

**1 ARTICLE 14** ..... 1  
 1.1 Text of article 14 ..... 1  
 1.1.1 Standard of review..... 1

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*Dispute Settlement*

The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes arising under this Agreement.

**1.1.1 Standard of review**

1. In *Argentina – Footwear (EC)*, Argentina argued in its appeal that the Panel correctly articulated the standard of review but alleged that the Panel erred in applying that standard of review by conducting a "de facto de novo review" of the findings and conclusions of the Argentine authorities. The Appellate Body rejected Argentina's argument, stating as follows:

"We have stated, on more than one occasion, that, for all but one of the covered agreements, Article 11 of the DSU sets forth the appropriate standard of review for panels.

...

Based on our review of the Panel's reasoning, we find that the Panel correctly stated the appropriate standard of review, as set forth in Article 11 of the DSU. And, with respect to its *application* of the standard of review, we do not believe that the Panel conducted a *de novo* review of the evidence, or that it substituted its analysis and judgement for that of the Argentine authorities. Rather, the Panel examined whether, as required by Article 4 of the *Agreement on Safeguards*, the Argentine authorities had considered all the relevant facts and had adequately explained how the facts supported the determinations that were made. Indeed, far from departing from its responsibility, in our view, the Panel was simply fulfilling its responsibility under Article 11 of the DSU in taking the approach it did. To determine whether the safeguard investigation and the resulting safeguard measure applied by Argentina were consistent with Article 4 of the *Agreement on Safeguards*, the Panel was obliged, by the very terms of Article 4, to assess whether the Argentine authorities had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination."<sup>1</sup>

2. In *Korea – Dairy*, the Panel considered Korea's request for the Panel not to engage in a *de novo* review of its national authorities' determination to impose a safeguard. More specifically, Korea argued that the standard of review of Article 11 implies that the function of the Panel is to assess whether Korea (i) examined the relevant facts before it at the time of the investigation; and (ii) provided an adequate explanation of how the facts before it as a whole supported the determination made. Furthermore, Korea claimed that a certain deference or latitude should be left to the national authorities in this respect. The Panel held that it could not grant "total deference" to the national authorities but agreed that it could not substitute its assessment for that of the national authority:

"We consider that for the Panel to adopt a policy of total deference to the findings of the national authorities could not ensure an 'objective assessment' as foreseen by

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<sup>1</sup> Appellate Body Report, *Argentina – Footwear (EC)*, paras. 118 and 121.

Article 11 of the DSU. This conclusion is supported, in our view, by previous panel reports that have dealt with this issue<sup>2</sup>. However, we do not see our review as a substitute for the proceedings conducted by national investigating authorities. Rather, we consider that the Panel's function is to assess objectively the review conducted by the national investigating authority, in this case the KTC. For us, an objective assessment entails an examination of whether the KTC had examined all facts in its possession or which it should have obtained in accordance with Article 4.2 of the Agreement on Safeguards (including facts which might detract from an affirmative determination in accordance with the last sentence of Article 4.2 of the Agreement on Safeguards), whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of Korea."<sup>3</sup>

3. In *US – Lamb*, the Appellate Body held that, in considering a claim under the *Agreement on Safeguards*, a panel's objective assessment involves both a *formal* aspect (whether the competent authorities have evaluated "all relevant factors") and a *substantive* aspect (whether the competent authorities have given a reasoned and adequate explanation for their determination):

"[A]n 'objective assessment' of a claim under Article 4.2(a) of the *Agreement on Safeguards* has, in principle, two elements. First, a panel must review whether competent authorities have evaluated *all relevant factors*, and, second, a panel must review whether the authorities have provided a *reasoned and adequate explanation* of how the facts support their determination.<sup>4</sup> Thus, the panel's objective assessment involves a *formal* aspect and a *substantive* aspect. The formal aspect is whether the competent authorities have evaluated 'all relevant factors'. The substantive aspect is whether the competent authorities have given a reasoned and adequate explanation for their determination.

This dual character of a panel's review is mandated by the nature of the specific obligations that Article 4.2 of the *Agreement on Safeguards* imposes on competent authorities. Under Article 4.2(a), competent authorities must, as a formal matter, evaluate 'all relevant factors'. However, that evaluation is not simply a matter of form, and the list of relevant factors to be evaluated is not a mere 'check list'. Under Article 4.2(a), competent authorities must conduct a substantive evaluation of 'the *'bearing', or the 'influence' or 'effect' or 'impact'* that the relevant factors have on the 'situation of [the] domestic industry'. (emphasis added) By conducting such a substantive evaluation of the relevant factors, competent authorities are able to make a proper overall determination, *inter alia*, as to whether the domestic industry is seriously injured or is threatened with such injury as defined in the Agreement."<sup>5</sup>

4. In *US – Lamb*, the Appellate Body further stated that the panel must examine whether the explanation given by the competent authorities in their published report is reasoned and adequate without conducting a *de novo* review of the evidence nor substituting the authorities' conclusions:

"It follows that the precise nature of the examination to be conducted by a panel, in reviewing a claim under Article 4.2 of the *Agreement on Safeguards*, stems, in part, from the panel's obligation to make an 'objective assessment of the matter' under Article 11 of the DSU and, in part, from the obligations imposed by Article 4.2, to the

<sup>2</sup> (footnote original) We recall that in *US – Underwear*, paras. 7.53-54, a case dealing with a safeguard action under the ATC, the panel reached the conclusions that the standard of review was that established in Article 11 of the DSU and commented on the implications of such standard of review for safeguard measures. See also the Panel Report in *Brazil – Countervailing Duty Proceeding Concerning Imports of Milk Powder from the European Community*, SCM/179: "It was incumbent upon the investigating authorities to provide a reasoned opinion explaining how such facts and arguments had led to their finding.", para. 286.

<sup>3</sup> Panel Report, *Korea – Dairy*, para. 7.30.

<sup>4</sup> (footnote original) Clearly, a claim under Article 4.2(a) might not relate at the same time to both aspects of the review envisaged here, but only to one of these aspects. For instance, the claim may be that, although the competent authorities evaluated all relevant factors, their explanation is either not reasoned or not adequate.

<sup>5</sup> Appellate Body Report, *US – Lamb*, paras. 103-104. See also Appellate Body Report, *US – Steel Safeguards*, para. 279.

extent that those obligations are part of the claim. Thus, as with any claim under the provisions of a covered agreement, panels are required to examine, in accordance with Article 11 of the DSU<sup>6</sup>, whether the Member has complied with the obligations imposed by the particular provisions identified in the claim. By examining whether the explanation given by the competent authorities in their published report is reasoned and adequate, panels can determine whether those authorities have acted consistently with the obligations imposed by Article 4.2 of the *Agreement on Safeguards*.

We wish to emphasize that, although panels are not entitled to conduct a *de novo* review of the evidence, nor to *substitute* their own conclusions for those of the competent authorities, this does *not* mean that panels must simply *accept* the conclusions of the competent authorities. To the contrary, in our view, in examining a claim under Article 4.2(a), a panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate *only* if the panel critically examines that explanation, in depth, and in the light of the facts before the panel. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation. Thus, in making an "objective assessment" of a claim under Article 4.2(a), panels must be open to the possibility that the explanation given by the competent authorities is not reasoned or adequate.

In this respect, the phrase '*de novo* review' should not be used loosely. If a panel concludes that the competent authorities, in a particular case, have *not* provided a reasoned or adequate explanation for their determination, that panel has not, thereby, engaged in a *de novo* review. Nor has that panel substituted its own conclusions for those of the competent authorities. Rather, the panel has, consistent with its obligations under the DSU, simply reached a conclusion that the determination made by the competent authorities is inconsistent with the specific requirements of Article 4.2 of the *Agreement on Safeguards*.<sup>7</sup>

5. In *US – Wheat Gluten*, the Appellate Body considered the duties of competent authorities and stated that an investigation by a competent authority requires a proper degree of activity. Their "duties of investigation and evaluation preclude them from remaining passive in the face of possible short-comings in the evidence submitted".<sup>8</sup> They "must undertake additional investigative steps, when the circumstances so require, in order to fulfil their obligation to evaluate all relevant factors."<sup>9</sup> In this case, the Appellate Body found that the Panel had applied a standard of review which fell short of what is required by Article 11 of the DSU by concluding that the report of the investigating authority contained an adequate explanation. In the Appellate Body's view, the Panel had heavily relied upon supplementary information supplied by the United States during the Panel proceedings.<sup>10</sup>

<sup>6</sup> (footnote original) We note, however, that Article 17.6 of the *Anti-Dumping Agreement* sets forth a special standard of review for claims under that Agreement.

<sup>7</sup> Appellate Body Report, *US – Lamb*, paras. 105-107. See also Appellate Body Report, *US – Steel Safeguards*, para. 302 and Panel Report, *US – Safeguard Measure on PV Products*, paras. 7.4-7.5 and 7.201.

<sup>8</sup> Appellate Body Report, *US – Wheat Gluten*, para. 55.

<sup>9</sup> Appellate Body Report, *US – Wheat Gluten*, para. 55. See also Appellate Body Report, *US – Cotton Yarn*, para. 73.

<sup>10</sup> Appellate Body Report, *US – Wheat Gluten*, paras. 161-162. The Appellate Body found as follows:

"Although the Panel's conclusion on this issue was that the *USITC Report* contained an adequate explanation of the allocation methodologies, the Panel's reasoning discloses that the Panel clearly did not consider this to be the case. The Panel did not feel able to rely solely or, even, principally, on the explanation actually provided in the *USITC Report* and, instead, relied heavily on supplementary information provided by the United States in response to the Panel's questions. Indeed, the most important part of the Panel's reasoning on this issue is based on those 'clarifications'. We consider that the Panel's conclusion is at odds with its treatment and description of the evidence supporting that conclusion. We do not see how the Panel could conclude that the *USITC Report* *did* provide an adequate explanation of the allocation

6. In *US – Steel Safeguards*, the Appellate Body stated that the standard of review explained in *US – Lamb* and *US – Line Pipe* in connection with Article 4.2 of the Agreement on Safeguards applied generally to the obligations under that Agreement as well as to those under Article XIX of the GATT 1994:

"We explained in *US – Lamb*, in the context of a claim under Article 4.2(a) of the *Agreement on Safeguards*, that the competent authorities must provide a 'reasoned and adequate explanation' of how the facts support their determination'. More recently, in *US – Line Pipe*, in the context of a claim under Article 4.2(b) of the *Agreement on Safeguards*, we said that the competent authorities must, similarly, provide a 'reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports'. Our findings in those cases did not purport to address *solely* the standard of review that is appropriate for claims arising under Article 4.2 of the *Agreement on Safeguards*. We see no reason not to apply the same standard generally to the obligations under the *Agreement on Safeguards* as well as to the obligations in Article XIX of the GATT 1994."<sup>11</sup>

7. The Appellate Body then reminded the parties of the importance of providing a reasoned and adequate explanation of the facts supporting the imposition of safeguard measures, thereby enabling panels to make their objective assessment as required under Article 11 of the DSU:

"It bears repeating that a panel will not be in a position to assess objectively, as it is required to do under Article 11 of the DSU, whether there has been compliance with the prerequisites that must be present before a safeguard measure can be applied, if a competent authority is not required to provide a 'reasoned and adequate explanation' of how the facts support its determination of those prerequisites, including 'unforeseen developments' under Article XIX:1(a) of the GATT 1994. A panel must not be left to *wonder* why a safeguard measure has been applied.

It is precisely by 'setting forth findings and reasoned conclusions on all pertinent issues of fact and law', under Article 3.1, and by providing 'a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined', under Article 4.2(c), that competent authorities provide panels with the basis to 'make an objective assessment of the matter before it' in accordance with Article 11. As we have said before, a panel may not conduct a *de novo* review of the evidence or substitute its judgement for that of the competent authorities.<sup>12</sup> Therefore, the 'reasoned conclusions' and 'detailed analysis' as well as 'a demonstration of the relevance of the factors examined' that are contained in the report of a competent authority, are the only bases on which a panel may assess whether a competent authority has complied with its obligations under the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994. This is all the more reason why they must be made explicit by a competent authority."

...

[W]e cannot accept the United States' interpretation that a failure to explain a finding does not support the conclusion that the USITC 'did not actually *perform* the analysis correctly, thereby breaching Article 2.1, 4.2, or 4.2(b) [of the *Agreement on Safeguards*]'. As we stated above, because a panel may not conduct a *de novo* review of the evidence before the competent authority, it is the *explanation* given by the competent authority for its determination that alone enables panels to determine whether there has been compliance with the requirements of Article XIX of the GATT 1994 and of Articles 2 and 4 of the *Agreement on Safeguards*. It may well be

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methodologies, when it is clear that the Panel itself saw such deficiencies in that Report that it placed extensive reliance on "clarifications" that were not contained in the USITC Report. By reaching a conclusion regarding the USITC Report which relied so heavily on supplementary information provided by the United States during the Panel proceedings – information not contained in the USITC Report – the Panel applied a standard of review which falls short of what is required by Article 11 of the DSU."

<sup>11</sup> Appellate Body Report, *US – Steel Safeguards*, para. 276.

<sup>12</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 121.

that, as the United States argues, the competent authorities have performed the appropriate analysis correctly. However, where a competent authority has not provided a reasoned and adequate explanation to support its determination, the panel is not in a position to conclude that the relevant requirement for applying a safeguard measure has been fulfilled by that competent authority. Thus, in such a situation, the panel has no option but to find that the competent authority has not performed the analysis correctly."<sup>13</sup>

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<sup>13</sup> Appellate Body Report, *US – Steel Safeguards*, paras. 298-299 and 303.