interests or vertical integration as determinant of the scope of domestic industry.

The Panel was correct to rely on the Canada – Beef case

123. The *Canada – Beef* case concerned a Canadian countervailing duty investigation in which the producers and feeders of *live cattle* were treated as part of the domestic industry producing *manufacturing beef*. The issue before the panel was whether the industry producing manufacturing beef included the growers and feeders of live cattle.

124. In its Appellant submission, the United States argues, *inter alia*, that the Panel erred by relying on the *Canada – Beef* decision which was an unadopted panel report. The United States also seeks to distinguish the report on the basis that it related to a countervailing duty case under the Tokyo Round Subsidies Code, and on the facts of the case.

125. Australia recalls that the Appellate Body in *Japan – Alcoholic Beverages* stated that “a panel could nevertheless find useful guidance

⁶⁷ Report of the Panel on *Canada – Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC*, dated 13 October 1987, not adopted, SCM/85.

in the reasoning of an unadopted panel report that it considered to be relevant”.⁶⁹

126. The definitions of “domestic industry” under the Tokyo Round Subsidies Code, and the WTO Agreements on Subsidies and Countervailing Measures and on Anti-Dumping, are virtually identical to Article 4.1(c) of the Safeguards Agreement.⁷⁰ These read in pertinent part: “... the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products”.⁷¹
127. There are also no grounds for distinguishing the *Canada – Beef* report on the basis of Article 6.6 of the Tokyo Round Subsidies Code. As the Panel correctly pointed out, this provision does not address the question of the definition of the domestic industry but deals primarily with the data collection in an investigation.⁷²
128. The United States seeks to factually distinguish *Canada – Beef* on the basis that boneless manufacturing beef was in that case found to be a “by-product” resulting from economic activities whose principal aim was to produce other products for sale. The United States argues that, by contrast, the USITC found that lamb meat production was both dedicated and continuous from the raw to processed product.
129. Australia recalls that the Panel’s *findings of fact* demonstrated otherwise. For example, the Panel found that the USITC report contains no information as to the percentage of live lamb production dedicated to the production of lamb meat other than for the years covered by the safeguard investigation. The USITC report makes clear

⁶⁸ Report of the Panel on *United States – Definition of Industry Concerning Wine and Grape Products*, adopted by the Committee on Subsidies and Countervailing Measures on 28 April 1992, SCM/71, BISD 39S/436.

⁶⁹ WT.DS177/R, footnote 113; citing WT/DS8/AB/R, pp. 14-15.

⁷⁰ The only exception is that the SCM and AD Agreements refer exclusively to “like products” while the Safeguard Agreement also includes “directly competitive products”. Australia recalls that in the present dispute, the United States is not claiming live lambs and lamb meat to be “directly competitive products”.

⁷¹ SCM Article 16.1, AD Article 4.1, Article 6.5 of the Tokyo Round Subsidies Code.

⁷² WT/DS177/R, para. 7.97.

that there are alternative uses for live lambs, including growing mature sheep for mutton meat, wool production or for breeding purposes.⁷³

Application of the Canada – Beef case to the present dispute

130. The panel in *Canada – Beef* found that the *like product* at issue was manufacturing beef and that live cattle produced by ranchers and feedlots constituted a product *different* from the like product. The panel considered that “in common usage, one is normally considered the ‘producer’ of only those goods one actually makes and sells; one who produces a raw material is not normally regarded as a ‘producer’ of the end-product”.⁷⁴ This by itself supports the conclusion in the present case that feeders and growers of lambs produce live lambs, and that packers and breakers produce lamb meat.
131. The *Canada - Beef* panel also examined Canada’s three criteria: continuous production process, dedicated input and economic interdependence by which end-product producers could “pass-back” to input producers injury suffered from subsidised imports. As noted by the Panel in the present dispute, these criteria are very similar to the two-prong test argued by the United States.⁷⁵
132. The *Canada - Beef* panel found that such a standard would “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”. 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”.⁷⁶
133. Nor was there any basis for a special rule for processed agricultural products. A definition of domestic industry “could only rest on principles of general applicability” and any principle justifying an

⁷³ WT/DS177/R, para. 7.83-84.

⁷⁴ SCM/85, para. 5.2.

⁷⁵ WT/DS177/R, para. 7.90.

exception “would open the door to claims of standing by a substantial number of other input suppliers”.⁷⁷

134. The Panel in the present dispute agreed with the *Canada – Beef* panel that factors such as vertical integration or common ownership are not in themselves determinative or even particularly relevant to defining the scope of the domestic industry. The issue is whether: (i) the products at various stages of production are *different forms of a single like product* or have become *different products*; and (ii) whether it is possible to *separately identify* the production process of the like product at issue, or whether instead common ownership results in *such complete integration* of production processes that *separate identification and analysis of different production stages is impossible*.⁷⁸
135. In the present case, the Panel found that live lambs were transformed into a *different* end-product, i.e. lamb meat;⁷⁹ and that it was possible to *separately identify* the different physical stages of the production process.⁸⁰
136. The Panel also went on to find that even if vertical integration and common ownership were relevant, the United States had failed to demonstrate this on the facts: there was little vertical integration of growing and feeding operations with packing and breaking operations; it was possible to separately identify the different physical stages of the production process; and there was relatively little vertical integration in the sense of common ownership between growers, feeders, packers and breakers of lamb.⁸¹

⁷⁶ SCM/85, para. 5.12.

⁷⁷ SCM/85, para. 5.12.

⁷⁸ WT/DS177/R, para. 7.95.

⁷⁹ WT/DS177/R, para. 7.85.

⁸⁰ WT/DS177/R, para. 7.96.

⁸¹ WT/DS177/R, para. 7.96.

The Panel was correct to rely on the United States - Wine and Grapes case

137. The panel report in *United States – Wine and Grapes* considered the question of whether domestic producers of the principal raw agricultural product (grapes) were to be included as part of the domestic industry producing wine and grape products.
138. Australia fails to appreciate the distinction which the United States seeks to draw between a finding by the competent authority in *Wine and Grapes* that wine and grapes were not like products, and the USITC’s finding in this case that there was only one like product, lamb meat. The USITC report did not make a finding that live lambs and lamb meat were “like products”, or investigate if they were “directly competitive products”. The fundamental question is the same as in *Wine and Grapes* – what is the like product, and who produces it.
139. The United States argues that a live lamb “remains substantially the same throughout the production process and is never transformed into a different article”. Given the USITC report found there was only *one* “like product” (lamb meat), there is no basis for the claim that live lambs “remains substantially the same” and are “never transformed into a different article”. Live lambs and lamb meat are clearly *different* articles.
140. The United States also argues that “meat-type lambs are almost wholly devoted to the production of lamb meat”. Australia recalls its earlier arguments on the vagueness of terms such as “almost wholly devoted”, “most”, “primarily”, “generally” and “virtually all”. The USITC report also found growers to include two categories: (i) purebred breeders, who keep purebred animals and sell rams for breeding purposes, and (ii) commercial market lamb producers, who maintain flocks for the production of feeder or slaughter lambs. The report provides no

breakdown of the percentage of live lambs actually sold for lamb meat as opposed to breeding lambs.⁸²

Application of the United States - Wine and Grapes case to the present dispute

141. The panel in *Wine and Grapes* considered that “in view of the precise definition of ‘domestic industry’ ... producers of the like products could be interpreted to comprise only producers of wine”.⁸³ The panel also considered that this precise definition of “domestic industry” was one which “could not be interpreted extensively”.⁸⁴
142. The *Wine and Grapes* panel rejected the United States’ argument that wine-grape growers and wineries were part of the same industry producing wine because of their close relationship. 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 – the growers of wine-grapes on the one hand and the wineries on the other”.⁸⁵ The panel also found that once a separate economic process was identifiable, the “economic interdependence between industries producing raw materials or components and industries producing the final product was not relevant for the purposes of the Code”.⁸⁶
143. In the present dispute, the Panel found that live lambs were transformed into a *different* end-product, i.e. lamb meat;⁸⁷ and that it was possible to *separately identify* the different physical stages of the production process.⁸⁸ The Panel also made findings of fact at paragraphs 7.83-7.85 of its Report that *even if* “continuous line of production” and “inputs wholly dedicated to the production of a single

⁸² USITC report at II-11.

⁸³ BISD 39S/436, para. 4.2.

⁸⁴ BISD 39S/436, para. 4.6.

⁸⁵ BISD 39S/436, para. 4.3.

⁸⁶ BISD 39S/436, para. 4.5.

⁸⁷ WT/DS177/R, para. 7.85.

⁸⁸ WT/DS177/R, para. 7.96.

end-product” were relevant, the United States failed to demonstrate this in the present dispute.

The New Zealand - Transformers case

144. Australia submits that the United States’ reliance on the GATT panel report in *New Zealand – Transformers* case to support its broad definition of domestic industry is legally flawed. Firstly, as noted by the Panel, the *Transformers* case involved a claim under Article VI:1 of GATT 1947. This contains no reference to “like product” to define “domestic industry”. In the present dispute, the relevant question under Article 4.1(c) of the Safeguards Agreement is what is the “like product” to imported lamb meat, and who produces it.

145. In any event, the Panel found that to the extent that *Transformers* was relevant, it supported its reading of Article 4.1(c) of the Safeguards Agreement. 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. This is fully consistent with the view that separability of production processes is a key factor in identifying the domestic producers of a like product.⁸⁹

THE PANEL’S FINDINGS OF FACT

146. In the event the Appellate Body finds that considerations such as vertical integration, continuous lines of production, economic interdependence or substantial coincidence in economic interests are relevant to the definition of domestic industry, the Panel has made *findings of fact* that this was not demonstrated by growers and feeders of live lambs in relation to lamb meat.

⁸⁹ WT/DS177/R, para. 7.100.

147. The Panel’s factual findings are located at paragraphs 7.83, 7.84, 7.85, 7.96 and 7.107 of the Panel Report. In summary, the Panel found:

- (i) on the evidence, there was little vertical integration of growing and feeding operations with packing and breaking operations;⁹⁰
- (ii) it was possible to separately identify the different physical stages of the production process;⁹¹
- (iii) on the information contained in the USITC report, there was relatively little vertical integration in the sense of common ownership between growers, feeders, packers and breakers of lamb;⁹²
- (iv) to the extent there is an overlap in activities between companies, this overlap occurs predominantly between growing and feeding operations, or between packing and breaking operations, but does not occur between growers and feeders on the one hand and packers and breakers on the other;⁹³
- (v) the USITC report contains no information as to the percentage of live lamb production dedicated to the production of lamb meat other than for the years covered by the safeguard investigation. It was therefore unclear to what extent such predominant dedication to meat as opposed to wool production was a temporary result of the removal of the wool subsidies;⁹⁴
- (vi) the USITC report makes clear there are alternative uses for live lambs, including growing mature sheep for mutton meat, wool production or growing ewes for breeding purposes;⁹⁵

⁹⁰ WT/DS177/R, para. 7.96.

⁹¹ WT/DS177/R, para. 7.96.

⁹² WT/DS177/R, para. 7.96.

⁹³ WT/DS177/R, para. 7.96.

⁹⁴ WT/DS177/R, para. 7.83.

⁹⁵ WT/DS177/R, para. 7.84.

- (vii) there is no factual evidence that the situation of lamb growers and feeders in respect of the availability of alternative uses for live lambs in the longer run is fundamentally different from that of the grape growers in the *Wine and Grapes* report;⁹⁶
 - (viii) in the case of both lamb and wine, the agricultural input product (i.e., grapes and live lambs) is transformed into a different end-product (i.e., wine or meat);⁹⁷
 - (ix) profits/losses of growers/feeders declined *prior to* those of packers/breakers.⁹⁸
148. In any event, the USITC report includes as “growers” *two* categories of enterprises: (i) purebred breeders, who keep purebred animals and sell rams for *breeding* purposes, and (ii) commercial market lamb producers, who maintain flocks for the production of feeder or slaughter lambs. The report provides no breakdown of the relative number of enterprises in these two categories, or the percentage of live lambs actually sold for lamb meat as opposed to breeding lambs.⁹⁹
149. Australia submits that the Appellate Body has sufficient factual information before it, on the basis of the factual findings of the Panel and/or the undisputed facts in the Panel record, to conclude that the United States failed to demonstrate a “continuous line of production” from live lambs to lamb meat; or that a “substantial coincidence of economic interest” existed between growers and feeders of live lambs, and packers and breakers of lamb meat.

CONCLUSION

150. Australia submits that the United States’ claim that the Panel erred in its findings on the “domestic industry” producing lamb meat is legally unfounded:

⁹⁶ WT/DS177/R, para. 7.85.

⁹⁷ WT/DS177/R, para. 7.85.

⁹⁸ WT/DS177/R, para. 7.107.

⁹⁹ USITC report at II-11.

- (i) The United States’ reliance on considerations such as “continuous line of production” or a “substantial coincidence of economic interest” has no support either in the plain language of Article 4.1(c) of the Safeguards Agreement, interpreted in its context and in light of its object and purpose, or by previous panel decisions; and
- (ii) The United States’ standard does not provide rules of general application and would lead to an open-ended approach to domestic industry definition.

151. In the event the Appellate Body finds that considerations such as vertical integration, continuous lines of production, economic interdependence or substantial coincidence in economic interests are relevant to the definition of “domestic industry”, Australia submits that the Appellate Body has sufficient factual information before it to complete the analysis and find that this was not demonstrated by growers and feeders of live lambs in relation to lamb meat.

152. Australia requests the Appellate Body to uphold the Panel’s finding at paragraph 7.118 of its report that the USITC’s inclusion of growers and feeders of live lamb in the domestic industry of lamb meat is inconsistent with Article 4.1(c), and thus also with Article 2.1 of the Safeguards Agreement. Accordingly, Australia also requests that the Appellate Body uphold the Panel’s conclusions at paragraphs 8.1(b) and (e) of its report.

IV. DATA REPRESENTATIVENESS

OVERVIEW

153. Australia submits that the Panel correctly found that the USITC threat of serious injury determination in the lamb meat investigation was inconsistent with Article 4.1(c) and Article 2.1 of the Safeguards

Agreement. The Panel was not persuaded that the data used as a basis for the USITC’s determination were sufficiently representative of “those producers whose collective output...constitutes a major proportion of the total domestic production of those products” within the meaning of Article 4.1 (c) of the Safeguards Agreement.

154. The United States claims that the Panel erred in several respects, arguing that:

- (i) Australia and New Zealand did not claim that the USITC’s data collection was inconsistent with Article 4.1 (c) and that, by pursuing this point, the Panel relieved the complainants of the task of demonstrating the inconsistency¹⁰⁰;
- (ii) the Safeguards Agreement does not impose a requirement for representativeness of the data and that the Panel’s standard of “the most comprehensive data possible” could not objectively be met¹⁰¹; and
- (iii) the USITC data collection met the requirements in Article 4.2 on the grounds that it was an evaluation of factors of an “objective and quantifiable nature”¹⁰².

155. In pursuing the first two claims set out above, the United States is attempting to divert attention away from the clear and unambiguous finding made by the Panel, namely that the USITC threat of serious injury determination was inconsistent with the United States’ obligations under the Safeguards Agreement. Australia claims that the Panel acted consistently with the provisions of the DSU, specifically Article 7.2.

156. As demonstrated by the claims and arguments set out in Australia’s other appellant’s submission, the Panel made several errors of law in the course of reaching its overall assessment on the threat of serious

¹⁰⁰ United States Appellant submission, para. 90-96.

¹⁰¹ United States Appellant submission, para. 97-101.

injury issue and its findings do not fully reflect the reasoning in the body of its report. However, the United States' claims concerning burden of proof and misinterpretation of Article 4.1(c) are without merit and should be rejected.

157. If the Appellate Body concludes that the Panel erred in reaching a finding under Article 4.1(c) that the data relied upon by the USITC was not representative of the domestic industry, in light of arguments made by Australia under Articles 4.2(a) and (b), Australia submits that the Appellate Body must address the issue of the representativeness of the data relied upon by the USITC and find the United States' measure inconsistent with those two provisions.
158. Australia also makes an alternative argument that in the event that the Appellate Body reverses the Panel's finding in paragraph 8.1(e) regarding the lack of representativeness of the data, Australia also requests that the Appellate Body complete the legal analysis and find that the USITC did not properly evaluate the factors listed in Article 4.2(a) and so the United States has acted inconsistently with Article 4.2(a) of the Safeguards Agreement.

Australia did establish a prima facie case that the data relied upon by the USITC was inadequate

159. The United States argues that the Panel erred in reaching a conclusion in paragraph 8.1(e) that was not the subject of a claim by the complainants in their submissions to the Panel. According to the United States, by finding that the United States' data collection was inconsistent with Article 4.1(c), the Panel erroneously relieved Australia of the requirement to discharge the burden of proof.
160. Australia submits that this is a misinterpretation of the Panel's actual findings and conclusions on this issue. Australia submits that the Panel's finding as contained in paragraph 8.1(e) does not fully reflect

¹⁰² United States Appellant submission, para. 102-118.

the reasoning contained in the body of the Panel's report. It is, therefore, necessary for the conclusions in paragraph 8.1 of the Panel's report to be read in the context of the Panel's overall findings and conclusions concerning the USITC's threat of serious injury determination, including the conclusion by the Panel that the United States had breached Article 2.1 of the Safeguards Agreement.

161. It is clear from the Panel's report that its conclusion concerned the representativeness of the data as it related to the producers defined in Article 4.1(c) of the Safeguards Agreement and not that the data collection by the United States was inconsistent with Article 4.1(c).
162. The United States seeks to use the misleading wording in the Panel's conclusions that the USITC "failed to obtain data" to obscure the actual nature of the Panel's conclusions. The Panel concluded, in fact, that the USITC's violation of Article 4.1(c) was based on its finding that the USITC had relied on unrepresentative data in the making of its determination.
163. It is clear from the record, and as reflected in the Panel's report, that Australia did argue that "the responses to the USITC's questionnaires provided an inadequate basis for it to render judgements about the condition of the industry...."¹⁰³ Australia specified its claim that the safeguard measure imposed by the United States was inconsistent with Article 2.1 of the Safeguards Agreement because of the inadequacy of the data.¹⁰⁴
164. In its submission to the Panel, Australia highlighted the fact that the samples used by the USITC were either not statistically valid or their significance could not be verified. The USITC itself acknowledged that the questionnaires it despatched to selected members of the industry did not produce a statistically valid sample of the producers across the

¹⁰³ WT/DS177/R, paragraph 7.208.

¹⁰⁴ Australia's First Submission to the Panel, para. 1.12.

industry. The Panel noted that there were also deficiencies in the data collected from other parts of the domestic industry¹⁰⁵.

165. It is, therefore, clear the Panel agreed with Australia that the inadequacy related to the representativeness of the data. In effect, the Panel took Australia’s argument that the data was insufficient under Articles 4.2(a) and (b) of the Safeguards Agreement and was, therefore, not representative of the firms in the “domestic industry,” and completed a logical extension to reach its conclusion that the data was not representative. This is evident most notably in paragraph 7.225 of the Panel’s report. The reference to Article 4.1(c) was aimed at identifying the target group in relation to the data representativeness. This neither adds to nor detracts from the arguments Australia made and demonstrates that Australia did provide sufficient proof to support its claims.
166. In addition, Australia submits that the Panel’s approach in this case is fully consistent with Article 7.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes which requires panels to “address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.”
167. It is, therefore, reasonable to conclude that the Panel took into account Australia’s arguments under Articles 4.2 (a) and (b) of the Safeguards Agreement and reached its conclusions on the relevance of Article 4.1(c) based on the close relationship between that provision and Article 4.2. As argued above, the Panel set out to specify the group at issue but, in doing so, it made a finding that the United States acted inconsistently with respect to Article 4.2 (a) and (b) of the Safeguards Agreement.
168. Australia notes that the United States cites the Appellate Body Report *in Japan-Measures Affecting Agricultural Products*. Australia argues that not only was this case concerned with a somewhat different set of

¹⁰⁵ WT/DS177/R, para. 7.218.

circumstances under the SPS Agreement, but also that the alternative measure in question was not one that the United States had referred to in its claims. As demonstrated above, however, Australia did stake a clear claim that the USITC’s investigation and its determination of threat of serious injury had violated Article 2.1 of the Safeguards Agreement.

169. Thus, Australia argues that the rules on burden of proof have been fully respected. Australia provided sufficient proof to support its assertion that the data used by the USITC was inadequate to reach a determination of threat of serious injury under the requirements of Article 4.2 and, by extension, Article 4.1(c). The burden of proof was neither altered nor relieved as a result of the Panel’s treatment of Australia’s arguments or evidence.

The United States wrongly interprets the requirement for an evaluation of “objective and quantifiable” factors

170. In essence, the United States claims that there is no requirement under the terms of the Safeguards Agreement for data to be representative and that Article 4.1(c) of the Safeguards Agreement does no more than define the parameters of the group from which data is sought.¹⁰⁶
171. The definition of domestic industry in Article 4.1 (c) covers “producers as a whole” or “those who...constitute a major proportion of domestic production”. The Panel, in finding that the data used must be for at least a major proportion of the producers, focused on the requirement implicit in this definition that the sample of data used be sufficiently significant to be representative of producers as a whole.
172. The United States argues that the only requirement is for the data to be “objective and bear on the state of the industry”¹⁰⁷ and that there is no provision specifying a requirement for a certain volume of data.

¹⁰⁶ United States Appellant submission, para. 97-101

¹⁰⁷ United States Appellant submission, para. 97.

173. Article 4.1(c) requires that the competent authority must examine the situation in the industry with reference to either all producers or at least those whose output constitutes a major proportion of total production. Australia recalls that the Panel found, and the USITC itself acknowledged, that grower and feeder questionnaire data were not a statistically valid sample of that essential segment of the industry. Moreover, the character of the questionnaire data regarding packers and breakers with respect to such relevant factors as production and capacity utilization could not be ascertained. The United States even refused to provide information on the overall representativeness of the breakers' questionnaire data. Beyond the issue of representativeness, some data was completely absent, including the lack of grower/feeder financial data for interim 1997 and 1998.
174. It follows that the data relied upon by the USITC could not meet the standard in Article 4.1(c). Even in light of what the United States argues is the relevant question, reliance on statistically invalid, incomplete and lacking data cannot be objective or have any relevant bearing on the factors that must be considered under Article 4.2(a).

The data used by the USITC were not sufficiently representative to meet the requirements of Article 4.2 of the Safeguards Agreement

175. Australia agrees with the Panel that, for an evaluation to be both objective and quantifiable, there is a requirement for it to be based on data which presents a full picture of the situation in that industry, specifically the "domestic industry" as defined in Article 4.1 (c) of the Safeguards Agreement. The claim by the United States that the USITC's investigation met the "objective and quantifiable" standard cannot be verified.
176. According to the United States, only the competent authority should have the responsibility of determining whether or not the data are objective. By inference, it suggests that other WTO Members should show complete deference to its competent authority in this respect.

177. Australia submits that the United States is seeking to justify *ex post facto* its data collection methodology. Yet, the argument of the United States about targeting only the larger firms in the growers/feeders sector only serves to reinforce the argument made by Australia that the United States’ approach to data collection was selective and arbitrary.
178. There is nothing in the United States’ submission which addresses Australia’s arguments that the amount of information from growers is trivial; the amount of information from other industry segments is scarcely better; the lack of greater coverage is not adequately explained; and there is no explanation provided as to why an improved range of data could not have been collected.
179. Australia, therefore, submits that the USITC data did not meet the requirements in Article 4.2 of the Safeguards Agreement and that the Panel was correct in its findings in this respect.

Completing the Analysis under Articles 4.2(a) and (b)

180. If the Appellate Body does not consider that the Panel’s finding on Article 4.1(c) took into account Australia’s arguments regarding Articles 4.2(a) and (b), and encapsulated a finding that the USITC acted inconsistently with those two provisions, Australia requests that it now complete the analysis.
181. In its investigation, the USITC relied on two primary sources of information: (1) data provided by the U.S. Department of Agriculture (“USDA”); and (2) questionnaire response data. Acknowledging that the USDA provided more comprehensive data than the questionnaire responses, the USITC used the USDA data where possible, including figures on the domestic lamb slaughter and on the number of lamb-growing establishments. For other industry indicators, and most notably financial indicators, the USITC relied on questionnaire response data¹⁰⁸.

¹⁰⁸ USITC Report, at I-16.

182. The United States argues that the USITC was able to obtain objective and quantifiable data of the domestic industry by relying on USDA data and supplementing it with questionnaire responses¹⁰⁹. This position is indefensible in light of the limited nature of the USDA data and the obvious shortcomings of the questionnaire responses. These shortcomings are well illustrated in paragraphs 7.209 through 7.212 of the Panel’s report. Very limited numbers of questionnaires were distributed, particularly with respect to the grower segment; still fewer responses were received, and in many cases lacked usable data, including financial data.
183. Despite the fact that its own competent authority acknowledged that questionnaire data it held was not statistically representative, the United States attempts in its submission to sidestep part of the problem with *ex post* justifications regarding the methodology employed by the USITC in targeting the domestic industry with questionnaires. The United States’ reasoning, itself, reveals the arbitrary and statistically invalid nature of the process, and specifically the decision to target only the largest firms in the industry,¹¹⁰ essentially ensuring that the data would not be representative.
184. The most telling weakness of the United States’ position is its decision to bury within a footnote, as opposed to the body of its argument, the idea that the number of questionnaires sent by the USITC is irrelevant; and that the responses it received, combined with USDA data, was consistent with Articles 4.2(a) and (b).¹¹¹ Beyond the extremely limited number of questionnaire responses actually received, the United States completely ignores the fact that the USITC had virtually no financial data for the largest segment of the defined domestic industry -- the growers. The United States seems to argue that only one questionnaire response from one segment of the domestic industry would have been sufficient. It has no answer for how the USITC could

¹⁰⁹ United States Appellant submission, para. 107.

¹¹⁰ United States Appellant submission, para. 109.

¹¹¹ United States Appellant submission, para. 134.

ensure objective and quantifiable data on the relevant factors listed under Article 4.2(a), such as profits and losses, in the absence of more complete information.

185. Weaknesses in the data cited by the Panel included:

- (i) the fact that only 49 growers, three grower/feeders, and nine feeders, representing only 5 percent of the U.S. lamb crop in 1997 provided data on the financial condition of the industry and only 27 for the interim periods;¹¹²
- (ii) the fact that no financial data were provided for interim 1998 by grower/feeders;¹¹³
- (iii) the inability to discern the representativeness of the packer financial data;¹¹⁴
- (iv) the fact that the USITC received usable questionnaire responses from only 57 growers out of 74,710 total growers (1997), with 53 additional questionnaires either not adequately completed or never returned from what the US argues were among the largest (and presumably most interested, or uninterested as the case may be) growers;¹¹⁵
- (v) the inability to discern the overall representativeness of the usable data provided by breakers in terms of total domestic output;¹¹⁶ and
- (vi) the inability to discern the coverage of the usable packer data received on production and capacity utilization as compared to packer data received on financial indicators.¹¹⁷

¹¹² WT/DS177/R, para. 7.209.

¹¹³ WT/DS177/R, para. 7.218.

¹¹⁴ WT/DS177/R, para. 7.210.

¹¹⁵ WT/DS177/R, para. 7.212.

¹¹⁶ *Id.*

¹¹⁷ WT/DS177/R, para. 7.213.

186. All of the data cited above could not be supplemented by the USDA data; it was in fact the primary data upon which the USITC relied to reach conclusions on a number of the relevant factors listed under Article 4.2(a). The weaknesses are so obvious that the data cannot be considered objective or quantifiable as required by Articles 4.2(a) and (b) of the Safeguards Agreement.

Argument in the alternative if the Appellate Body does not uphold the Panel's finding in paragraph 8.1(e) about the lack of representativeness of the data within the meaning of Article 4.1(c) of the Safeguards Agreement

187. The Panel's finding in paragraph 8.1(d) is based, *arguendo*, on the industry definition used in the USITC Report and that the data were not representative within the meaning of Article 4.1(c). The view of the Panel is set out in particular at paragraphs 7.218 and 7.219. If the Appellate Body decides to reverse the Panel's finding in paragraph 8.1(e) regarding the lack of representativeness of the data, then Australia requests that the Appellate Body complete the legal analysis and find that the USITC did not properly evaluate the factors listed in Article 4.2(a) and so the United States has acted inconsistently with Article 4.2(a) of the Safeguards Agreement.

188. At paragraph 55 of *United States - Wheat Gluten* the Appellate Body emphasized that: "the competent authorities must undertake additional investigative steps, when the circumstances so require, in order to fulfill their obligation to evaluate all relevant factors." While this statement was made in the particular context of examining "other factors", how even more valid must it be in the context of the listed relevant factors, that the competent authorities': "duties of investigation and evaluation preclude them from remaining passive in the face of possible shortcomings in the evidence submitted, and views expressed, by the interested parties." Thus the competent authority has the duty to be active in obtaining data.

189. The USITC took the attitude in this investigation that it was not its responsibility to pursue parties for information, where they did not volunteer it the first time around. Thus, where the very firms that were seeking the imposition of a safeguard measure were not prepared to provide information, the USITC was quite satisfied to make determinations on the partial information that it was given. Further the USITC took the attitude that it had no responsibility to ensure that the data it obtained constituted even a statistically valid sample, especially for growers.
190. The Panel found as a matter of fact that the data were not representative. Australia submits that in the absence of representative data it is not possible to evaluate the factors listed in Article 4.2(a) in an objective manner. Accordingly, Australia requests the Appellate Body to find that the USITC did not evaluate the factors listed in Article 4.2(a) of the Safeguards Agreement.

CONCLUSION

191. For the reasons discussed above, Australia submits that the USITC acted inconsistently in respect of Articles 4.2(a) and (b) of the Safeguards Agreement.

V. CAUSATION

OVERVIEW

192. Article 4.2(b) of the Safeguards Agreement imposes an obligation on WTO Members to ensure that serious injury or threat thereof caused by other factors are not attributed to increased imports; and to determine whether a causal link exists between increased imports and serious injury.

193. Australia submits that the Panel’s “necessary and sufficient cause” test is consistent with the Appellate Body’s requirement in *Wheat Gluten* that there be a “genuine and substantial relationship” between increased imports and serious injury. A “genuine and substantial relationship” requires something more than *some* relationship between increased imports and serious injury.
194. In the event that the Appellate Body reverses the Panel’s interpretation of Article 4.2(b), Australia submits that the United States failed to *demonstrate* that any threat of serious injury caused by other factors had not been attributed to imports. Moreover, the USITC’s “substantial cause” approach could not and did not result in a valid determination of whether a “causal link” involving a “genuine and substantial relationship” existed between increased imports and serious injury.
195. Australia makes a conditional argument that if the Appellate Body decides that the three-step *Wheat Gluten* test does not apply to a case involving threat of serious injury, the United States’ causation analysis was inconsistent with a proper interpretation of Article 4.2(b) on threat of serious injury.
196. By virtue of its violation of Article 4 of the Safeguards Agreement, the United States has also acted inconsistently with Article 2.1 of the Safeguards Agreement.

THE PANEL’S FINDINGS ON “NECESSARY AND SUFFICIENT” CAUSE

197. The United States claims that the Panel erred in finding the United States violated Article 4.2(b) of the Safeguards Agreement by requiring that increased imports were by themselves a “necessary and sufficient” cause of the threat of serious injury.
198. Australia submits the Panel’s findings are consistent with the Appellate Body’s findings in *Wheat Gluten* that there needs to be a “genuine and substantial relationship” between increased imports and threat of serious injury.

199. In any event, Australia submits that the United States failed to demonstrate a causal link and that “some” relationship between increased imports and threat of serious injury does not constitute a “genuine and substantial relationship”.

The Panel’s findings are consistent with the Appellate Body’s test in *Wheat Gluten* that there needs to be a “genuine and substantial relationship” between increased imports and threat of serious injury

200. The Appellate Body in *Wheat Gluten* established the test for the competent authorities’ examination of causation:
- (i) the injurious effects caused to the domestic industry by increased imports are *distinguished from* the injurious effects caused by other factors;
 - (ii) the “injury” caused by these different factors are attributed to increased imports, on the one hand, and, by implication, to other relevant factors, on the other hand; and
 - (iii) in the final step, the competent authority is to determine whether a “causal link” exists between increased imports and serious injury, and whether this causal link involves a “genuine and substantial relationship of cause and effect”.¹¹⁸
201. The purpose of a causation analysis is, therefore, to determine whether there was a “genuine and substantial relationship” between increased imports and serious injury or threat thereof. The fact that a competent authority correctly attributes injury between increased imports and other factors *does not* satisfy the requirement of a “genuine and substantial relationship” between increased imports and serious injury.
202. In the *Wheat Gluten* case, the Appellate Body found that, as the United States failed to demonstrate step two of the causation test in relation to average available domestic capacity, it could not establish the

¹¹⁸ WT/DS166/AB/R, para. 69.

existence of the “causal link” required by Article 4.2(b) of the Safeguards Agreement. The Appellate Body did not therefore examine what *proportion* of serious injury must be contributed to by imports for there to be a “genuine and substantial relationship”.

203. Australia recalls the Appellate Body’s statements in *Korea – Dairy* that safeguard measures are “extraordinary” measures given the remedy provided is the temporary suspension or modification of obligations and concessions, and that this must be taken into account when construing the prerequisites for taking safeguard action.¹¹⁹

204. Given the extraordinary nature of safeguard relief, something *more* than a mere contribution to injury is required for a “genuine and substantial relationship” and that such a test must be construed strictly. Clearly, a “genuine and substantial relationship” would not be satisfied where the only evidence of the impact of increased imports was the loss of a single domestic sale. It is also apparent that absent total market segmentation, increased imports will *always* have some impact on the domestic industry. The requirement of “genuine and substantial relationship” must be construed strictly to ensure that the application of safeguard measures remain “extraordinary”.

205. The Appellate Body in *Wheat Gluten* emphasised that:

“[T]he contribution of each relevant factor is to be counted in the determination of serious injury according to its ‘bearing’ or effect on the situation of the domestic industry.”¹²⁰

206. The Appellate Body also stated in that case:

“We do not suggest that the increase in capacity utilization was *the sole* cause of the serious injury sustained by the domestic industry. Nor do we suggest that the increase in imports had *no* relevance to the situation of the domestic industry. Rather, we

¹¹⁹ WT/DS121/AB/R, para. 94.

¹²⁰ WT/DS166/AB/R, para. 72.

submit that the data relied upon by the USITC indicate that the relationship between the increase in average capacity, the increase in imports and the overall situation of the domestic industry was far more complex than suggested by the text of the USITC Report.”¹²¹

207. These passages indicate that the proscription against non-attribution must have some purpose and that something *more* than a mere contribution to serious injury or threat thereof must be demonstrated for increased imports. Australia submits that the Panel’s test of “necessary and sufficient” seeks to articulate such a standard, even if imports need not *by themselves* constitute serious injury or threat thereof. The Panel stated in relation to Article 4.2(b) of the Safeguards Agreement:

“[T]he 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 that may 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 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.”¹²²

208. The Panel was also careful to distinguish its “necessary and sufficient” test from a “sole cause” test. The Panel agreed with 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

¹²¹ WT/DS166/AB/R, para. 90.

¹²² WT/DS177/R, para. 7.238.

implication recognises that *multiple* factors may be present in a situation of serious injury or threat thereof”.¹²³

The United States failed to demonstrate a “genuine and substantial relationship” between increased imports and threat of serious injury

209. Australia submits that, even if the United States established *some* relationship between increased imports and threat of serious injury to the domestic lamb industry, this does not satisfy the requirement of a “genuine and substantial relationship”.
210. Australia demonstrated that the declining condition of the United States industry was due to a number of factors, notably the removal of the Wool Act subsidies, and a long-term contraction in United States sheep production and consumption of lamb meat. Australia also demonstrated that notwithstanding falling consumption, domestic supply of lamb meat was insufficient to fill demand.¹²⁴
211. Moreover, domestic supply was contracting at a *faster rate* than domestic demand. This gap was being filled by imports and accordingly any increase in imports *was not* displacing domestic production. The United States, therefore, failed to demonstrate that a “genuine and substantial relationship” of cause and effect between increasing imports and threat of serious injury.

CAUSAL LINK BETWEEN INCREASED IMPORTS AND THREAT OF SERIOUS INJURY

212. In the event that the Appellate Body reverses the Panel’s interpretation of Article 4.2(b) of the Safeguards Agreement, Australia submits that the United States’ causation analysis is inconsistent with the proper interpretation of Article 4.2(b) of the Safeguards Agreement as articulated by the Appellate Body in the *Wheat Gluten* case:

¹²³ WT/DS177/R, para. 7.239.

¹²⁴ Australia’s Oral Statement to the Panel, para. 37; Australia’s Answers to Questions by the Panel, response to question 8.

- (i) the United States failed to *demonstrate* that any threat of serious injury caused by other factors had not been attributed to imports; and
- (ii) the USITC’s “substantial cause” approach could not, and in the circumstances of this case, did not, result in a valid determination of whether a “causal link” exists between increased imports and threat of serious injury, and whether it involves a “genuine and substantial relationship of cause and effect”.

213. Australia also makes the conditional argument that if the Appellate Body decides that the *Wheat Gluten* causation test does not apply to a case involving a threat of serious injury, the United States’ causation analysis was inconsistent on a proper interpretation of Article 4.2(b) in terms of “threat of serious injury”.

The United States failed to *demonstrate* that any threat of serious injury caused by other factors had not been attributed to imports

214. The steps set out by the Appellate Body in paragraph 69 of “*United States-Wheat Gluten*” require the competent authority to distinguish the injurious effects caused by factors other than increased imports in order to be able to attribute to other relevant factors the injury caused by them. Where a number of other factors are involved, this attribution can only be achieved by aggregating the injurious effects caused by them in order to attribute the injury caused by such other factors and distinguishing it from the injury caused by increased imports. Thus the competent authority is required to determine the injury caused by all other relevant factors before proceeding to determine whether the “causal link” exists. Indeed, if all the other relevant factors were together causing serious injury, then no causal link could exist between increased imports and the serious injury that had been found to exist. Unless the impact of the aggregate of the injurious effects and injury caused by the other factors had been properly attributed, there would

be no way in which the competent authority could justify an affirmative determination of the causal link.

215. The USITC Report did not do this because it limited itself to examining factors individually without assessing the aggregate effect of all the relevant factors other than increased imports. Accordingly, the USITC Report did not follow the procedure that the Appellate Body found to be required by Article 4.2(b) of the Safeguards Agreement. Therefore, the USITC Report failed to demonstrate the causal link in keeping with the requirements of Article 4.2(a) and (b).
216. Australia submits that, after reviewing the USITC determination to examine whether the United States “did *ensure* that none of any injury caused by such factors were attributed to increased imports”¹²⁵, the Panel correctly found that the United States failed to demonstrate that any threat of injury caused by other factors had not been attributed to increased imports, as required by Article 4.2(b) of the Safeguards Agreement.
217. The Panel’s examination of non-attribution *did not* focus on whether increased imports were a “necessary and sufficient cause” of threat of serious injury and its findings were not based on any misapplication of such a test.¹²⁶ Regardless of the applicable standard on the degree to which increased imports should contribute to serious injury, the USITC report failed to demonstrate on its face that any threat of serious injury caused by other factors had not been attributed to increased imports.
218. For example, the Panel itself recognised that, *even if* the United States applied the wrong “causation standard”, the United States could still meet its obligation on non-attribution if the other factors were found not to have any significant effect on the threat of serious injury to the domestic industry:

¹²⁵ WT/DS177/R, para. 7.258.

¹²⁶ After articulating its “necessary and sufficient cause” test, the Panel simply went on to consider that there was “no basis to conclude that imports had *no* effect on the condition of the domestic industry”

“[T]he United States has argued that the USITC determined that no factor other than increased imports contributed in any significant way to the threat of serious injury faced by the domestic industry. If the facts before us confirm this argumentation, then even the application of a causation standard which does not in all cases ensure consistency with the causation standard of the Safeguards Agreement could have resulted in no substantive error as far as the USITC’s determination in the lamb investigation is concerned.”¹²⁷

219. Australia therefore submits there are sufficient factual findings by the Panel for the Appellate Body to complete the analysis to find that the United States failed to demonstrate that any threat of injury caused by other factors had not been attributed to imports. Accordingly, the United States has failed to demonstrate a causal link between increased imports and threat of serious injury as required by Article 4.2(b) of the Safeguards Agreement.

The Panel’s analysis of non-attribution is consistent with the Appellate Body’s approach in Wheat Gluten

220. In examining whether the United States ensured that any threat of injury caused by other factors had not been attributed to increased imports, the Panel first considered whether the USITC report considered any of these factors to have made an “appreciable” or “more than a negligible” contribution to the threat of serious injury. For the factors identified as having such an effect, the Panel then went on to examine whether the USITC report ensured the non-attribution of injury caused by the factors.
221. The Panel’s approach is conceptually logical by first identifying factors that may be relevant in contributing to threat of serious injury, and then examining whether the USITC report met the requirements of Article

but that this does not mean that the USITC found that imports by themselves were necessary and sufficient to cause injury: WT/DS177/R, para. 7.258.

¹²⁷ WT/DS177/R, para. 7.252.

4(b) of the Safeguards Agreement in relation to these factors. Clearly, if a factor was found as a preliminary question *not* to be contributing to threat of serious injury, the United States would not be in breach of its obligations not to attribute injury caused by that factor to imports.

222. The Panel’s analysis is also consistent with the Appellate Body’s approach in *Wheat Gluten*. In that case, the Appellate Body found that data before the USITC suggested that increases in average available capacity in the domestic industry “*may have been very important to the overall situation of the domestic industry*”.¹²⁸ The Appellate Body then went on to find that the USITC report *had not* “adequately evaluated the complexities of this issue and, in particular, whether the increases in average capacity, during the investigative period, were causing injury to the domestic industry at the same time as increased imports”.¹²⁹ The Appellate Body concluded that the USITC had “*not demonstrated adequately, as required by Article 4.2(b)*” that any injury caused to the domestic industry by increases in average capacity has not been “attributed” to increased imports.
223. The United States seeks to confuse the issue by challenging the Panel’s “no appreciable contribution” analysis as being irrelevant under the Agreement and improperly shifting to the United States “the burden of disproving a case that the complainants had not made”.¹³⁰
224. The United States’ arguments on reversal of the burden of proof should also be rejected. Once factors have been identified which may have had an impact on the domestic industry, the Panel examined whether the United States ensured that any threat of injury caused by other factors had not been attributed to increased imports as required by Article 4.2(b) of the Safeguards Agreement. The Panel’s approach is

¹²⁸ WT/DS166/AB/R, para. 90.

¹²⁹ WT/DS166/AB/R, para. 91.

¹³⁰ United States Appellant submission, para. 74.

therefore consistent with that taken by the Appellate Body in *Wheat Gluten* in relation to increases in average capacity.¹³¹

225. In the present dispute, the United States failed to meet this positive obligation when, after finding that other factors were merely a “less important cause” of the threat of serious injury than imports, it failed to undertake the next step in the analysis. As pointed out by the Panel, the mere fact that the USITC report determined that a factor was a “less important cause” than imports *does not* satisfy the requirement to ensure that any threat of injury caused by this factor had not been attributed to increased imports.¹³² The USITC applied a similar analysis in the *Wheat Gluten* case in concluding that “neither domestic competition nor increased domestic capacity was a more important cause of serious injury than increased imports.”¹³³

The Panel’s findings of fact that the United States failed to demonstrate that any threat of serious injury caused by other factors had not been attributed to imports

226. The Panel rejected the United States’ argument that none of the six “other factors” identified by the USITC report had an appreciable effect on the threat of serious injury to the domestic industry. In summary, the Panel found:
- (i) the USITC report states that there was “no doubt that the loss of Wool Act payments hurt lamb growers and feeders and caused some to withdraw from the industry” and that it was “unrealistic to conclude that the effects of the termination of Wool Act payments had completely disappeared as of 1997”,¹³⁴

¹³¹ WT/DS166/AB/R, para. 90-91.

¹³² WT/DS177/R, para. 7.265.

¹³³ WT/DS166/AB/R, para. 82.

¹³⁴ WT/DS177/R, para. 7.264-7.265.

- (ii) the USITC report appears to acknowledge that competition from other meats plays some role in the condition of the domestic lamb industry;¹³⁵
- (iii) the USITC report cites data indicating that nine packers accounted for 85 per cent of the sheep and lambs slaughtered in 1997 and that “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;¹³⁶
- (iv) the USITC report concluded that an “effective marketing program could have had an important impact on the industry”.¹³⁷

227. The Panel also considered that the USITC’s finding that these factors were “less important” or not “more important” causes of threat of serious injury than increased imports meant that the factors were contributing in a more than insignificant way to that threat.¹³⁸

228. The Panel then went on to examine whether the USITC report demonstrated that any threat of serious injury caused by these factors were not attributed to increased imports. The Panel found that after concluding that the factors were “less important” or not “more important” causes of threat, the USITC report failed to undertake any further analysis. The USITC report failed, on its face, to demonstrate that injury caused by these other factors was not attributed to increased imports.

229. The Panel also found that the USITC’s different treatment of the two other factors in its report – increased input costs and overfeeding of lambs – confirmed its findings in relation to the four factors. The USITC report’s determination on increased input costs appeared, on its face, to say that the USITC in fact found that increased input costs

¹³⁵ WT/DS177R, para. 7.266-7.267.

¹³⁶ WT/DS177/R, para. 7.272.

¹³⁷ WT/DS177/R, para. 7.274-7.275.

played and were expected to play no appreciable role in the condition of the industry.¹³⁹

230. Similarly, the USITC report determined 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. The Panel regarded the difference in the wording on these two factors, as compared to the other four factors, “as undercutting the US argument that the USITC had in fact determined that *none* of the “other factors” had had any impact”.¹⁴⁰
231. Australia submits that there are sufficient findings of fact by the Panel for the Appellate Body to conclude that the United States failed to demonstrate that any threat of serious injury caused by other factors had not been attributed to imports, and therefore failed to demonstrate a “genuine and substantial relationship” between increased imports and threat of serious injury.

Specific arguments by the United States

Termination of Wool Act payments

232. In its Appellant submission, the United States claims that the impact of the loss of the Wool Act payments was “stock liquidation by growers, decreased supply of lamb meat, and increased prices, with the impact on the financial performance concentrated in the growers segment of the industry” and that these are “for the most part, different” from those of increased imports.¹⁴¹
233. The United States also argues that the USITC differentiated between the two causes in concluding that the effects of the Wool Act termination were diminishing and the effects of increased imports were

¹³⁸ WT/DS177/R, para. 7.277.

¹³⁹ WT/DS177/R, para. 7.266-7.267.

¹⁴⁰ WT/DS177/R, para. 7.270-7.271.

¹⁴¹ United States Appellant submission, para. 78.

intensifying. Accordingly, the USITC report establishes that the Wool Act would not be responsible for any *future* worsening of the industry’s condition and therefore ensured that any *threat* of injury caused by that factor was not attributed to increased imports.

234. The United States did not make these factual arguments before the Panel. Nor did these factual arguments form part of the Panel’s legal findings. The United States cannot raise new facts and evidence in an Appellate Body process to rebut the Panel’s factual findings. It is also apparent that the United States is seeking to re-constitute the USITC’s findings in a way not contemplated by the USITC and to extrapolate reasoning and conclusions absent from the USITC report.
235. Australia also fails to appreciate the distinction which the United States tries to make between some types of effects which cause a threat of serious injury from other types of effects. An “other factor” which contributes to serious injury does not cease to do so simply because its “effects” are somehow not identical to that of increased imports. The United States must still ensure that the injury caused by other factors is not attributed to increased imports.
236. The United States therefore seeks to misconstrue the first step in the Appellate Body’s test in *Wheat Gluten*. In stating “the injurious effects caused to the domestic industry by increased imports are *distinguished from* the injurious effects caused by other factors”, the Appellate Body was simply articulating the first step of its test to ensure that injury caused by other factors was not attributed to increased imports, and that there was a causal link between increased imports and serious injury. The Appellate Body considered that “what is important in this process is separating or distinguishing the *effects* caused by the different factors in bringing about the ‘injury’”. The United States cannot discriminate between some types of injurious effects and other types of injurious effects in order to avoid the obligation of non-attribution in Article 4.2(b) of the Safeguards Agreement.

237. In any event, the United States’ description of the future effects of stock liquidation, as a consequence of the ending of Wool Act payments, fails to reflect the market realities and the interplay of other factors. A direct effect of stock liquidation is decreased future production of lambs, but the effect of this on prices depends upon the market. Given the weakness of the market for lamb meat, as demonstrated by other factors noted by the USITC, namely competition from other meat products as well as imports and the lack of an effective marketing program, the capacity of the US market to offer increased prices is constrained.
238. Lower future production thus implies lower overall sales for all segments of the industry, growers and packers. To the extent that concentration in the packer segment enables packers to increase their per unit margins to compensate, the cost will be further born by growers through depressed lamb prices, and only lead to further downward pressure on lamb production. In this way, the effect of the ending of Wool Act payments is not only not restricted to the growers, but is also not necessarily of diminishing future effect. The effects, in a competitive market, are also quite similar to those caused by increased imports.

Competition from other meat products

239. The United States claims that the USITC noted that “other meat products may compete with lamb meat to a certain extent, but that *per capita* consumption of lamb meat had held relatively steady since 1995, with no discernible trend indicating a shift to other meat products in the imminent future”. Consequently, the United States argues, there seems to be no basis for finding that competition with other meat products is causing injury to the domestic injury at the same time as imports.¹⁴²

¹⁴² United States Appellant submission, para. 80.

240. The United States seeks to substitute its own factual reasoning for the factual findings made by the Panel on the face of the USITC report. Moreover, the fact that *per capita* consumption of lamb remained constant *does not* mean that competition from other meat products was not causing serious injury or threat thereof to the domestic industry. The USITC identified *lower prices* to be the most obvious effect of competition with other meat products. Serious injury or threat thereof may also be implied where:

- (i) household incomes were rising, but consumers were spending a greater proportion of their *increased* income on other meat products than on lamb meat; or
- (ii) household incomes remained constant, but consumers were spending an increasing proportion of their incomes on other meat products than on lamb meat.

241. Both situations imply a direct and negative impact on lamb meat from competition by other meats, as well as a *declining market share* of lamb meat. By failing to further investigate these issues, the USITC report failed to ensure non-attribution of threat of serious injury by competition from other meat products.

242. The United States also claims that competition from other meat products has a different effect than increased imports. Australia recalls its earlier arguments that competent authorities cannot discriminate between some types of injurious effects and other types of injurious effects in order to avoid the obligation of non-attribution in Article 4.2(b) of the Safeguards Agreement. The United States also ignores that the USITC report identified lower prices to be the most obvious effect of competition with other meat products.¹⁴³ Given that the same effect was supposedly also caused by imports, it is clear that the USITC failed to ensure that the injurious effects of competition with other meats were not attributed to imports.

¹⁴³ USITC Report, at II-80.

Concentration in the packer segment

243. The United States again seeks to substitute its own factual reasoning for the factual findings made by the Panel on the face of the USITC report. The USITC report made four general observations:
- (i) USDA data indicated that nine domestic packing plants accounted for 85 per cent of the sheep and lambs slaughtered in 1997;
 - (ii) however, petitioners claim that packer concentration has actually decreased over the past 5 years;
 - (iii) an undue level of concentration among packers would have suggested that they would have been sheltered from the effects of low-priced imports and would have been able to pass through lower prices more readily to feeders and growers; and
 - (iv) however, packers like other segments of the lamb meat industry, experienced deteriorating profits in the latter part of the period of investigation and operated at a loss in January-September 1998.
244. Having made these four, somewhat conflicting, observations, the USITC report simply concluded that concentration in the packer industry was a “less important cause” of the threat of serious injury than increased imports. The USITC report therefore failed to undertake the next step of the analysis to ensure that the threat of serious injury caused by the factor were not attributed to imports.
245. The USITC report also, having defined the domestic industry to include growers and feeders, failed to assess at all the effect of concentration in the packer segment on these other segments of the industry. This was despite its own observation that through this factor packers would have been able to pass through lower prices more readily to feeders and growers. To the extent that packers did pass through lower prices it can only have caused further injury to growers and feeders, and

exacerbated the effects of the ending of Wool Act payments in causing stock liquidation and discouraging future production.

246. Australia also recalls the Appellate Body’s approach in *Wheat Gluten* where it found that data before the USITC suggested that increases in average available capacity in the domestic industry “may have been very important to the overall situation of the domestic industry”.¹⁴⁴ The Appellate Body concluded that the USITC report had not “adequately evaluated the complexities of this issue” by failing to investigate whether this factor was simultaneously causing injury to the domestic industry as imports. In the present dispute, the USITC should have undertaken further analysis into what was obviously a complex issue, as evident by the four, apparently conflicting, observations.

The lack of an effective industry marketing program

247. The USITC report considered that “an effective marketing program to bolster domestic demand could have had an important impact on the industry”, but concluded that failure to implement such a program was not a “more important cause” of the threat of serious injury than increased imports. Accordingly, the Panel correctly concluded that the USITC report could not be understood, on its face, to find that the factor made no appreciable contribution to the threat of serious injury, and that the United States failed to ensure that injurious effects caused by this factor were not attributed to imports.¹⁴⁵
248. The United States makes two arguments in seeking to overturn the Panel’s factual findings. Firstly, the United States seeks to distinguish injurious effects caused by failure to introduce an effective marketing program from those caused by increased imports.¹⁴⁶ Australia reiterates its earlier arguments that competent authorities cannot discriminate between some types of injurious effects and other types of injurious effects in order to avoid the obligation of non-attribution. In

¹⁴⁴ WT/DS166/AB/R, para. 90.

¹⁴⁵ WT/DS177/R, para. 7.274-7.275.

¹⁴⁶ United States Appellant submission, para. 86.

any event, the absence of an effective marketing program, by not promoting demand, would constrain or depress prices. This is presumably an effect that the USITC would also attribute to imports.

249. Secondly, the United States argues that the fact that a marketing program *could* improve the industry’s performance by increasing demand does not prove that the absence of such a program is “causing injury”, and that neither the USITC nor the Panel found that the evidence indicated such an injurious effect.
250. As found by the Panel, the USITC report on its face indicated that the lack of an effective marketing program had “an important impact on the industry” and that this was linked to the “threat of serious injury”. The United States’ argument that neither the USITC nor the Panel found an injurious effect is not supported by the USITC report on its face or the Panel’s findings at paragraph 7.275 of its Report.

The USITC could not, and did not, make a valid determination of whether a “causal link” exists between increased imports and threat of serious injury and whether this involved a “genuine and substantial relationship of cause and effect”

251. Australia submits that regardless of whether the USITC correctly met the obligation of non-attribution, it could not, and did not, make a valid determination of whether a “causal link” exists between increased imports and threat of serious injury, and whether this causal link involves a “genuine and substantial relationship” of cause and effect.
252. This conclusion flows logically from the obligations imposed on the USITC under the United States statute, and from the actual structure of the USITC’s determination. Put simply, the USITC followed its own “statute-mandated” three-step process.¹⁴⁷
253. First, the USITC considered whether increased imports were an *important* cause of the threat of serious injury. Second, having found

¹⁴⁷ USITC Report, at I-21 to I-26.

that increased imports were an *important* cause, the USITC considered “whether any other cause might be a *more important cause* of the threat of serious injury than increased imports”.¹⁴⁸ Third, having found “that increased imports of lamb meats are both an *important* cause of the threat of serious injury and a cause that is not less than any other cause”, the USITC made the following determination, without any further analysis:

“[T]hus, we find that increased imports of lamb meat are a “substantial cause” of the threat of serious injury to the domestic lamb meat industry under Section 202(b)(1)(B).”

254. Clearly, the USITC did not make any further analysis of causation after completing its second step (if it did, then this is not reflected in the USITC report). The USITC did not examine whether a “causal link” exists between increased imports and threat of serious injury and whether this involves a “genuine and substantial relationship” of cause and effect.
255. Contrary to the United States’ assertion at paragraph 60 of its Appellant submission, the process followed by the USITC did not “ensure that the evidence on which it established causation by increased imports reflected a genuine and substantial causal link” within the meaning of that phrase as interpreted by the Appellate Body in *Wheat Gluten*. The USITC simply applied its own statutory definition of “substantial cause”.

The United States’ causation analysis was inconsistent with a proper interpretation of Article 4.2(b) of the Safeguards Agreement in terms of “threat of serious injury”.

256. Australia makes the conditional argument that, if the Appellate Body decides that the three-step *Wheat Gluten* causation test does not apply to a case involving a threat of serious injury, the United States’ causation analysis was inconsistent with a proper interpretation of

¹⁴⁸ USITC Report, at I-24.

Article 4.2(b) of the Safeguards Agreement in terms of “threat of serious injury”.

257. Australia reiterates its earlier arguments that the USITC, in applying its statutory “substantial cause” test, did not proceed to examine whether a “causal link” existed between increased imports and threat of serious injury, and whether this causal link involved a “genuine and substantial relationship” of cause and effect.
258. Australia also recalls the United States’ contention and the Panel’s finding that the USITC Report did not find that there was no serious injury being experienced. Footnote 159 of the Panel Report states: “The United States contends that there was no express statement by the USITC that there was *no* actual serious injury.”
259. As such, there can also have been no finding that actual serious injury was not attributable to increased imports. Indeed, if there had been such a finding that would have been the basis for the imposition of the measure, not the finding on “threat of serious injury”. The strong implication is that the USITC recognised that the actual serious injury claimed by the petitioners was not being caused by increased imports.
260. If actual serious injury existed but was not being caused by increased imports, then a threat of imminent serious injury could not be attributed to increased imports. However, the USITC report did not provide any findings on whether there was actual serious injury, what might have been causing such injury, and why such serious injury should suddenly be attributed to increased imports in the imminent future. Australia submits that without such analysis the USITC Report fails to provide the demonstration of causal link required by the Safeguards Agreement.
261. In any event, a “genuine and substantial relationship” requires *more than* a mere contribution to threat of serious injury by increased imports. The United States also failed to demonstrate this given that the declining condition of the United States industry was due almost

entirely to a long-term structural contraction in domestic consumption and production of lamb meat, exacerbated by the removal of the Wool Act subsidies.

CONCLUSION

262. Australia submits that the Panel’s “necessary and sufficient cause” test is consistent with the Appellate Body’s requirement in *Wheat Gluten* that there be a “genuine and substantial relationship” between increased imports and serious injury, and that the United States failed to demonstrate such a relationship.
263. In the event that the Appellate Body reverses the Panel’s interpretation of Article 4.2(b) of the Safeguards Agreement, Australia submits that the United States’ causation analysis is inconsistent with Article 4.2(b):
- (i) the United States failed to *demonstrate* that any threat of serious injury caused by other factors had not been attributed to imports; and
 - (ii) the USITC’s “substantial cause” approach could not and did not result in a valid determination of whether a “causal link” exists between increased imports and threat of serious injury, and whether this involves a “genuine and substantial relationship” of cause and effect.
264. Australia also makes the conditional argument that if the Appellate Body decides that the three-step *Wheat Gluten* test does not apply to a case involving threat of serious injury, the United States’ causation analysis was inconsistent with a proper interpretation of Article 4.2(b) on threat of serious injury.
265. In the event that the Appellate Body reverses the Panel’s finding in paragraph 8.1(e) regarding the lack of representativeness of the data, Australia requests that the Appellate Body complete the legal analysis

and find that the USITC did not properly evaluate the factors listed in Article 4.2(a) and so the USA has acted inconsistently with Article 4.2(a).

266. Australia requests the Appellate Body to uphold the Panel’s finding at paragraphs 7.277 and 7.279 of its report that the United States acted inconsistently with Article 4.2(b) of the Safeguards Agreement, and thus also with Article 2.1, by failing to ensure that threat of serious injury caused by other factors has not been attributed to increased imports. Accordingly, Australia also requests that the Appellate Body uphold the Panel’s conclusions at paragraphs 8.1(b) and (e) of its report.

VI. ARTICLE 2.1 OF THE SAFEGUARDS AGREEMENT

267. Given the United States’ violations of Article 4 of the Safeguards Agreement, Australia requests the Appellate Body to find that the United States also acted inconsistently with Article 2.1 of the Safeguards Agreement.

VII. CONCLUSIONS

268. Australia requests that the Appellate Body uphold the following findings of the Panel:
- (a) that the United States failed to demonstrate as a matter of fact “unforeseen developments” and, therefore, acted inconsistently with Article XIX:1(a) of GATT 1994;

- (b) that the United States has acted inconsistently with Article 4.1(c) of the Safeguards Agreement because the USITC defined the domestic industry to include growers and feeders of live lambs as producers of lamb meat;
- (c) that the United States acted inconsistently with Article 2.1 of the Safeguards Agreement because the data used by the USITC as the basis for its determination were not sufficiently representative of “those producers whose collective output...constitutes a major proportion of the total domestic production of those products” within the meaning of Article 4.1(c) of the Safeguards Agreement;
- (d) that the United States has acted inconsistently with Article 4.2(b) of the Safeguards Agreement because the USITC’s causation analysis did not demonstrate and articulate the required causal link between increased imports and threat of serious injury caused by “other factors” was not attributed to increased imports; and
- (e) that the United States, by virtue of violating Article 4 of the Safeguards Agreement, has also acted inconsistently with Article 2.1 of the Safeguards Agreement.