

ANNEX 1-1

FIRST SUBMISSION OF AUSTRALIA

(19 April 2000)

TABLE OF CONTENTS

	<u>Page</u>
1. OVERVIEW.....	5
2. REQUEST FOR IMMEDIATE PRELIMINARY RULING ON INFORMATION USED IN THE INVESTIGATION	7
3. FACTS OF THE CASE.....	7
3.1. Investigation and imposition of the safeguard measure	7
3.1.1 US law and practice in a safeguards investigation.....	7
3.1.2 The procedures followed by the US in this case.....	8
3.1.3 Description of the recommended and imposed safeguard measures.....	9
3.2. Competitive conditions in the US market.....	11
3.2.1 Growers - US	12
3.2.2 Growers - Australia and New Zealand.....	12
3.2.3 Lamb meat - Australia and US	12
3.2.4 Support for US growers.....	12
3.2.5 Market developments in the US.....	13
3.2.6 Price developments in the US market.....	14
3.3. US's tariff bindings on lamb meat	15
4. THE USITC FAILED TO FULFIL THE REQUIREMENT UNDER ARTICLE XIX OF GATT 1994 TO DEMONSTRATE "UNFORESEEN DEVELOPMENTS"	15
4.1. "Unforeseen developments"	15
4.2. Conclusion on "unforeseen developments"	17

TABLE OF CONTENTS (Cont'd)

	<u>Page</u>
5. THE US FAILED TO ACTED CONSISTENTLY WITH ITS OBLIGATION UNDER SG ARTICLE 5 TO ONLY APPLY A MEASURE TO THE EXTENT NECESSARY TO PREVENT SERIOUS INJURY.....	17
6. THE US ACTED INCONSISTENTLY WITH THE REQUIREMENTS UNDER SG ARTICLE 3.1 ON INVESTIGATIONS AND PUBLIC REPORTS.....	20
6.1. The investigation did not stop with the USITC Report	20
6.2. The US failed to act consistently with its obligations under SG Article 3.1 regarding investigations subsequent to the USITC Report	20
6.3. The US failed to act consistently with its obligations under SG Article 3.1 to publish the justification for the measure	22
6.4. Conclusions on the obligations on investigations and public reports	23
7. THE US FAILED TO ACT CONSISTENTLY WITH THE REQUIREMENTS UNDER SG ARTICLE 4 TO DEMONSTRATE THAT INCREASED IMPORTS ARE THREATENING TO CAUSE SERIOUS INJURY TO THE "DOMESTIC INDUSTRY"	23
7.1. The USITC determination of threat of serious injury was based on a determination of domestic industry inconsistent with SG Article 4.1(c)	23
7.2. The USITC determination of threat of serious injury was not supported by evidence obtained in the investigations as required by SG Article 4.2.....	26
7.2.1 The USITC made some use of USDA data, which was inconsistent with its own questionnaire data	26
7.2.2 Inadequacy of the evidence, especially from growers, on "domestic industry" performance	27
7.2.2.1 <i>Growers</i> 27	
7.2.2.2 <i>Grower/feeders</i> 28	
7.2.2.3 <i>Feeders</i> 29	
7.2.2.4 <i>Packers, Packer/Breakers, Breakers</i>	29
7.2.3 The "evidence" used by the USITC in its examination of factors listed in SG Article 4.2(a) did not demonstrate threat of serious injury caused by imports.....	30
7.2.3.1 <i>The USITC data showed an increase in production</i>	30

TABLE OF CONTENTS (Cont'd)

	<u>Page</u>
7.2.3.2 Imports share of domestic market increased due to decline in domestic production.....	30
7.2.3.3 Productivity was constant.....	31
7.2.3.4 Capacity utilization down only because capacity increased.....	31
7.2.3.5 Profits and losses - some fall in profits as prices return to normal levels.....	32
7.2.3.5.1. Growers.....	32
7.2.3.5.2. Grower/feeders.....	33
7.2.3.5.3. Feeders.....	34
7.2.3.5.4. Packers, Packer/Breakers, Breakers.....	34
7.2.3.6 Employment increased for growers, was steady for feeders, but was not examined for packers and breakers.....	34
7.2.3.7 Capital expenditure and fixed assets increased over the period of the investigation 35	35
7.2.3.8 The failure to show that there was a "significant overall impairment of the position of the domestic industry".....	35
7.2.4 Illogical conclusions from the evidence obtained regarding injury.....	36
7.2.5 No evidence of threat.....	36
7.2.6 Conclusions on the adequacy of the evidence to support the USITC's determination under SG Article 4.2.....	36
7.3. The USITC determination of threat of serious injury was inconsistent with the requirements of Article 4.1(b) which requires that the serious injury be "imminent" and the determination of threat of serious injury be "based on facts, not merely allegation, conjecture or remote possibility".....	37
7.3.1 The failure to look to the future to prove threat of serious injury.....	37
7.3.2 The lack of an analysis that serious injury was "imminent".....	38
7.3.3 Conclusions on the inconsistency of the threat of serious injury determination with SG Article 4.1(b).....	40
7.4. The USITC determination of threat of serious injury attributed to imports injury caused by other factors contrary to the requirements of SG Article 4.2(b).....	40
7.5. Various factors in SG Article 4.2(a) were not considered by the USITC.....	42
7.6. Conclusion on the issue of injury.....	45
8. THE US FAILED TO ACT CONSISTENTLY WITH ITS OBLIGATION TO ENDEAVOUR TO MAINTAIN A SUBSTANTIALLY EQUIVALENT LEVEL OF RIGHTS AND OBLIGATIONS WITH AUSTRALIA UNDER SG ARTICLE 8.1.....	46

TABLE OF CONTENTS (Cont'd)

	<u>Page</u>
9. THE US FAILED TO ACT CONSISTENTLY WITH NOTIFICATION AND CONSULTATION REQUIREMENTS UNDER SG ARTICLE 12	48
9.1. The US failed to act consistently with the notification obligations under SG Article 12.2 to notify the Committee of the justification for the measure	48
9.2. The US failed to act consistently with the requirements under SG Article 12.3 for consultations to achieve the objective set out in SG Article 8.1.....	49
9.3. The US failed to act consistently with the notification obligations under SG Article 12.6 regarding the conduct of investigations	49
9.4. Conclusions on notification and consultation requirements under SG Article 12 50	
10. THE US BREACHED ITS OBLIGATIONS UNDER THE SAFEGUARDS AGREEMENT BY EXEMPTING CERTAIN COUNTRIES FROM THE MEASURE	50
11. THE US BREACHED ITS OBLIGATIONS UNDER SG ARTICLE 11 BECAUSE THE MEASURE WAS NOT EMERGENCY ACTION AND DID NOT CONFORM TO THE PROVISIONS OF GATT 1994 ARTICLE XIX AND THE SAFEGUARDS AGREEMENT	51
12. THE US IS IN BREACH OF THE REQUIREMENTS OF SG ARTICLE 2.1.....	51
13. SINCE THE MEASURE IS INCONSISTENT WITH THE SAFEGUARDS AGREEMENT AND GATT 1994 ARTICLE XIX, THE US IS IN BREACH OF ITS OBLIGATIONS UNDER ARTICLE II OF GATT 1994.....	52
14. CONCLUSION	52
EXHIBITS	54

1. OVERVIEW

1. On 7 July 1999 the United States of America imposed a safeguard measure in the form of a tariff quota on imports of fresh, chilled, and frozen lamb meat to apply from 22 July 1999. This involved not only a high out of quota tariff starting at 40 per cent in the first year but also an in-quota tariff starting at 9 per cent in the first year compared to the bound rate of about 0.2 per cent. The US excluded Canada, Mexico, Israel and beneficiary countries under CBERA and ATPA¹ from the measure.²

2. The imposition of the safeguard measure followed an investigation by the USITC³ initiated on 7 October 1998, which reported to the US President on 5 April 1999 that there was a threat of serious injury, i.e. that serious injury was imminent, for which increased imports were a substantial cause. The decision on the measure was not taken by the US President until 7 July 1999. The measure imposed was more trade restrictive than that recommended by the USITC. No explanation has been given for the delay in the decision and no justification has been given about the basis for imposing a more restrictive measure.

3. The non-confidential versions of the USITC Report⁴ and the main submissions by Meat and Livestock Australia (MLA) to the USITC have been provided as Exhibits AUS-1 and 28-31. These will provide the Panel with detailed background on the market.

4. Australia asks the Panel for an immediate preliminary ruling that the US should be asked to supply information to the Panel and Australia to ensure that the Panel can carry out its responsibilities under DSU Article 11.⁵

5. Australia will show that the US has acted inconsistently with its obligations under the Safeguards Agreement and GATT 1994 Article XIX⁶ in imposing the measure. In addition, Australia will show that the measure is inconsistent with the US's obligations under GATT 1994 Article II.

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

7. The US acted inconsistently with the requirements of SG Article 5.1⁸ for a determination that the measure is applied only to the extent "necessary to prevent or remedy serious injury and to facilitate adjustment." Neither the USITC recommendation nor the action ultimately taken by the US President was justified under SG Article 5.1.

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

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

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

³ United States International Trade Commission.

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

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

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

⁷ GATT 1994 Article XIX:1

⁸ Article 5.1 of the Safeguards Agreement.

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

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

- (a) the USITC's determination of the relevant "domestic industry" was inconsistent with the provisions of SG Article 4.1(c) through the inclusion of enterprises that do not produce the like or directly competitive products
- (b) the US did not demonstrate that increased imports were threatening to cause serious injury to the "domestic industry", in particular
 - (i) the data were inadequate and did not support the determination as required under SG Article 4.2
 - (ii) the USITC did not meet the requirements of SG Article 4.1(b) that for a finding of threat of serious injury the serious injury must be imminent and "[a] determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility"
 - (iii) the determination of threat of serious injury, by attributing to increased imports injury caused by other factors, was contrary to SG Article 4.2(b)
 - (iv) the USITC failed to consider all the factors in SG Article 4.2(a)

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

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

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

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

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

Therefore, Australia asks the Panel:

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

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

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

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

- (a) all confidential information in the USITC Report on which its determination and recommendation were based; and
- (b) all information, including details of any deliberations and analysis, and documents taken into account by the US Administration or the US President in the course of taking a decision to apply the measure in dispute.

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

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

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

3. FACTS OF THE CASE

3.1 Investigation and imposition of the safeguard measure

3.1.1 US law and practice in a safeguards investigation

19. The USITC is the agency of the US Government that, amongst other things, conducts injury inquiries for contingent remedy cases on safeguards, anti-dumping, and countervailing. The US safeguards legislation was notified to the WTO Committee on Safeguards (Committee) in G/SG/N/1/US/1.¹⁰ The principal legislative provisions covering safeguards under the Safeguards Agreement are Sections 201-204 of the Trade Act of 1974, as amended. The USITC initiates an inquiry on the basis of a private petition. It holds a public hearing on the question of injury. If it finds that increased imports are a substantial cause of serious injury or threat thereof to an industry in the US, it then holds a public hearing on the question of remedy.

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

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

⁹ Question 3, Exhibit AUS-27.

¹⁰ At Exhibit AUS-24.

¹¹ Under Section 203(a)(4)(A) of the Trade Act of 1974.

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

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

3.1.2 The procedures followed by the US in this case

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

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

25. The USITC initiated an investigation (TA201-68) on 7 October 1998 through a notice on 19 October 1998¹⁶ "to determine whether lamb meat, provided for in subheadings 0204.10.00, 0204.22.20, 0204.23.20, 0204.30.00, 0204.42.20 and 0204.43.20 of the Harmonized Tariff Schedule of the United States, is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article." The period of the investigation was 1 January 1993 through to 30 September 1998.¹⁷

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

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

¹² Under Section 203 (a)(5) of the Trade Act of 1974.

¹³ Under Section 203 (a)(4)(B), of the Trade Act of 1974.

¹⁴ At page 1 of G/SG/N/1/US/1.

¹⁵ See G/SG/N/6/US/5 at Exhibit AUS-8.

¹⁶ See G/SG/N/6/US/5 at Exhibit AUS-8.

¹⁷ At page I-7 of the USITC Report ("USITC I-7").

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

29. The US notified the Committee in G/SG/N/8/US/3¹⁸ dated 18 February 1999 of the injury determination and in G/SG/N/8/US/3/Rev.1 dated 15 April 1999 of the USITC recommendation on the measure. The US notified the Committee of the measure actually imposed in G/SG/N/10/US/3-G/SG/N/11/US/3 dated 12 July 1999.¹⁹

30. Australia and the US had consultations under SG Article 12.3 on 4 May 1999 and 14 July 1999.²⁰

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

32. On 23 July 1999 Australia requested consultations under DSU Article 4 and pursuant to GATT 1994 Article XXII:1 and SG Article 14.²² These were held on 26 August 1999. On 14 October 1999 Australia asked for the establishment of a Panel in WT/DS178/5 and Corr.1. The first request to the DSB was on 27 October 1999. The Panel was established at the second request on 19 November 1999. The Panel was composed with standard terms of reference on 21 March 2000.

3.1.3 *Description of the recommended and imposed safeguard measures*

33. The USITC recommended that the US President:²³

- "- impose a tariff-rate quota system, for a four-year period, on imports of lamb meat that are the subject of this investigation, as follows (all weights are in terms of carcass-weight equivalents):

¹⁸ Subsequently amended in G/SG/N/8/US/3/Corr.1, and G/SG/N/8/US/3/Corr.2.

See Exhibit AUS-9.

¹⁹ Subsequently modified and notified in G/SG/N/10/US/3- G/SG/N/11/US/3/Suppl.1.

See Exhibit AUS-12.

²⁰ G/L/313-G/SG/19 at Exhibit AUS-13.

²¹ G/L/339-G/SG/N/12/AUS/1-G/SG/N/12/US/1 at Exhibit AUS-14.

²² WT/DS178/1-G/L/314-G/SG/D9/1, and Corr.1 at Exhibit AUS-21.

²³ G/SG/N/8/US/3/Rev.1 at Exhibit AUS-10.

<i>Year</i>	<i>Tariff Rate Quota</i>
<i>First</i>	20% <i>ad valorem</i> on imports over 78 million pounds;
<i>Second</i>	17.5% <i>ad valorem</i> on imports over 81.5 million pounds;
<i>Third</i>	15% <i>ad valorem</i> on imports over 81.5 million pounds; and
<i>Fourth</i>	10% <i>ad valorem</i> on imports over 81.5 million pounds

- implement appropriate adjustment assistance to facilitate efforts by the domestic industry to make a positive adjustment to import competitive [*sic*] and provide greater economic and social benefits than costs.
- exclude from the relief imports from Canada and Mexico under section 311(a) of the NAFTA Implementation Act in view of the USITC's finding that imports from those countries either do not account for a substantial share of total imports or do not contribute importantly to serious injury, or both.
- exclude from the relief imports from Israel, and any imports that enter duty free from beneficiary countries under the Caribbean Basin Economic Recovery Act or the Andean Trade Preference Act, in view of the USITC's finding that there were few or no imports of lamb meat from these countries."

34. The US President, without any justification, imposed a far more aggressive remedy, as follows:²⁴

"The measure is a tariff-rate quota on imports of lamb meat²⁵ for a period of just over three years. The tariff-rate quota in the first year is 31,851,151 kilograms, an amount that is equal to imports of lamb meat during calendar year 1998. The tariff-rate quota amount will increase by an additional 857,342 kilograms in each of the second and third years of the measure. Individual country allocations for product imported from Australia, New Zealand, and an "other country" category within the tariff-rate quota have also been established, which reflect the actual shares of each country in calendar year 1998.

Increased rates of duty for imports within the tariff-rate quota amount will be set as follows: 9 per cent *ad valorem* for imports in the first year of the measure; 6 per cent *ad valorem* for imports in the second year; and 3 per cent *ad valorem* for imports in the third year. Rates of duty for imports above the tariff-rate quota levels will be set at 40 per cent *ad valorem* in the first year of relief, 32 per cent *ad valorem* in the second year, and 24 per cent *ad valorem* in the third year.

²⁴ G/SG/N/10/US/3-G/SG/N/11/US/3 and G/SG/N/10/US/3/Suppl.1-G/SG/N/11/US/3/Suppl.1 at Exhibit AUS-11 and 12.

²⁵ Fresh, chilled and frozen lamb meat under the tariff headings HS 0204.10.00, 0204.22.20, 0204.23.20, 0204.30.00, 0204.42.20 and 0204.43.20. [*Footnote not in original text but specified separately.*]

Chart 1: Country Allocation²⁶

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

Chart 2: Tariff Duties

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

The measure does not apply to imports from Canada, Mexico, Israel, beneficiary countries under the Caribbean Basin Economic Recovery Act or the Andean Trade Preference Act, or developing countries described in the notification under Article 9, footnote 2, provided below.²⁷

35. "The measure was introduced on 7 July 1999, and is effective with respect to goods exported on or after 22 July 1999."²⁸

3.2 Competitive conditions in the US market

3.2.1 Growers – US

36. In the US, lambs are initially raised by "growers", who also produce wool and who would usually breed the lambs.

37. At around 6 months of age the lambs are weaned and about 70-80% of lambs for lamb meat go to feedlots or "feeders" for fattening on grain or other concentrates.²⁹

38. Lambs are then subject to intensive feeding and finishing for 2-4 months. The fed lambs or "slaughter lambs" are then sold at about 9-12 months to an abattoir or "packer". The packer in turn may sell the carcass to be butchered to a "breaker", which divide carcasses into primal, subprimal, or retail cuts for resale to non-breaker wholesalers or retail outlets.

39. Each of these industries produces a different product. Moreover, many growers will have other activities rather than being a specialist grower of lambs for sale as feeders. Packers and breakers may not be limited to lamb meat, but may also produce other sheep meat. Some lamb meat

²⁶ Weights are in terms of product weight. The carcass weight equivalent depends on the conversion factor used, but the USITC recommendation and the measure are approximately equivalent for the first year. [Footnote not in original text.]

²⁷ G/SG/N/10/US/3-G/SG/N/11/US/3 at Exhibit AUS-11.

²⁸ G/SG/N/10/US/3/Suppl.1-G/SG/N/11/US/3/Suppl.1 at Exhibit AUS-12.

²⁹ See table on USITC II-52.

is produced by packers and breakers that also slaughter other livestock species and butcher their carcasses.³⁰

3.2.2 *Growers - Australia and New Zealand*

40. There is no Australian or New Zealand counterpart for the lamb feeder industry. Lambs are grass fed and then go to slaughter.

41. The genetic differences between Australian and US lambs combine with the earlier slaughter age in Australia to give much smaller lambs.³¹

3.2.3 *Lamb meat - Australia and US*

42. The average Australian lamb carcass is significantly smaller than in the US with lower fat content. This results in significantly different sizes of cuts with imported cuts sold in the marketplace as ungraded cuts. This, combined with Australian lamb being grass fed, means that the imported product has different product characteristics from the domestic product and competes for different market segments. In addition, much of the imported product comes in as frozen and so again competes for a different segment of the market.³²

3.2.4 *Support for US growers*

43. The major support for US growers, including grower/feeders, was through National Wool Act subsidies.³³ This was based on a support price for wool of varying grades and a direct payment to growers when prices fell below the relevant support price. In 1993 total payments under the National Wool Act amounted to US\$125.2m.³⁴ For those growers that responded to the USITC questionnaire these subsidies amounted to 18% of net sales value in fiscal year 1993 and 19% in fiscal year 1994. This meant the difference between net income before taxes of US\$0.995m and US\$2.007m and losses of US\$3.672m and US\$3.306m in fiscal years 1993 and 1994, respectively.³⁵

44. The Omnibus Budget and Reconciliation Act of 1993 (P.L. 103-130) enacted in November 1993 provided for the phase-out and repeal of the National Wool Act. In 1995, growers received payments for the 1994 marketing year of 75% of the usual payment; in 1996 this reduced to 50% for the 1995 marketing year; and effective 31 December 1995 the National Wool Act was repealed with no further payments to be made after 1996.³⁶

³⁰ USITC II-12, 14 and 15, and Footnote 57.

³¹ At page 4 and Exhibit 2 of Vol. 1 of the MLA pre-injury hearing brief at Exhibit AUS-28.

³² At pages 29-34 of Vol. 1 of the MLA pre-injury hearing brief at Exhibit AUS-28.

³³ National Wool Act of 1954, as amended. See USITC II-11.

³⁴ See table below derived from data in Table 45 at USITC II-78.

³⁵ See Table 12 at USITC II-25 and table in Section 7.2.3.5.1 of this Submission.

³⁶ For a description of the National Wool Act of 1954, see USITC II-77-79.

PAYMENTS UNDER THE NATIONAL WOOL ACT (US\$ millions)

	1993	1994	1995
Shorn wool net payments	100.6	55.5	24.9
Unshorn wool net payments	24.6	13.6	6.7
Total	125.2	69.1	31.6

Source: Table 45, USITC II-78.

3.2.5 Market developments in the US

45. The repeal of the National Wool Act caused a reduction in the number of grower operations and a decline in flock numbers. As a result of the repeal of the National Wool Act, the US sheep industry entered into a flock liquidation phase. The flock reduction was accomplished partly by the slaughter of breeding stock and partly by exporting animals. Over 1993 and 1994, a period of stable imports, the flock declined 9 per cent in 1993, from 10.013m on 1 January 1993 to 9.076m by 1 January 1994, and a further 7 per cent to 8.461m by 1 January 1996. This decline continued to 7.937m by 1 January 1997, a fall of a further 6 per cent.³⁷

46. The decline in flock numbers over the period of investigation simply continued historical trends, intensified by the repeal of the National Wool Act. The flock had fallen from 56.2m in 1942 to 10.75m by 1992. The reduction in flock numbers did result in higher feeder lamb prices in 1996 and 1997.

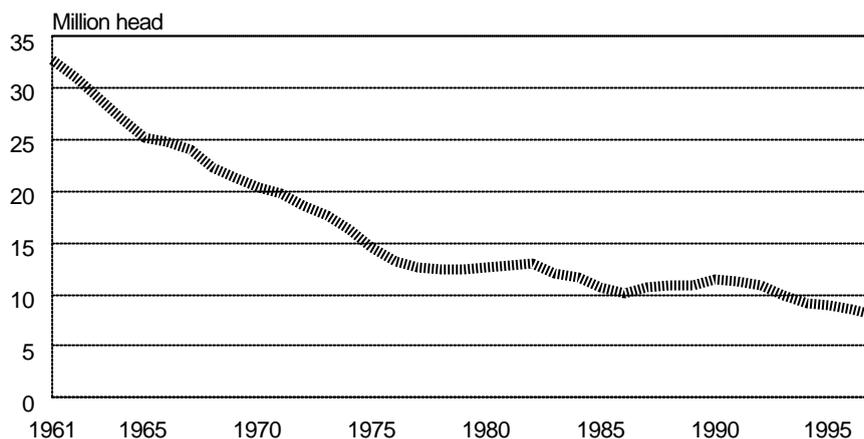
47. The accelerated decline during the period of investigation was directly linked to the decisions to liquidate the domestic flock, which in turn was caused by the removal of the National Wool Act subsidies.³⁸

³⁷ At Exhibit 15 of Vol. 1 of the MLA pre-injury hearing brief at Exhibit AUS-28.

³⁸ See pages 48-50 of Vol. 1 of the MLA pre-injury hearing brief at Exhibit AUS-28.

GRAPH 1

**US Sheep Numbers
1961-1997**



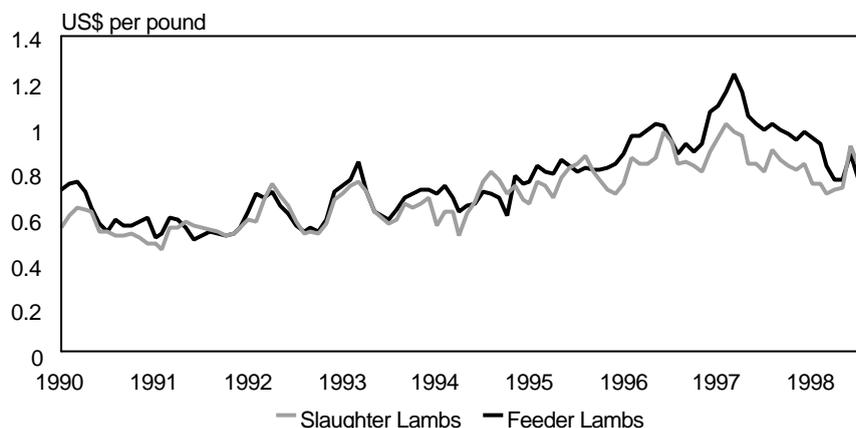
3.2.6 Price developments in the US market

48. The flock liquidation resulted in sharply increased lamb prices through 1996 and 1997. Subsequently prices tended to return to more normal levels. However, prices remained in both nominal and real terms above those prevailing in 1993 and 1994. See Figure 3 on USITC II-55. Prices of lamb carcasses followed a similar trend with prices first spiking but then returning to levels that were still above those prevailing in 1993 and 1994. See Figure 5 on USITC II-58. Wholesale price trends for various prices of cuts of lamb meat are shown in Figures 6-10 on USITC II-59 to II-60. These show that prices were relatively flat over the period of investigation, and ended the period above the level in 1993 and 1994.

GRAPH 2

US LAMB PRICE

San Angelo, Texas - Choice grade



Source: USDA

3.3 US's tariff bindings on lamb meat

49. In the Uruguay Round, the US bound the tariffs on lamb meat in Schedule XX at 0.7¢/kg reducing from 1.1¢/kg in six equal instalments over six years. This tariff concession entered into force on 1 January 1995. The bound level was 0.8¢/kg in 1999 and is 0.7¢/kg in 2000.

4. THE USITC FAILED TO FULFIL THE REQUIREMENT UNDER ARTICLE XIX OF GATT 1994 TO DEMONSTRATE "UNFORESEEN DEVELOPMENTS"

4.1 "Unforeseen developments"

50. Before imposing the measure the US was obliged to demonstrate that:

"as a result of **unforeseen developments** and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions, any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products". [*Emphasis added.*]³⁹

51. The Appellate Body in Korea - Dairy Safeguard⁴⁰ and in Argentina - Footwear Safeguard⁴¹ found that:

³⁹ GATT 1994 Article XIX:1.

⁴⁰ Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products (Korea - Dairy Safeguard), Panel Report, WT/DS98/R; Appellate Body Report, WT/DS98/AB/R.

⁴¹ Argentina - Safeguard Measures on Imports of Footwear (Argentina - Footwear Safeguard), Panel Report, WT/DS121/R; Appellate Body Report, WT/DS121/AB/R.

"Thus, any safeguard measure imposed after the entry into force of the *WTO Agreement* must comply with the provisions of *both* the *Agreement on Safeguards* and Article XIX of the GATT 1994."⁴² [Footnote omitted.]

52. The Appellate Body in *Korea - Dairy Safeguard* and in *Argentina - Footwear Safeguard* also found that the first clause in GATT 1994 Article XIX:1(a):⁴³

"describes certain *circumstances* which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994."⁴⁴

53. Accordingly, for a Member to apply a safeguard measure consistently with its WTO obligations it is necessary that it has demonstrated, as a matter of fact, that increased imports are causing or threatening to cause serious injury to the domestic industry as a result of "unforeseen developments".

54. The Appellate Body in *Korea - Dairy Safeguard* at paragraph 87 said that

"The object and purpose of Article XIX is to allow a Member to re-adjust temporarily the balance in the level of concessions between that Member and other exporting Members when it is faced with "unexpected" and, thus, "unforeseen" circumstances which lead to a product "being imported" in "such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers ... of like or directly competitive products". "

55. Thus the issue of "unforeseen" circumstances ' is a "pertinent issue of fact and law" that has to be demonstrated by the competent authority and included in its report in compliance with SG Article 3.1, which requires that:

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

56. The USITC did not examine the issue and therefore as a matter of fact did not demonstrate this circumstance of "unforeseen developments". Therefore, the US has not acted consistently with its obligations under GATT 1994 Article XIX.

57. While there is no onus on Australia to demonstrate that the circumstance of "unforeseen developments" did not exist, a brief description of the facts in this case make it clear that the situation affecting the "domestic industry" in the US was not the result of unforeseen developments.

58. The long-term decline of the US sheep and lamb meat industries was not new: it was not unexpected. The major cause for the instability in the market and the subsequent reduction in returns to growers was the removal of the National Wool Act subsidies.

59. As set out above in the section on "Support for US growers",⁴⁵ the legislation for the removal of the National Wool Act subsidies was enacted on 1 November 1993. Knowledge about what the impact would be was well known to both the American Sheep Industry Association (ASI) and

⁴² At Paragraph 77 of WT/DS98/AB/R. See also Paragraph 84 of WT/DS121/AB/R.

⁴³ "If, as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions".

⁴⁴ At Paragraph 85 of WT/DS98/AB/R. See also Paragraph 92 of WT/DS121/AB/R.

⁴⁵ Section 3.2.4.

members of the US Congress. Members of the US Congress as well as the ASI were fully aware that this was going to have a major impact on growers and significantly reduce the flock size. There was no surprise when that actually happened. This was clearly foreseen at the time.⁴⁶

60. On 1 January 1995, the WTO Agreement entered into force for the US. This involved a binding commitment by the US to reduce its tariff from 1.1¢/kg to 0.7¢/kg by 2000. The enactment of legislation removing the National Wool Act subsidies was before that date and the effects of the removal of the National Wool Act subsidies were clearly foreseen at the time.

61. The Appellate Body in *Korea - Dairy Safeguard* and *Argentina - Footwear Safeguard* has found that "unforeseen" developments must be "unexpected" developments.⁴⁷ "Unexpected" means: "not expected; surprising".⁴⁸ Some volatility in the price of an agricultural product is hardly surprising. Nor is the growth of imports into a market where production is declining. Nor is the decline in production of lambs where the government took the conscious decision to remove a large subsidy programme from an inefficient industry. The USITC Report at II-78 and 79 said:

" . . . in the early 1990's increases in producer surplus resulting from the Wool Act sometimes exceeded 10 percent of producer revenue. [Footnote omitted.] Effects under the Wool Act were not substantial enough to reverse the long-term decline, but it did abate the decline."

62. The removal of the National Wool Act subsidies led to the reduction in lamb production which led to the reduction in domestic production of lamb meat which led to an increase in lamb meat prices. The subsequent cyclical drop in prices to the levels prevailing before the removal of the subsidies was a normal cycle. It was not unexpected: it was not surprising. To allow the combination of any such cycle with an increase in imports over a low bound tariff to trigger safeguard action would undermine the gains of the Uruguay Round in liberalizing markets for agricultural products. Where an industry is in long-term secular decline and is subject to a low, bound rate of duty, increases in imports can only be expected from countries that are more efficient producers of that product and cannot be regarded as being "unforeseen developments".

4.2 Conclusion on "unforeseen developments"

63. The USITC did not look at the issue of "unforeseen developments" and so did not prove that increased imports were threatening to cause serious injury as a result of "unforeseen developments". Accordingly, the US acted inconsistently with its obligations under GATT 1994 Article XIX. Therefore, the measure is not in conformity with GATT 1994 Article XIX and hence also the Safeguards Agreement, in particular SG Article 11.1(a).

5. THE US FAILED TO ACTED CONSISTENTLY WITH ITS OBLIGATION UNDER SG ARTICLE 5 TO ONLY APPLY A MEASURE TO THE EXTENT NECESSARY TO PREVENT SERIOUS INJURY

64. SG Article 5.1 says, *inter alia*⁴⁹

⁴⁶ See pages 45-48 of Vol. 1 of the MLA pre-hearing injury submission at AUS 28. See also a statement by Senator Baucus on 18 October 1993 at AUS-32.

⁴⁷ At Paragraph 84 of WT/DS98/AB/R, and Paragraph 91 of WT/DS121/AB/R.

⁴⁸ NSOED - New Shorter Oxford English Dictionary CD version, January 1997.

⁴⁹ This demonstration that the US acted inconsistently with its obligations under SG Article 5.1 is without prejudice to Australia's claims that the measure is not in conformity with other provisions of GATT 1994 Article XIX and the Safeguards Agreement, including SG Article 4, and so had no right under the Safeguards Agreement to impose any measure.

"A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment."

65. Since the basis for the USITC injury determination was "threat of serious injury" (i.e. in the future), the issue is what (if any) measure was necessary to prevent serious injury being caused by increased imports in the future. The US had to have demonstrated that the measure chosen would be applied: "only to the extent necessary to prevent . . . serious injury and to facilitate adjustment".

66. The Appellate Body found in *Korea - Dairy Safeguard* that:

"the first sentence of Article 5.1 imposes an *obligation* on a Member applying a safeguard measure to ensure that the measure applied is not more restrictive than necessary to prevent or remedy serious injury and to facilitate adjustment."⁵⁰

67. Thus the US was obliged "to ensure that the measure applied was not more restrictive than necessary . . .". The only way in which the US could have met that obligation was if it had reached a finding, before imposing the measure, that the measure met the requirements of the first sentence of SG Article 5.1. Therefore, the US was obliged to have justified the measure applied before the decision to impose the measure. This is a critical issue of fact and law under the Safeguards Agreement and so is a "pertinent issue of fact and law" under SG Article 3.1.

68. The US has not been prepared to produce any such justification and it can only be presumed that it does not exist. Accordingly, Australia submits that the Panel should conclude that such a justification did not exist and that the US breached its obligations under SG Article 5.1. It would not be sufficient for the US to seek to justify its actions after the event. A lack of a formal determination at the time cannot be cured.

69. Australia considers that the onus of proof that such a justification existed lay with the US. If the US had provided such a proof, then it would have been up to Australia to argue that it was invalid.

70. The following argument in the alternative is provided in case the Panel considers that Australia must establish a *prima facie* case that the measure was not justified under SG Article 5.1 even in the face of the refusal by the US to provide its justification of July 1999.

71. The USITC recommendation to the US President was that a less restrictive measure was sufficient to prevent serious injury from being caused by increased imports. The USITC recommendation was less restrictive because it did not impose an additional in-quota tariff and because the out of quota tariff was much lower.

72. The US imposed large increases in the tariff rate applying within the tariff quota, compared to the bound rate of 0.8¢/kg in 1999 and 0.7¢/kg in 2000, or approximately 0.2 per cent *ad valorem*⁵¹ compared to the 9 per cent safeguard rate for 1999/2000. The tariff quota aimed at effectively limiting imports at levels where no injury was being experienced by the "domestic industry". Given the unanimous finding of the USITC that no serious injury was being caused by this level of imports, there is no conceivable basis for imposing an additional tariff on product coming within quota. Such an additional impost goes well beyond the extent necessary to prevent the occurrence of serious injury.

⁵⁰ At Paragraph 96 of WT/DS98/AB/R.

⁵¹ At USITC II-8.

73. The USITC recommendation was for an out of quota tariff of 20 per cent in the first year whereas the measure provides for an outside tariff of 40 per cent. SG Article 5.1 is a necessity test and so the US cannot simply impose a higher tariff than is necessary to prevent injury. The USITC found that a 20 per cent out of quota tariff would be sufficient. The arbitrary imposition of a level twice that, as imposed by the US President, was clearly in excess of what was necessary. The final out of quota tariff rate of 24 per cent in the third year compares to the 15 per cent recommended by the USITC, and is still higher than that recommended by the USITC for the first year.

74. Therefore, the measure imposed by the US went far beyond the recommendation of the USITC and so, on the basis of its own competent authority's finding, was not necessary to prevent serious injury being caused by increased imports.

75. Turning to the USITC recommendation itself, the recommended measure aimed at effectively limiting the level of trade in 1999/2000 to that achieved in calendar year 1998 with a small increase for the subsequent years. However, the USITC found that the level of imports in 1998 was not causing injury. If this level of imports was not causing injury then it **could not have been necessary** to restrict imports to that level. No objective analysis is given of what level of quota would have been **necessary**, but it would have had to be greater than the 1998 level of imports. SG Article 5.1 is clear that the US had to ensure that the measure was **necessary**, not merely that it was **sufficient**.

76. The USITC does not objectively analyse why the recommended measure was necessary to prevent serious injury being caused by increased imports for each of the industry segments⁵² that make up the "domestic industry". Each segment will be affected differently by an import restriction. Moreover, the USITC did not seek to weigh the impact of the recommended measure on the various segments to obtain an overall view of the impact on the "domestic industry" as a whole.

77. A safeguard measure can only be applied to the extent that it is remedying or preventing injury from being caused by the increased imports. It is not a means of increasing protection generally. Where there is injury, including injury in the future due to threat, the Member can only apply a measure that offsets the injury caused, or to be caused, by the increased imports. An analysis is required of the injury so that the measure is at most proportionate to the share of the injury, which is attributable to increased imports. Such an analysis requires the Member to cumulate other causes of injury to determine the extent of serious injury attributable to increased imports. The necessity test of SG Article 5.1 then requires that any safeguard measure only be applied to the extent necessary to prevent that injury. The exceptional nature of safeguard measures calls for particular care in the determination of what is necessary and must be the least trade restrictive option available. The USITC Report failed to perform such an analysis and so could not have been used to justify even its own recommendation. This is, of course, now hypothetical given that the US did not adopt the USITC recommendation.

78. In addition the US had to demonstrate that the extent of the recommended measure itself was necessary to facilitate adjustment by the "domestic industry". Again, in the absence of a report explaining the basis for the measure imposed, there has been no demonstration that the measure was necessary to facilitate adjustment.

79. The USITC Report would not be sufficient to justify the actual measure, since the measure is more restrictive than its recommendation. Moreover, the USITC Report does not meet the requirements of SG Article 5.1 even for its own recommended measure. There is no objective

⁵² The USITC expression "industry segment" is used in this Submission to maintain consistent language. This is without prejudice to Australia's view of what constitutes the "domestic industry" under SG Article 4.1(c) in this dispute.

analysis of why the measure was necessary, what the impact would be for the various industries, and whether the USITC sought to weigh the impact on the various industries.

80. A tariff quota cannot help all the industry segments and runs the risk of destabilizing the market. The industry segments are faced with the reality of long-term declining consumption and production. A temporary increase in domestic prices due to a tariff quota combined with restricted availability of Australian and New Zealand product, which is serving to grow the market,⁵³ will only serve to accelerate the decline in the demand for lamb meat. The US has manifestly failed to show how even the USITC recommended measure this would facilitate adjustment for the "domestic industry".

81. Therefore, the US acted inconsistently with SG Article 5.1 and so the measure is not in conformity with the Safeguards Agreement. Such an inconsistency cannot be cured by a subsequent evaluation of what measure was necessary.

6. THE US ACTED INCONSISTENTLY WITH THE REQUIREMENTS UNDER SG ARTICLE 3.1 ON INVESTIGATIONS AND PUBLIC REPORTS

6.1 The investigation did not stop with the USITC Report

82. The US legislation requires the US President to reach a decision on a recommendation by the USITC within 60 days. The only apparent exception to this is where the US President asks for a supplemental report from the USITC, in which case under Section 203 (a)(4)(B), the US President has 30 days from the receipt of the supplemental report.

83. The USITC reported to the US President on 5 April 1999. Accordingly, the US President had until 4 June 1999 to make his decision. The actual decision was not made until 7 July 1999.

84. Clearly the issue of the nature of the measure to be imposed was subject to further intensive investigation by US agencies. This is confirmed by US media.⁵⁴ However, no such further work by the USITC or any other US agency have been made public by the US.

6.2 The US failed to act consistently with its obligations under SG Article 3.1 regarding investigations subsequent to the USITC Report

85. SG Article 3.1 says that:

"A Member may **apply** a safeguard **measure only following** an **investigation by the competent authorities** of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. . . ." [*Emphasis added.*]

It then goes on to set out further requirements for that "investigation".

86. The object and purpose of SG Article 3 are to ensure that governments can not undertake safeguard investigations in a black box, i.e. that they cannot impose measures following a secret, internal investigation.

⁵³ See for example, the last line on I-34, where the USITC notes that the continuing efforts by the Australian and New Zealand producers to increase lamb consumption in the US have substantially benefitted all lamb producers, including the domestic industry.

⁵⁴ For example, report at pages 7 and 8 of Inside US Trade of 18 June 1999 at Exhibit AUS-33.

87. The word "investigation" means:

- "1. The action or process of investigating; systematic examination; careful research
2. An instance of this; a systematic inquiry; a careful study of a particular subject"⁵⁵

This is not limited to inquiries involving data gathering.

88. The NSOED defines "following" (as a preposition) to mean:

"As a sequel to or consequence of; coming after in time."

89. To take the second meaning ("coming after in time"), would be to say that once the report of the SG Article 3.1 investigation has been made, the government of the Member is not bound to abide by it but can have a further investigation outside the requirements of SG Article 3.1. This would render the provision meaningless for the purpose of transparency and affording Members the ability to defend their rights under the WTO.

90. Accordingly, its interpretation is that the **application** of a measure ("apply a safeguard measure") has to be as a **consequence** of the findings of the investigation. Thus, it applies to all issues of fact and law through to the application of the measure, not just the injury determination but also the justification of the measure applied that is required under SG Article 5.1.

91. On the question of when does the "investigation" under the Safeguards Agreement finish, the Committee and Secretariat practice here is instructive. Under the G/SG/N/9/- series, the Committee publishes: "Information to be Notified to the Committee where a Safeguard Investigation is Terminated with No Safeguard Measure Imposed". In three cases where an affirmative determination was followed by a decision not to impose a measure, the notifications were regarded as terminations of an investigation without the imposition of a measure,⁵⁶ i.e. the investigation process under the terms of the Safeguards Agreement can go on beyond the initial report by the investigating authority.

92. There is no basis for limiting the scope of SG Article 3.1 to some preliminary stage of the complete investigation. If a Member could arbitrarily limit what is to be an "investigation" under SG Article 3.1, then it could leave any aspect of it to an internal inquiry at some later date.

93. Australia submits that the determination of the measure is a key issue that must be covered by the investigation procedures of SG Article 3. The US was not allowed to conduct further investigations, collect information or other facts without giving parties the opportunity to defend themselves in accordance with the published procedures provided for under SG Article 3.1.

94. A country's domestic arrangements cannot be used to avoid obligations under the WTO. The US could have published a report on the actual decision. Of course, where the recommendation of the USITC, or a less restrictive measure, is adopted, there would be no need.⁵⁷ But where that is not the case, then there is a requirement under the Safeguards Agreement to publish a report on the decision as "a pertinent issue of fact and law".

95. Moreover, if the US carried out a further investigation to justify the measure, then it would also be in breach of its obligations under SG Article 3.1 on the establishment and publication of

⁵⁵ NSOED.

⁵⁶ G/SG/N/9/AUS/1, G/SG/N/9/IND/2, and G/SG/N/9/KOR/1 at Exhibits AUS-21-23.

⁵⁷ This is without prejudice to Australia's views on the USITC determination and Report under other provisions of the Safeguards Agreement and the GATT 1994 Article XIX.

procedures for investigations, the nature of those investigations and the publication of a report of the investigation on all matters of fact and law.

6.3 The US failed to act consistently with its obligations under SG Article 3.1 to publish the justification for the measure

96. Australia recognizes that the Appellate Body in paragraph 151(d) of *Korea - Dairy Safeguard* said that it:

"reverses the Panel's broad finding in paragraph 7.109 of its Report that Article 5.1 requires a Member to explain, at the time it makes its recommendations and determinations concerning the application of a safeguard measure, that its measure is necessary to remedy serious injury and to facilitate adjustment, even where the particular safeguard measure applied is *not* a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years"

However, in this context the Appellate Body restricted itself to finding what obligations SG Article 5.1 imposes on a Member about justifying its action. The Appellate Body did not in this context address the obligations under other provisions of the Safeguards Agreement, in particular SG Article 3.1. Moreover, the second sentence of SG Article 5.1 does not apply to this measure, which is not a quantitative restriction.

97. The panel report in *Mexico - HFCS*⁵⁸ says at paragraph 7.104:

' . . . at the point of preliminary or final determination, when a stage of the process of investigation is completed, the investigating authority reaches its conclusions based on the information and arguments developed to that point in the investigation, and preliminary or definitive anti-dumping measures are either imposed or not. The parties', and the public's, interest in a full understanding of the reasons for the imposition of measures, or of a negative determination, is much greater, and the requirement in Article 12.2 that the investigating authority set forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material" is directed at that interest. Footnote 592: *See Korea-Anti-Dumping Duties on imports of Polyacetal Resins from the United States (Korea-Resins)*, ADP/92, adopted 27 April 1993, BISD 40S (*Korea-Resins Panel Report*), paras. 209-210, where the Panel noted that the purpose of the requirement for explanations of final determinations in public notices under Article 8:5 of the Tokyo Round Anti-Dumping Code was transparency, that this purpose would be frustrated if, in dispute settlement, the country imposing the measure could rely on reasons not set forth in the public notice, which latter would be inconsistent with orderly dispute settlement, because a full statement of reasons "enabled Parties to the Agreement to assess whether recourse to the dispute settlement mechanism...was appropriate...".'

98. This emphasises that the importing Member's government must comply with the "investigation" requirements on all aspects of the measure and provide a public notice of its reasons, including the justification for the actual measure imposed.

99. Accordingly, the US has acted inconsistently with its obligations under SG Article 3.1 to publish its reasons for the measure imposed.

⁵⁸ *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States (Mexico - HFCS)*, WT/DS132/R.

6.4 Conclusions on the obligations on investigations and public reports

100. The US failed to act consistently with its obligations under SG Article 3.1 in respect to the conduct of any investigation after the USITC Report and also failed to provide a public report on the "findings and reasoned conclusions" for the actual measure imposed. Therefore, the measure is not in conformity with the Safeguards Agreement, and the US has acted inconsistently with its obligations under SG Article 3.1.

7. THE US FAILED TO ACT CONSISTENTLY WITH THE REQUIREMENTS UNDER SG ARTICLE 4 TO DEMONSTRATE THAT INCREASED IMPORTS ARE THREATENING TO CAUSE SERIOUS INJURY TO THE "DOMESTIC INDUSTRY"

7.1 The USITC determination of threat of serious injury was based on a determination of domestic industry inconsistent with SG Article 4.1(c)

101. The concept of "domestic industry" in the Safeguards Agreement derives from the definition in the other two WTO agreements on contingent trade remedies, i.e. the Anti-Dumping Agreement and the Subsidies Agreement⁵⁹, i.e.

"the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products . . . "⁶⁰

102. For the Safeguards Agreement "domestic industry" is defined in SG Article 4.1(c) as:

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

103. While the Safeguards Agreement does not itself define "like product", the Anti-Dumping and Subsidies Agreements provide authoritative guidance, i.e.

"Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration."⁶¹

104. Clearly packers and breakers of lamb meat produce like product to imported lamb meat.

105. At I-13, the USITC determined that the "domestic industry" consisted of growers, feeders, packers and breakers. This was on the basis of "like product". The only explanation of this is that:

⁵⁹ The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 and the Agreement on Subsidies and Countervailing Measures, respectively.

⁶⁰ Article 4.1 of the Anti-Dumping Agreement. See also Article 16.1 of the Subsidies Agreement.

⁶¹ Article 2.6 of the Anti-Dumping Agreement and Footnote 46 of the Subsidies Agreement.

"The evidence clearly establishes a continuous line of production from a raw product, live lambs, to the processed product, lamb meat."

and

"There is also evidence of a coincidence of economic interests between lamb growers and processors."

This analysis was not done to satisfy the requirements of the Safeguards Agreement, but rather being simply consistent with the USITC's past practice, since at I-12 the USITC says:

"Unlike the antidumping and countervailing duty provisions in title VII of the Tariff Act of 1930, section 201 does not address the issue statutorily. Over the years the Commission [*i.e. the USITC*] generally has taken an approach similar to that developed, and later codified, under title VII. [*Footnote omitted.*] Under that approach, the Commission includes producers of the raw product in the industry producing the processed product if it finds (1) there is a continuous line of production from the raw to the processed product, and (2) there is substantial coincidence of economic interest between the growers and processors. [*Footnote omitted.*]"

106. At I-10 (first full paragraph) the USITC says that:

"If there are identifiable domestic producers of a product that is "like" the imported product, the Commission is not required to look further for an industry producing products that are "directly competitive" but not "like" the imported products." [*Footnote omitted.*]

107. Accordingly, the USITC defined "domestic industry" on the basis of "like product" rather than "like or directly competitive products". This is confirmed by the discussion by Commissioners Askey and Crawford in Footnotes 7 and 8 at USITC I-8&9.

108. The USITC does not provide any explanation how it would justify its determination of "domestic industry" under the Safeguards Agreement in light of the requirements of SG Article 4.1(c). The US has provided no argument, beyond USITC practice and US anti-dumping/countervailing statute, why a lamb produced by a grower or a feeder should be regarded as being "like product" to the lamb meat being imported from Australia and New Zealand that is subject to the safeguard measure.

109. Indeed, the USITC found that:

" . . . **the** domestic product "like" the imported lamb meat is domestically produced lamb meat."⁶² [*Emphasis added.*]

Accordingly, the USITC found that feeder lambs, lambs for breeding purposes, and slaughter lambs were not "like" imported lamb meat.

110. The USITC Report says: "[e]xcept for lambs withheld for breeding purposes, virtually all meat-type lambs are shipped to feeders in the fall".⁶³ Thus growers of lambs in the US produce lambs for sale to feeders who fatten them before selling lambs to packers for slaughter.

⁶² At the first full paragraph on USITC I-12.

⁶³ At the second full paragraph on USITC I-13.

111. Growers are producing lambs for breeding purposes and for sale on weaning to feeders for fattening. A lamb that has just been weaned is not yet even ready for slaughter. It clearly is not "alike in all respects" to lamb meat. Indeed, it has quite different characteristics to the product under investigation, which is meat, chilled and frozen, whole carcass, half-carcass, bone-in and bone-out, in a wide variety of cuts. The lamb is alive and even if destined for slaughter will be subject first to being fattened and finished by a feeder and then being slaughtered by a packer before it becomes a carcass. A lamb produced by a grower is in no way interchangeable with a carcass or some cut of lamb meat. Indeed, feeder lambs have different characteristics to slaughter lambs and are not interchangeable with them. Thus lambs produced by growers are not "like product" to lamb meat. Therefore growers do not produce "like product" to lamb meat.

112. Similarly, lambs produced by feeders (i.e. slaughter lambs) again are not "alike in all respects" to lamb meat, and again have quite different characteristics. A slaughter lamb is alive and is in no way interchangeable with a carcass or some cut of lamb meat. It only obtains "characteristics closely resembling" lamb meat after it has been slaughtered. Therefore, slaughter lambs are not "like product" to lamb meat and so feeders do not produce "like product" to lamb meat.

113. While the USITC based its decision on the definition of the "domestic industry" on "like product", the same error would apply if it had in fact used "directly competitive" as the criterion. Clearly, two products are "directly competitive" only if they compete in the market place. This is confirmed, for example, by the Appellate Body in *Japan - Taxes on Alcoholic Beverages*, in the context of looking at "directly competitive or substitutable".⁶⁴

114. In respect of growers, feeder lambs do not compete in the market with carcasses or primal and subprimal cuts. Neither do lambs for breeding. The markets for lambs for breeding and for feeder lambs are each quite different from that for lamb meat. Therefore, growers do not produce product that is directly competitive with lamb meat.

115. Similarly, slaughter lambs do not compete with the output of packers and breakers, since they are the major input for packers. Thus slaughter lambs are not directly competitive with lamb meat. Therefore, feeders do not produce product that is directly competitive with lamb meat.

116. Accordingly, growers and feeders are not part of the "domestic industry" as defined in SG Article 4.1(c), which should be composed only of packers and breakers. Therefore the determination by the USITC is wrong and the incorrect "domestic industry" is used in its injury determination and in any assessment under SG Article 5.1 as to what measure was necessary to prevent or remedy serious injury and to facilitate adjustment.

117. If the Panel agrees that the USITC was in error in including growers, or in including growers and feeders, as part of the "domestic industry", then the Panel should find that the USITC's injury investigation is irretrievably flawed. In that case, the Panel should find that the imposition of the safeguard measure was inconsistent with the US's obligations under SG Article 4.

118. In the alternative, Australia will proceed to demonstrate that even if the "domestic industry" is considered to include all four industries, the action by the US does not meet the requirements of SG Article 4.

⁶⁴ At page 25 of *Japan - Taxes on Alcoholic Beverages*, Appellate Body, WT/DS8/AB/R.

7.2 The USITC determination of threat of serious injury was not supported by evidence obtained in the investigations as required by SG Article 4.2

119. The Panel has the responsibility under DSU Article 11 to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". The conclusion⁶⁵ of the panel in *Korea - Dairy Safeguard* at paragraph 7.30 was that:

"We consider that for the Panel to adopt a policy of total deference to the findings of the national authorities could not ensure an "objective assessment" as foreseen by Article 11 of the DSU. This conclusion is supported, in our view, by previous panel reports that have dealt with this issue. [*Footnote omitted*] However, we do not see our review as a substitute for the proceedings conducted by national investigating authorities. Rather, we consider that the Panel's function is to assess objectively the review conducted by the national investigating authority, in this case the KTC. For us, an objective assessment entails an examination of whether the KTC had examined all facts in its possession or which it should have obtained in accordance with Article 4.2 of the Agreement on Safeguards (including facts which might detract from an affirmative determination in accordance with the last sentence of Article 4.2 of the Agreement on Safeguards), whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of Korea. Finally, we consider that the Panel should examine the analysis performed by the national authorities at the time of the investigation on the basis of the various national authorities' determinations and the evidence it had collected. . . ."

120. This emphasises in particular that the Panel needs to assess objectively whether the US met its obligations in examining the data that it had collected. However, the Panel also has the responsibility to decide whether the US met its obligations in collecting the right data to allow it to make a determination in conformity with the requirements of the Safeguards Agreement, and in particular SG Article 4.

7.2.1 The USITC made some use of USDA data, which was inconsistent with its own questionnaire data

121. At I-18-19, USITC Report said that:

"We note that questionnaire data from all industry segments generally showed more positive trends on such indicators as production, shipments, and employment than USDA data. [*Footnote omitted.*] As discussed above, since USDA data are more comprehensive, where possible we have relied more heavily on USDA data and given less weight to questionnaire data."

122. The USITC uses both its own survey data, in particular the responses to questionnaires sent to enterprises in the "domestic industry", and USDA data. It uses the USDA data selectively, which can amount to picking and choosing data to support the case. On the other hand, the questionnaire data is not comprehensive and is not based on statistically valid samples. Neither does the questionnaire data objectively support the USITC's determinations.

⁶⁵ This was also confirmed by the Appellate Body in *Argentina - Footwear Safeguard* at paragraphs 116 and 117.

123. The USITC at the first and third paragraphs on I-17 seeks to argue that USDA data are better. This rationalization is not compelling, especially for a finding of "threat of serious injury". For example, in the first paragraph on I-17 the USITC said:

"A main reason for this is that our questionnaire data have a survivorship bias in that we did not obtain responses from those establishments that exited the market. Indeed, it stands to reason that those establishments that survive are relatively more competitive for a variety of reasons."⁶⁶

124. This dispute, however, is not about whether the USITC found that there was serious injury - the USITC found that there was no serious injury. Threat of serious injury has to be based on a demonstration that serious injury will occur imminently. But "serious injury" can only be "serious injury" to growers that are still in the "domestic industry", and the USITC says that it "stands to reason" that the survivors are "more competitive" than those that have exited. The threat of serious injury must be demonstrated in respect of those survivors, not those that have left the industry.

7.2.2 Inadequacy of the evidence, especially from growers, on "domestic industry" performance

125. There are four basic types of production involved in the "domestic industry", i.e. growers, feeders, packers and breakers. However, for data on financial conditions, capital expenditure, research and development, and investment, the USITC Report looks at two additional segments of grower/feeders (i.e. feedlots that also grow some feeder lambs) and packer/breakers (i.e. firms that are both packers and breakers). Grower/feeders that do not purchase feeder lambs, are included as part of the grower industry for the presentation of financial data and analysis in the USITC Report.

126. For each segment, the USITC failed to support its conclusions with adequate evidence. Without adequate evidence on the "position" of the "domestic industry" it was impossible for the USITC to "demonstrate[] on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof" as required by SG Article 4.2(b).

7.2.2.1 Growers

127. In the case of growers, the USITC did not attempt to obtain a valid picture of the position of this industry segment. At paragraph 2 on USITC I-17 it said:

"We note that the sheer size and nature of the grower segment (there were over 70,000 growers in 1997) made it impossible to canvass a large percentage of the industry or even to develop the kind of statistically valid sample used for smaller, less dispersed industries. To obtain financial and other data on grower operations, we sent questionnaires to 110 firms and individuals believed to be among the larger growers of lambs. We received usable data from 57 firms or individuals accounting for an estimated 6 percent of domestic lamb production. [Footnote 65 omitted]"⁶⁷

128. When it comes to the USITC's assessment of the financial condition of growers, the number is reduced to just 49 growers accounting for an estimated 5% of the lamb crop in 1997.⁶⁸ Moreover,

⁶⁶ Nowhere does the USITC justify this implication that it received so few replies because of growers exiting. It does not stand to reason that half of the growers to whom the USITC sent questionnaires had exited the "industry". If that were the case, why did the USITC not find some other growers, out of a population of 70,000 who had not exited?

⁶⁷ Note that at paragraph 3 on USITC II-11, this figure of 110 appears to include grower/feeders.

⁶⁸ At paragraph 1 on USITC II-24.

even these 49 include 7 grower/feeders who indicated that they fed only their own live lambs.⁶⁹ Of these 49, the data from a further 4 growers was excluded from the Jan-Sept 1997 and Jan-Sept 1998 interim data,^{70,71} and the quantitative data for another was estimated from the value data.⁷² The USITC recognized at Footnote 87 on USITC II-24 that:

"The grower data may not be a representative sample due to the number of questionnaires received and the variance of data elements among the sample growers." [*Emphasis added.*]

129. The data on the number of ewes in the first line of Table 12 on USITC II-25 suggests that the growers on which interim data are provided may account for only around half the production of the 49 chosen, i.e. for only 2 to 3% of the total domestic market. Thus the assessment of the financial condition of the "domestic industry" in 1998 so far as growers are concerned is based on a trivial proportion, 45 growers out of 70,000 accounting for less than 3% of production of lambs.

130. It would seem from the relative number of feeder lamb sales and slaughter lamb sales,⁷³ that the growers who also feed their own lambs account for around 40 per cent of the lambs grown for meat by this selection of growers. Since the profitability of the various segments are not synchronized such a mix of data is of little value.

131. The fact that out of the trivial proportion of growers sent questionnaires less than half responded with financial data for Jan-Sept 1998 means that the data is even more unreliable. Apart from the fact that the data has no statistical validity, a reasonable scenario would see the least profitable growers responding to questionnaires, since they would be the strongest proponents for protectionist measures on imports.

132. Financial information is given on the basis of the financial years used by the individual companies.⁷⁴ These years are not consistent⁷⁵, and so aggregated numbers are also potentially misleading.

133. The questionnaire data relates only to the period of the investigation, i.e. up to September 1998. No quantifiable, forward looking data is collected from growers that would have allowed a prospective analysis to make a finding on the issue of "threat of serious injury".

7.2.2.2 *Grower/feeders*

134. For grower/feeders, the USITC only obtained data from three firms.⁷⁶ The data cannot be analyzed because Table 14⁷⁷ is blank, being confidential. However, the first full paragraph on USITC II-29 says that:

"Interim data were not provided by the firms."

⁶⁹ Footnote 89 on USITC II-29.

⁷⁰ See Footnote 1 to table 12 on USITC II-28.

⁷¹ "Interim data" in the USITC Report means data for Jan-Sept 1998 compared with data for Jan-Sept 1997.

⁷² See Footnote 3 to Table 12 on USITC II-28.

⁷³ See Table 12 at USITC II-25.

⁷⁴ References to fiscal years and FY1993-97 are in respect of the usage of the responding companies' fiscal periods in the USITC Report.

⁷⁵ See Footnotes 79, 80, and 81 on USITC II-24.

⁷⁶ At paragraph 1 on USITC II-24.

⁷⁷ At USITC II-29.

135. Therefore no data was provided for Jan-Sept 1998,⁷⁸ i.e. the latest data is for 1997. Thus it was impossible for the USITC to come to the conclusion that these three firms, let alone any other grower/feeders, were subject to threat of serious injury in 1999.

136. Again there would appear to be no statistical basis for the selection of these firms, and it is unclear what proportion of this segment was covered by the responses to the questionnaire. However, what is clear is that the USITC did not have the valid data to make a finding of threat of serious injury for this section of what it calls the "domestic industry".

7.2.2.3 *Feeders*

137. No basis for the selection of the 9 feeders is given.⁷⁹ The USITC Report claims that they only account for about a third of the slaughter lambs in feedlots.⁸⁰ In addition it is unclear what data has been excluded because of the deletion of information in Footnote 82 on USITC II-24.

138. On II-29, the USITC notes that one of the nine feeders went out of business in the interim period for 1998 (Jan-Sept 1998). This makes the data on the financial condition non-comparable to previous periods. Moreover, this is a case of threat of serious injury. There can be no threat of serious injury being caused to a feeder that is no longer in business. To use data from such a feeder is a significant flaw in the USITC Report. The data in Table 15 on USITC II-30-32 are for 9 firms over FY1993-97, but for 7 firms for Jan-Sept 1997 and for 6 firms in Jan-Sept 1998, which severely reduces the validity of any comparison of data over the investigation period.

7.2.2.4 *Packers, Packer/Breakers, Breakers*

139. As with the data for growers, grower/feeders, and feeders, there is no prospective analysis for these industries, and so the USITC had no basis to find threat of serious injury. Given that these are the actual producers of the like product, lamb meat, it was incumbent upon the USITC to provide a detailed justification of the "threat of serious injury" at least for the packers and breakers that had responded to the questionnaire.

140. The responding packers and packer/breakers account for some 76% of commercial lamb slaughter,⁸¹ but of the 17 questionnaires returned only five responses included detail on packing operations.⁸² The financial data is based on two packers and two packer/breakers.⁸³ While some firms may have gone out of business, the USITC does not explain why it did not pursue the other firms for responses. Neither did it explain why these firms could be regarded as representative of the packers as a whole.

141. For breakers, useable data was provided by only 4 firms. For financial data the USITC relied on what appear to be the same two packer/breakers and just one additional breaker. The USITC Report at II-15 notes that there are "less than ten major firms" that are breakers but not packers. At Footnote 63 on II-15, the USITC quotes an estimate that 75% of lamb carcasses are processed by breakers other than packers. By implication there must be close to 10 **major** breakers and presumably significantly more than 10 who are not classified as major. However, the USITC came up with only one respondent with no explanation of why more could not be obtained. Set against this is the fact that imports of lamb meat other than carcasses and half-carcasses accounted for 95% of US imports in

⁷⁸ The aggregation of company fiscal years.

⁷⁹ At paragraph 1 on USITC II-24.

⁸⁰ At paragraph 2 on USITC II-24.

⁸¹ At the second full paragraph on USITC II-24.

⁸² At the second full paragraph on USITC II-14.

⁸³ At the second full paragraph on USITC II-24.

1997.⁸⁴ Moreover, at least some of the carcasses and half-carcasses goes to breakers such as Transhumance. Thus virtually all of the imported product that enters the US market is in the form of primal, subprimal and retail cuts.⁸⁵ Yet the producers are represented by data from only one firm.

7.2.3 The "evidence" used by the USITC in its examination of factors listed in SG Article 4.2(a) did not demonstrate threat of serious injury caused by imports

7.2.3.1 The USITC data showed an increase in production

142. The USITC Report says on II-11 that US shipments of lambs by growers responding to questionnaires increased in Jan-Sept 1998.

143. The USITC Report says on II-17 that US shipments by producers of lamb meat increased slightly in Jan-Sept 1998.⁸⁶

7.2.3.2 Imports share of domestic market increased due to decline in domestic production

144. While imports of lamb meat have had an increase in market share of lamb meat due to the decline in domestic production, imports have been filling the gap left by declining production rather than displacing domestic product. Over the period from 1993-97 increased imports accounted for less than a third of the fall in domestic production.⁸⁷

⁸⁴ See the first table in Exhibit 8 of Vol. 1 of the MLA pre-hearing injury submission at Exhibit US-28. Imports of carcasses and half-carcasses were only 2,558,550 lbs out of total imports of 54,200,749 lbs in 1997, or 4.7%.

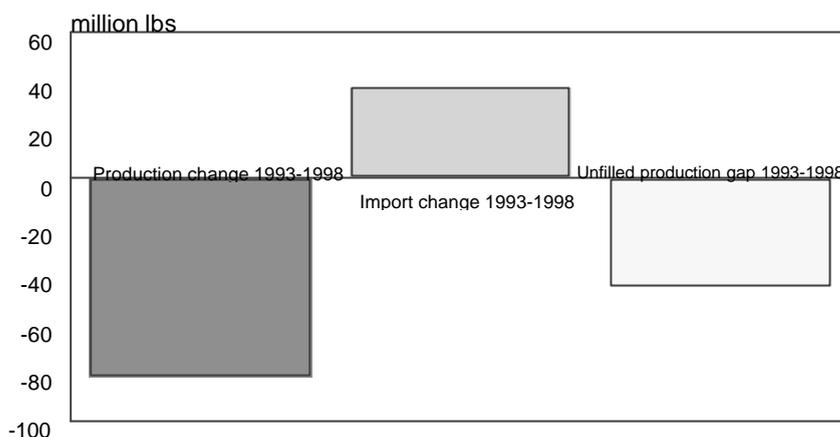
⁸⁵ In reality the imported grass fed product is different from that produced by breakers being grass fed and with different cuts. The bulk of it does not compete with US fed product, being sold to distinct markets.

⁸⁶ Table 5 at USITC II-17.

⁸⁷ At page 27 of Vol. 1 of the MLA pre-injury hearing brief at Exhibit AUS-28.

GRAPH 3

U.S. Lamb Meat Production Gap 1993-1998



Source: US DOC, Bureau of Customs, IM 145, HTS Codes: 0204100, 0204222, 0204232, 0204300, 0204422, 0204432; ITC Staff Report at II-17.

145. For the purpose of SG Article 4.2(a) imports from Australia and New Zealand have zero market share of feeder lambs and slaughter lambs. Imports from Australia and New Zealand have a share of the market for the product produced by packers and a share of the market for the product produced by breakers. These are different markets with different shares. In addition a share of the imports of product like that produced by packers goes to a breaker such as Transhumance and so are further processed by what the USITC is regarding as the "domestic industry". Accordingly, these imports are contributing to the profitability of such a firm.

146. As with all other sections in the threat of serious injury determination, there was no prospective analysis in this section.

7.2.3.3 Productivity was constant

147. The USITC found that the productivity of growers, feeders, packers, and breakers remained relatively constant over the period of the investigation.⁸⁸

7.2.3.4 Capacity utilization down only because capacity increased

148. The USITC at Footnote 96 on I-20 said that:

"Collection of capacity and capacity utilization data from growers and feeders was not practical."

149. SG Article 4.2(a) lists "capacity utilization" as one of relevant factors that must be evaluated. It is not for an investigating authority to decide whether it wants to examine a factor. As discussed above the US had an obligation to examine all factors. A reasonable explanation of why the USITC has not done this is shown by the paucity of data collected from growers and from feeders. The

⁸⁸ At USITC I-20.

USITC did not collect data on a consistent basis from a statistically valid sample of growers and feeders. This is why it was "not practical".

150. The capacity of packers rose during the latter part of the period of investigation including in the interim period for 1998 (Jan-Sept).⁸⁹ Presumably reflecting a profitable business and the ability to raise capital. The fall in capacity utilization in the interim period for 1998 (Jan-Sept) must be seen against the increasing capacity of the packers responding to the survey. The lack of data in the USITC Report makes it difficult to comment on the state of those responding to the survey. However, variations in capacity utilization are a normal part of any business especially a volatile one like the meat packing industry. It is difficult to see what can be read into this.

151. On USITC I-20, it was noted that the capacity of packers was higher in Jan-Sept 1998 than in Jan-Sept 1997 and that the capacity of breakers rose during the investigation period. The USITC recognizes that the reduction in capacity utilization for breakers is the result of increasing capacity:

"Capacity reported by breakers rose significantly during the period of investigation and at a faster rate than production. **As a result** capacity utilization declined significantly." [*Footnotes 95 and 96 omitted.*] [*Emphasis added.*]

152. This is hardly the sign of an ailing industry or one that is facing imminent serious injury. Moreover, this reduction in capacity utilization cannot be attributed to increased imports.

7.2.3.5 Profits and losses - some fall in profits as prices return to normal levels

7.2.3.5.1 Growers

153. Even from the financial data presented, what is clear is that while the growers had a better year in Jan-Sept 1997 than Jan-Sept 1998 due to the price spike from the flock liquidation in the mid-1990s, the situation in 1998 was still better than that in 1993 and 1994. In the absence of comparative data for the Jan-Sept period earlier years, it is difficult to see what the comparative profit and loss situation was. Table 12 on USITC II-25 shows that this selection of growers was still profitable over Jan-Sept 1998, and indeed had been profitable over the whole period of the investigation. However, for the period FY1993-96 in every year there was a loss if the payments under the National Wool Act are deducted from net income. It was only with the flock liquidation that the industry temporarily became more profitable. The change in 1998 can hardly be put down to being caused by imports rather than government action.

NET INCOME AND WOOL ACT SUBSIDIES FOR GROWERS **IN SELECTED SAMPLE (FISCAL YEARS AND US\$ '000)**

	1993	1994	1995	1996	1997	Jan-Sept 1997	Jan-Sept 1998
Wool incentive payment	4,105	4,709	2,771	1,437	0	0	0
Unshorn lamb payment	562	604	423	156	0	0	0
Total National Wool Act subsidies	4,667	5,313	3,194	1,593	0	0	0
Net income or (loss) before income taxes	995	2,007	2,078	189	792	3,072	1,522

⁸⁹ At USITC I-20.

Net income without National Wool Act subsidy	(3,672)	(3,306)	(1,116)	(1,404)	792	3,072	1,522
--	---------	---------	---------	---------	-----	-------	-------

Source: Table 12 on USITC II-25.

154. The data on growers showed that those responding to the survey (27) were profitable as a whole in the interim period for 1998 (Jan-Sept). The USITC said that 9 out of the 27 made losses in the interim period for 1998 compared to 7 out of 27 for the interim period of 1997.⁹⁰ Thus the USITC conclusion on profit and loss for growers in respect of imminent serious injury in 1999 was based on two further growers making losses in the interim period for 1998. These were only two growers out of more than 70,000 growers. Moreover, the respondents to the survey were self-selecting (to the extent that they were in the original sample surveyed) in that only those who wanted import restrictions would have bothered responding. To the extent that 9 out of 27 made losses in the interim period for 1998, the other 18 (i.e. two-thirds of the respondents) were profitable.

155. No proof is given for why these figures should be taken to show threat of serious injury, i.e. that there would be in the very near future serious overall impairment of the position of the industry segment. Moreover, the anecdotal type of so-called evidence that the growers that were asked and responded to the USITC said that low priced imports would erode profit margins⁹¹ cannot be taken as anything but self-serving allegations with no merit for a safeguard investigation. SG Article 4.1(b) is explicit that:

"A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility."

7.2.3.5.2 *Grower/feeders*

156. It is not possible to evaluate the information provided on the grower/feeders, since all that was provided is:

"The combined firms incurred losses in 1993 and 1997."⁹²

This suggests that at least some of the firms made profits in FY1997. In any case, information about FY1997 cannot be used to prove that there would be serious injury in 1999.

157. No interim data was provided by the reporting grower/feeders, i.e. the latest data was for FY1997. The USITC could not have used this data to make any assessment about imminent serious injury in 1999. It also begs the question why those firms responding did not provide such data. It would be reasonable to conclude that this was because it did not support the petitioners' case for safeguard action. No meaningful conclusions should have been drawn by the USITC on this.

158. The USITC at II-29 did say that net losses were incurred in FY1997. Presumably this was due to the simple variation of the margin on feeder and slaughter lambs. Something that will always occur in this industry segment. Such a variation between spring and fall of 1997 says nothing about imports going to cause serious injury some time in 1999.

⁹⁰ At Footnote 88 on USITC I-20.

⁹¹ At Footnote 88 on USITC I-20.

⁹² At first full paragraph on USITC II-29.

7.2.3.5.3 *Feeders*

159. The data for feeders is inconclusive so far as threat of serious injury is concerned. The figures indicate a high degree of volatility for these firms. The data does show a loss for Jan-Sept 1998 down on a profit in the same period for 1997. However, that loss is due to a fall of more than US\$21.26 per slaughter lamb compared to only US\$6.70 per feeder lamb, the major expense. This type of short term change in price differentials where there are lags between purchasing inputs and selling the product are common in all industries and well known in livestock industries. They are an integral part of market cycles. It says nothing about threat of serious injury in 1999 and beyond.

160. This was clearly a short run phenomenon, which would be expected to be corrected in future periods. The profit situation for feeders is highly dependent on the differential between the cost of feeder lambs and the subsequent sale price of slaughter lambs some 2-4 months later. The normal price transmission where there are upstream and downstream industries with livestock cycles entail that there are leads and lags in price movements. This was recognized, for example, in the third full paragraph on USITC II-14.

7.2.3.5.4 *Packers, Packer/Breakers, Breakers*

161. Even though these are the firms that produce the like product, the USITC does not indicate whether there was any attempt to follow up with the firms to whom questionnaires had been sent to seek responses or to obtain improved data from those who replied. The limited response to questionnaires supports the view that much of this part of the "domestic industry" was not suffering from serious injury or threat thereof. Clearly there was only limited support for the Section 201 investigation even in this more concentrated area of the "domestic industry".

162. On USITC II-29, it is noted that for packers the cost of lambs followed a similar trend to that of the sales value of the lamb meat. That makes economic sense and underlines the lack of a basis for finding threat of serious injury from increased imports.

163. The same comment was made for breakers on USITC II-33, i.e. that the cost of goods followed the same trend as the sales value. Again this indicates the lack of a basis for finding threat of serious injury from increased imports.

164. If prices received for lamb meat, carcass or cuts, fall, then this will be reflected in the price that will be paid by the packer or breaker for their input. Nowhere has the USITC sought to demonstrate that the normal, rational economic behaviour of private firms has been suspended for packers and breakers. This is not the basis for a finding of serious injury going to occur imminently in 1999.

165. The USITC claims on I-20 that two witnesses at a hearing reported difficulties in the packer and breaker segments in "recouping new investments in plant and equipment and in repaying loans." This is not the type of situation requiring emergency safeguard action. If every time a firm that had expanded capacity and did not immediately meet its profit targets could get safeguard protection, there would be little trade going on.

7.2.3.6 *Employment increased for growers, was steady for feeders, but was not examined for packers and breakers*

166. Employment is one of the relevant factors that the competent authority must consider under SG Article 4.2(a).

167. The comments for growers based on USDA data on USITC I-18 refer only to the period 1993 - 1997. These are of no relevance to a finding of threat of serious injury in 1999 and beyond.

168. Table 11 on USITC II-23 showed that production and related workers (PRWs) for growers **increased** between Jan-Sept 1997 and Jan-Sept 1998 with only a small decline in hours worked. The PRWs were steady for feeders over the same period again with only a small decline in hours worked. In both cases there had been significant growth in PRWs and hours worked over FY1993 to FY1997.

169. Footnote 78 on USITC I-18-19 notes that:

"production reported by packers fluctuated during the period of investigation, production reported by breakers trended upwards during the period of investigation, and production reported by growers also rose during the period of investigation. Similarly, the number of employees reported by growers increased by 9% between 1993 and 1997 and rose a further 4% in Jan-Sept 1998."

170. The USITC chose not to analyse employment for packers and breakers⁹³ despite the requirements of SG Article 4.2(a).

7.2.3.7 Capital expenditure and fixed assets increased over the period of the investigation

171. Tables 20 and 21 on USITC II-34 and 35 show that during the period FY1993-1997, the reporting growers were increasing their capital expenditure and their fixed assets. The data for the periods Jan-Sept 1997 and Jan-Sept 1998 are meaningless for comparison purposes because they are not comparable with data in the periods FY1993-1997, since some growers did not report for Jan-Sept 1998.

7.2.3.8 The failure to show that there was a "significant overall impairment of the position of the domestic industry"

172. The USITC was required to prove on the basis of facts that in the absence of a safeguard measure there would be serious injury to the "domestic industry", i.e. that there would be "significant overall impairment of the position of the domestic industry." However the USITC Report does not mark out the basis on which it distinguished between serious injury and the threat of serious injury. The concept of "threat of serious injury" is not a matter of a lower threshold for "serious injury" or a lower standard of proof about existence. The two concepts are distinct and require separate and different consideration. The standard of injury for "threat of serious injury" is the same as for "serious injury" and requires proof that it is clear that it will occur imminently.

173. As a consequence of the definition of "domestic industry" used, the USITC was obliged to prove that there would be a "significant overall impairment in the position" of the producers in all the industry segments (growers, feeders, packers, and breakers) as a whole. To comply with the requirements of the SG Article 4, the USITC had to examine each industry segment.

174. The USITC did not make a case that would be "significant overall impairment in the position" in each of the various segments. The paucity of the data meant it could not have carried out such an analysis even if it had tried to.

175. The USITC simply said that:

"These USDA data show an industry that has experienced a contraction over the period of investigation. Data on other industry indicators, in particular questionnaire data on the declining financial condition of the industry, exacerbated by declining

⁹³ See the section on employment on USITC II-23.

lamb prices at the end of the period of the investigation, show that the domestic industry is threatened with serious injury -- that is, that serious injury is imminent."⁹⁴

and

"In view of the declines during the period of investigation in the domestic industry's market share, production, shipments, profitability, and prices, among other difficulties that the domestic industry is facing we conclude that it is threatened with imminent serious injury."⁹⁵

176. Because the injury determination was not based on facts with prospective analysis but rather on conjecture, there is no attempt at a quantitative assessment. Thus there is no demonstration that any impairment would be "significant", i.e. "important".⁹⁶ The USITC makes no attempt to weigh the "imminent serious injury" in terms of the various segments that it determined constituted the "domestic industry".

177. Therefore, the USITC did not demonstrate that "significant overall impairment of the domestic industry" would occur. Therefore the finding of threat of serious injury was not in conformity with SG Article 4 and so the measure is not in conformity with the Safeguards Agreement.

7.2.4 Illogical conclusions from the evidence obtained regarding injury

178. The USITC recognized that the data was not representative. The USITC Report records no attempt to pursue firms to obtain more comprehensive data on the various industry segments. Information on the various industry segments is only to September 1998 and in some cases only to 1997. On the basis of its evidence the USITC found **unanimously** that serious injury was not being experienced by the "domestic industry".

179. There were no reasoned conclusions put forward why there would be serious injury. A conclusion on the basis of unrepresentative data, which found no serious injury and was at least nine months old by the time of the imposition of the measure, did not provide a logical basis for the US to impose a measure on the basis that there would be future serious injury.

7.2.5 No evidence of threat

180. The data used in the injury analysis was limited to the past state of the various segments of the "domestic industry". Therefore, there could not be any, and there was not any, prospective, objective consideration of the state of the "domestic industry" in reaching a determination of "threat of serious injury".

7.2.6 Conclusions on the adequacy of the evidence to support the USITC's determination under SG Article 4.2

181. The USITC questionnaire data from the "domestic industry" was not collected in a statistically valid manner. The amount of information from growers is trivial and meaningless in the absence of a proper sample. The amount of information from other industry segments is somewhat greater but is still very incomplete. The lack of greater coverage of down stream industry segments is unexplained, as is why a more valid sampling process could not have been used and non-responding firms pursued. It is difficult to see the justification of a safeguard measure where swathes of the

⁹⁴ At the first paragraph on USITC I-19.

⁹⁵ At the second paragraph on USITC I-21.

⁹⁶ NSOED.

"domestic industry" do not support the investigation to the extent of responding to questionnaires. The data that is used is in itself incomplete, e.g. with no interim data for Jan-Sept 1998 for grower/feeders. Data was not collected for some of the factors in SG Article 4.2(a), e.g. capacity utilization for growers and feeders and employment for packers and breakers.

182. No prospective data is collected on the state of the industry beyond anecdotal information such as in USITC Appendix F.

183. The use of USDA data when it supports the case for a measure amounts to picking and choosing data sources. Moreover, the USITC considers that the USDA data might differ because it includes some enterprises that have exited. Those firms should be excluded in any case for the determination of a threat of serious injury being caused by increased imports, since what is at issue is whether serious injury will be caused in the future to those enterprises still in the "domestic industry" at that time.

184. SG Article 4.1(b) emphasises that the determination must be "based on facts". SG Article 4.2(a) requires the evaluation of "all relevant factors of an objective and quantifiable nature". SG Article 4.2(b) requires the determination to be on the basis of "objective evidence". Thus the USITC was required to obtain comprehensive, or at least statistically valid, data on all relevant factors. This included obtaining prospective data about the "position" of each of the "industry segments" and at least explaining how it weighed that evidence. It was not permitted to make a determination on incomplete, unrepresentative data about the past.

185. Therefore, the data used by the USITC was inadequate to reach a determination of threat of serious injury under the requirements of SG Article 4.2.

7.3 The USITC determination of threat of serious injury was inconsistent with the requirements of Article 4.1(b) which requires that the serious injury be "imminent" and the determination of threat of serious injury be "based on facts, not merely allegation, conjecture or remote possibility"

7.3.1 The failure to look to the future to prove threat of serious injury

186. SG Article 4 required the USITC to perform an analysis that increased imports were threatening to cause serious injury within the meaning of SG Article 4.1(b):

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

187. The USITC's analysis was set up to prove serious injury. However, it actually found that the "domestic industry" was not experiencing serious injury. It then simply moved to a finding of threat of serious injury without any analysis of why such serious injury was going to happen, or even what the time frame would be. There is no proof presented that there will be serious injury in the future, let alone that serious injury is imminent, i.e. in the very near future.

188. The USITC concluded that the domestic industry was "threatened with imminent serious injury"⁹⁷ before it looked at causation issues. It came to that conclusion by looking essentially at the domestic factors bearing on the state of the "domestic industry". However, without looking at what factors might cause injury in the future, it is impossible to demonstrate threat of serious injury.

⁹⁷ At USITC I-21.

Existing (or past) serious injury might be subject to a static analysis. However, threat of serious injury demands a dynamic analysis of what will occur in the near future. This was not carried out by the USITC.

7.3.2 *The lack of an analysis that serious injury was "imminent".*

189. The USITC was required to have demonstrated, and published its "findings and reasoned conclusions reached on all pertinent issues of fact and law". This included the critical issue of "threat of serious injury" under SG Article 4.1(b). It did not make any demonstration beyond the simple assertions at I-19 (second full sentence) and I-21 (second paragraph).

190. The USITC was required to prove and include the proof in its Report that:

- (a) serious injury to the "domestic industry" will occur;
- (b) this occurrence is clearly imminent; and
- (c) the determination is based on facts.

191. The lack of any such demonstration in the USITC Report means that it must be presumed for this Panel that the USITC did not make such a demonstration, in breach of SG Article 4.1(b).

192. Nevertheless, Australia will show that the US could not have made such a determination.

193. The notion of "threat" is sharply defined here. It does not mean that it might happen, or that there is a possibility of serious injury. Instead it demands proof of **serious injury that is clearly imminent**. This provision exists for circumstances where a large amount of product is about to come over the wharf. SG Article 4.2(b) does not allow a finding of threat of serious injury being caused by increased imports on the basis that the injury might or might not occur in some indefinite period into the future, with a measure to be imposed as a precautionary or protective device.

194. In the NSOED:

"imminent" is defined as "of an event, esp. danger or disaster: impending, soon to happen".

195. Moreover, the Safeguards Agreement and GATT 1994 Article XIX are about "emergency action". This is the title of GATT 1994 Article XIX. Safeguard measures under the Safeguards Agreement are actions in the sense of GATT 1994 Article XIX.⁹⁸ It is also clear from SG Article 11.1(a)⁹⁹ that the measure must be "emergency action" to conform with the Safeguards Agreement.

196. The obligation on the US was to have demonstrated that serious injury was obviously going to occur within a very short time, unless a measure was imposed to prevent it.

197. There was no sense of urgency or immediacy in the investigation or the decision making. The petition on which this investigation was based was filed on 7 October 1998 and initiated on

⁹⁸ For example, see SG Article 1.

⁹⁹ "A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement."

19 October 1998.¹⁰⁰ The injury finding by the USITC was on 9 February 1999. The remedy finding was forwarded by the USITC to the US President on 5 April 1999. While the 60 day time frame for decision ran to 4 June 1999, the actual decision was not made until 7 July 1999 and was effective from 22 July 1999. These delays and missed deadlines underlined that this was not emergency action. Apparently, therefore, there was no **imminent** serious injury.

198. Because an event can only be "imminent" if it is going to happen soon, a finding that an event is "imminent" can only be made in the context of some time frame. In order to have such a finding, the USITC had to have some sense of how soon the serious injury would be caused by increased imports.

199. The USITC Report gives no indication of the time frame in which the USITC believed that the serious injury would occur. In consultations under both SG Article 12.3¹⁰¹ and DSU Article 4,¹⁰² the US did not provide any further elaboration on what it considered that "imminent" means or what was meant by the USITC in this case.

200. The USITC Report was essentially based on "domestic industry" information relating to the period up to 30 September 1998, and for some companies information was only provided to their 1997 fiscal years. The hearing on injury was on 12 January 1999. The USITC vote on injury was on 9 February 1999. The decision on the measure was not made until 7 July 1999 and the measure was not applied until 22 July 1999. This was almost a year after the latest "domestic industry" data on which the US has based its justification. The US President could not have used any information additional to the USITC Report without being in breach of SG Article 3.1.

201. Australia submits that to impose a trade restriction on the basis of a finding of "threat of serious injury" formulated on industry information prior to 30 September 1998 does not conform with the requirements of SG Article 4.1(b) that the serious injury must be "clearly imminent".

202. No reasonable interpretation of "clearly imminent" would allow for such a time period. For example, one authority writes:

Imminent means "certain and very near, impending," as in the legal phrases **imminent bodily harm** and **imminent death**.¹⁰³

203. In no jurisdiction would any case of **imminent bodily harm** or **imminent death** be found on the basis of such old information.

204. Paragraph 7.125 of the panel report in *Mexico - HFCS* also says:

"Moreover, it is clear that in making a determination regarding the threat of material injury, the investigating authority must conclude that **"material injury would occur"** (emphasis added) in the absence of an anti-dumping duty or price undertaking. . . . "

205. Footnote 599 of the panel report in *Mexico - HFCS* note that:

"The United States cites in this connection *Korea-Resins Panel Report*, para. 271 ("a proper examination of whether threat of material injury was caused by dumped

¹⁰⁰ The date of initiation was retroactively applied to be 7 October 1998.

¹⁰¹ Question 10 at Exhibit AUS-25.

¹⁰² Question 13 at Exhibit AUS-27.

¹⁰³ See entry under "imminent" in *A Dictionary of Modern Legal usage*: Bryan A. Garner, Oxford University Press 1987.

imports necessitated a **prospective analysis of a present situation** with a view to determining whether a 'change in circumstances' was 'clearly foreseen and imminent'" (emphasis added by the United States); *id.* para. 273 (noting that "the Panel. . . examined whether the [investigating authority's] determination [of threat of material injury] included an analysis **of relevant future developments regarding the condition of the domestic industry** and the volume and price effects of the imports under investigation") (emphasis added by the United States)."

206. Thus a determination of threat, where there is no current injury, must be prospective and based on the impact of future increased imports in the absence of a safeguard measure. No such prospective analysis was performed by the USITC. The resulting decision was therefore inconsistent with SG Article 4.1(b).

7.3.3 Conclusions on the inconsistency of the threat of serious injury determination with SG Article 4.1(b)

207. For threat cases, SG Article 4.1(b) calls for a particularly rigorous approach. The serious injury must be clearly imminent and not some allegation or possibility at some indefinite time in the future. This does not leave a "domestic industry" exposed to a long inquiry once serious injury is actually about to occur or is actually occurring, since in critical circumstances a Member has the ability to impose a provisional measure quickly under SG Article 6.

208. The USITC report does not comply with the requirements of SG Article 4.1(b). This error cannot be cured.

209. The USITC did not make a determination that satisfied the requirements of SG Article 4.1(b) that serious injury was imminent. Therefore, the US acted inconsistently with the requirements of SG Article 4.1(b) and the measure is not in conformity with SG Article 4.1(b).

7.4 The USITC determination of threat of serious injury attributed to imports injury caused by other factors contrary to the requirements of SG Article 4.2(b)

210. There has been a continuing long-term secular decline in the production of lamb meat in the US. Over the investigation period of 1993-1997, production fell by 67.2 million pounds (carcass weight equivalent) while lamb meat imports increased by only 19.4 million pounds. Thus there was a gap of 47.8 million pounds.¹⁰⁴ Imports over that period amounted to less than a third of the shortfall in domestic production. Imports were not displacing domestic production in the US market but only preventing an even more drastic decline in consumption. This gap was being left by declining industries due to a number of factors but including the flock liquidation coming from the removal of the National Wool Act subsidies.

211. Australia and New Zealand have been developing the market for lamb meat in the US and seeking to maintain consumption by market development in the face of falling domestic production. For example, the bulk of the increase in imports from Australia was to a new outlet, not displacing US lamb meat.¹⁰⁵

212. Meat and Livestock Australia (MLA) updated econometric modelling done for the USITC in a 1995 inquiry into the lamb market and provided this to the USITC as part of its pre-hearing

¹⁰⁴ At page 27 of Vol. 1 of the MLA pre-injury hearing brief at Exhibit AUS-28. See also Section 7.2.3 and Graph 3.

¹⁰⁵ See pages 34-36 of Vol. 1 of the MLA pre-injury hearing brief at Exhibit AUS-28.

submission for the USITC's injury phase. This econometric modelling confirmed what the USITC had found in 1995, i.e. that imports of lamb meat were not the cause of the alleged serious injury.¹⁰⁶

213. The USITC recognized that there was a range of other factors impacting adversely on the "domestic industry" but concluded that these were **individually** "a less important cause of the threat of serious injury". In effect it dismissed without substantiation against objective criteria: the loss of National Wool Act subsidies; competition from other meat products; increased input costs; concentration in the packer segment; and the failure to implement an effective marketing programme for lamb meat.¹⁰⁷

214. The USITC placed weight on the views of growers, in particular, about the impact of imports, with an opinion survey at II-77 and at USITC Appendix F. Since it was the grower organization that has sought to blame imports for the industry's problems it is not surprising that responding growers express concern about imports. Such anecdotal views cannot be part of an assessment of threat of serious injury, which must be "based on facts and not merely on allegation, conjecture or remote possibility." Moreover, given that growers are in a quite different industry and are only involved in selling wool, lambs for breeding and feeder lambs, they do not compete in the market place with the product being imported, lamb meat. Consequently, their views are necessarily anecdotal.

215. The USITC first concluded that the "domestic industry" was not experiencing serious injury. Then essentially on the basis of the conditions in 1998, the USITC concluded that the "domestic industry . . . is threatened with imminent serious injury."¹⁰⁸ This was in the section on "Serious injury or threat of serious injury" at USITC I-16-21. The USITC then went on in the **subsequent** section on "Causation" at USITC 21-26 to conclude no more than that a further increase in imports "would be expected"¹⁰⁹ or "is likely"¹¹⁰ to impact on the "industry" without any analysis even of which segment was being referred to. It then asserted that other factors **individually** were less important causes of this supposed "threat of serious injury".

216. SG Article 4.2(b) requires the Member to examine the impact of all other factors taken together not some dismissal of factors one by one. The USITC did not seek to cumulate the other causes to see what the aggregate impact would be.

217. The USITC was obliged to prove that some separate, additional serious injury was going to be caused by increased imports imminently. In the absence of an objective assessment of the impact of all other factors impacting on the "domestic industry", the USITC could not have made an objective assessment that increased imports would cause the serious injury that it alleged would occur.

218. Thus USITC failed to analyse adequately the impact of factors other than increased imports that were threatening to cause serious injury to the "domestic industry". In addition, the USITC by failing to cumulate the impact of such other factors the USITC did not fulfil its obligation to ensure that it did not attribute to increased imports the serious injury being threatened by those other factors. Therefore, the US acted inconsistently with its obligation under SG Article 4.2(b) not to attribute to increased imports the injury threatened by other factors.

¹⁰⁶ See pages 37-42 of Vol. 1 of the MLA pre-injury hearing brief at Exhibit AUS-28.

¹⁰⁷ At USITC I-25 and 26.

¹⁰⁸ At the second paragraph on USITC I-21.

¹⁰⁹ At line 8 of USITC I-24.

¹¹⁰ At the second full paragraph of USITC I-24.

7.5 Various factors in SG Article 4.2(a) were not considered by the USITC

219. A number of panel reports have made it clear that the US had an obligation to examine each of the factors in SG Article 4.2(a) for the domestic industry, i.e. "the producers as a whole . . .". See, for example, the two safeguard panels *Korea - Dairy Safeguard* and *Argentina - Footwear Safeguard* at paragraphs 8.123 and 7.55, respectively. A similar conclusion was reached in the panel on textiles and clothing safeguards, *United States - Shirts and Blouses*.¹¹¹ Paragraph 7.128 of the *Mexico - HFCS* panel report says:

"The question which next must be answered is what is the nature of the consideration of the Article 3.4 factors required in a threat of serious injury determination. The text of Article 3.4 is mandatory:

"The examination of the impact of the dumped imports on the domestic industry concerned **shall include** an evaluation of **all relevant economic factors** and indices having a bearing on the state of the industry, **including**..." (emphasis added).

In our view, this language makes it clear that the listed factors in Article 3.4 must be considered in all cases. There may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required. In a threat of serious injury case, for instance, the AD Agreement itself establishes that consideration of the Article 3.7 factors is also required. But consideration of the Article 3.4 factors is required in every case, even though such consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry or a particular case, and therefore is not relevant to the actual determination. Moreover, the consideration of each of the Article 3.4 factors must be apparent in the final determination of the investigating authority." [Footnote omitted.]

220. Thus a determination must involve an examination at least of each of the factors set out in SG Article 4.2(a). Moreover, the nature of a determination of threat of serious injury, where there is no current injury, must be prospective and based on the impact of future increased imports in the absence of a safeguard measure.

221. Finally, there is the definition used by the US for "domestic industry". Since the US includes all the producers in the various industry segments in its definition of "domestic industry", it has to have examined all the segments for prospective injury caused by increased imports. This had to be done for all relevant factors and in particular each of those specified in SG Article 4.2(a). Accordingly, putting to one side the issue of what is the proper definition of "domestic industry" under SG Article 4.1(c), there are critical issues involved in how the US is required to conduct its injury analysis. For example, the panel report in *Korea - Dairy Safeguard* says at paragraph 7.58:

". . . Second, as we noted above, the definition of the domestic industry in this case as comprising two different segments of the dairy products market has consequences for the evaluation of the situation of the industry. In assessing the serious injury to the whole domestic industry, we find that it is acceptable to analyze distinct market segments but, as stated above, all factors listed in Article 4.2 must be addressed. In considering each of the factors listed in Article 4.2, and any others found to be relevant by the authority, **the investigating authority has two options: for each**

¹¹¹ *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India (United States - Shirts and Blouses)* - see paragraph para. 7.25.

factor, the investigating authority can consider it either for all segments, or if it decides to examine it for only one or some segment(s), it must provide an explanation of how the segment(s) chosen is (are) objectively representative of the whole industry. A lack of consideration of all segments, without any explanation, is a flaw that we find present in Korea's analysis of the domestic industries' profits and losses, prices, debt to equity ratio, capital depletion and production cost. How Korea relates developments in one segment to its determination regarding the industry as a whole is for Korea to decide in the first instance. Our point here is that an analysis of only a segment of the domestic industry, without any explanation of its significance for the whole industry, will not satisfy the requirements of the Agreement on Safeguards. . . . " *[Emphasis added.]*

222. Accordingly, the US was obliged to look at every factor for every industry segment, unless it was prepared to explain the significance of the analysis of one segment for the whole industry. The following table sets out what the USITC found regarding the factors set out in SG Article 4.2(a) in its determination threat of serious injury of the factors.

CONSIDERATION BY THE USITC OF FACTORS IN SG ARTICLE 4.2(A)

	GROWERS	GROWER/FEEDERS	FEEDERS	PACKERS AND BREAKERS
FUTURE	No prospective consideration.	No prospective consideration	No prospective consideration	No prospective consideration
QUALITY OF DATA	Minimal sample. Not a statistically valid sample and data is unrepresentative.	No basis for selection of 3 firms.	No basis for selection of 9 firms.	No explanation why more firms not asked to respond.
LATEST DATA	Jan-Sept 1998	Latest data is for 1997.	Only data from 6 firms for Jan-Sept 1998.	Jan-Sept 1998 .
PRODUCTION	Shipments of lambs increased in Jan-Sept 1998.	Not examined.	Shipments of lambs decreased in Jan-Sept 1998	Shipments of lamb meat increased in Jan-Sept 1998.
MARKET SHARE	Nil market share for Australia and New Zealand.	Nil market share for Australia and New Zealand.	Nil market share for Australia and New Zealand.	Market share for packers only minimally affected by imports from Australia and New Zealand. Also product in this category can go to breakers. Market share for breakers decreased.
PRODUCTIVITY	Relatively constant over investigation period. Poor data.	Not examined.	Relatively constant over investigation period. Poor data.	Relatively constant over investigation period. Labour cost data.
CAPACITY UTILIZATION	Not examined.	Not examined.	Not examined.	Capacity utilization fell in Jan-Sept 1998, against increasing capacity
PROFITS AND LOSSES	Fall in profits in Jan-Sept 1998 because prices fell to more normal levels following price spike in 1996 and 1997 due to flock liquidation. 18 out of 27 respondents profitable in Jan-Sept 1998.	Little data. Some firms made losses in FY1997, so apparently some firms made profits.	Loss in Jan-Sept 1998 due to narrowing of margin between price paid for feeder lambs and sales value for slaughter lambs. No suggestion that that would not return to normal quickly.	Apparently situation for "all industry segments" "worsened" in Jan-Sept 1998. Presumably this includes packers, packer/breakers and breakers.
EMPLOYMENT	Increased in Jan-Sept 1998 .	Not examined.	Steady.	Not examined.

Note: Information from firms responding to the USITC questionnaires.

224. The table shows that the USITC determination was based on totally inadequate data and on few indications of injury. It is not surprising that the USITC found that its "domestic industry" was not experiencing serious injury. However, what is more disturbing is the lack of basis for the USITC to have then gone and found threat of serious injury on the same data without an analysis that there was to be a **major change** in the overall position of the "domestic industry". The USITC determination is seriously flawed and does not comply with the requirements of SG Article 4.¹

225. The USITC decided not to examine capacity utilization for growers and feeders and not to examine employment for packers and breakers. The panel report in *Korea - Dairy Safeguard* said at paragraph 7.58 in respect of the factors listed in SG Article 4.2(a): **"if it decides to examine it for only one or some segment(s), it must provide an explanation of how the segment(s) chosen is (are) objectively representative of the whole industry."** The USITC did not try to explain how capacity utilization for packers and breakers or how employment for growers and feeders were representative of the whole industry. Indeed, that would be impossible given the nature of the different industry segments. Therefore, the US did not conform with the requirement of SG Article 4.1(a) to examine every factor for the "domestic industry"

226. It is not just a matter of the examination of capacity utilization and employment. While nominally the USITC has looked at other factors, the reality is that not only was that done inadequately for a situation of serious injury, there was no attempt to examine the factors in the context of an examination of whether there was a threat of serious injury.

227. In no case in examining the factors set out in SG Article 4.2(a) did the USITC make a prospective analysis. The USITC looked to the past without examining the future. This made it impossible for it to reach a finding on threat of serious injury.

228. In addition, the USITC gave no indication of what sort of time frame was involved in its determination that each of the various industry segments would actually suffer from serious injury. The USITC had to demonstrate "threat of serious injury" for all of the various segments. However, not even the USITC makes the claim that the market changes impact on each of the segments simultaneously. For example, at I-14², the USITC says:

"While the impact of price changes on profitability in the various segments of the lamb industry can be **staggered in time**, price changes impact on all four segments in a similar manner." [*Emphasis added.*]

229. In looking at the factors listed in SG Article 4.2(a) the USITC has not even tried to show that serious injury was imminent (let alone serious injury being caused by increased imports). It has not explained how, given that the various segments are affected differently by changes in the market, there will be an overall impairment of the "domestic industry".

230. **Therefore, the US has acted inconsistently with the requirements of SG Article 4.2(a) and has acted inconsistently with its obligations under the Safeguards Agreement.**

7.6 Conclusion on the issue of injury

231. The US failed to act consistently with its obligations under SG Article 4 because:

¹ As will be proved also, the exclusion of certain countries from the cover of the measure is also inconsistent with not only SG Article 2.2 but also SG Articles 4 and 5.

² Third full paragraph on USITC I-14.

- (a) the USITC's determination of the relevant "domestic industry" was inconsistent with the provisions of SG Article 4.1(c) through the inclusion of enterprises that do not produce the like or directly competitive products
- (b) the US did not demonstrate that increased imports were threatening to cause serious injury to the "domestic industry", in particular
 - (i) the data was inadequate and did not support the determination as required under SG Article 4.2
 - (ii) the USITC did not meet the requirements of SG Article 4.1(b) that for a finding of threat of serious injury the serious injury must be imminent and "[a] determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility"
 - (iii) the determination of threat of serious injury, by attributing to increased imports injury caused by other factors, was contrary to SG Article 4.2(b)
 - (iv) the "evidence" used in its examination of factors listed in SG Article 4.2(a) did not demonstrate threat of serious injury USITC
 - (v) the USITC failed to consider all the factors in SG Article 4.2(a)

232. Therefore, the US is in breach of its obligations under SG Article 4 and the measure is not in conformity with the Safeguards Agreement.

8. THE US FAILED TO ACT CONSISTENTLY WITH ITS OBLIGATION TO ENDEAVOUR TO MAINTAIN A SUBSTANTIALLY EQUIVALENT LEVEL OF RIGHTS AND OBLIGATIONS WITH AUSTRALIA UNDER SG ARTICLE 8.1

233. SG Article 8.1 says that:

"A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure, in accordance with the provisions of paragraph 3 of Article 12. To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade."

234. During the SG Article 12.3 consultations on 4 May 1999 the US did not make any offer to maintain a substantially equivalent level of concessions and other obligations. Australia asked what the US was going to do and the US's response was that:

"Article 8.3 provides that the right of suspension of the application of substantially equivalent concessions or other obligations shall not be exercised for the first three years that a safeguard measure is in effect."³

235. The actual decision on 7 July 1999 imposed a much harsher regime, including an in-quota tariff above the bound rate. Again at the subsequent SG Article 12.3 consultations on 14 July 1999

³ See the answer to Question 34 asked at the consultations on 4 May 1999 at Exhibit AUS-25.

Australia asked what the US was going to do. The US's oral response was that it interpreted SG Article 8.3 as providing a three year grace period before it would be required to maintain a substantially equivalent level of obligations.⁴

^{236.} SG Article 8.1 imposes a clear obligation on the US to endeavour to maintain a substantially equivalent level of concessions and other obligations. The US's had an obligation to do this in good faith.⁵ The US's argument in respect of SG Article 8.3 seeks to render SG Article 8.1 meaningless in the case where there is an absolute increase in imports.

237. Moreover, where there is not an absolute increase in imports, the affected exporter has the right under SG Article 8.2 to take unilateral action and so would have negotiating leverage with the importing Member. Thus, the US's argument would have the effect of writing the obligation under SG Article 8.1 out of the Safeguards Agreement.

238. SG Article 8.3 does not say that the obligation under SG Article 8.1 is suspended for the first three years. It only says that the right to unilateral retaliation under SG Article 8.2 is suspended for the first three years.

239. Under GATT 1947, Article XIX allowed an affected exporter to take unilateral action to maintain a substantially equivalent level of concessions and other obligations. This provided the basis for bilateral negotiations to achieve that end. Article XIX only required the importing country to afford the opportunity for consultations:

"Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action."⁶

However, in return affected exporters had the right to take unilateral action under Article XIX:3.

240. Under the WTO, SG Article 8.3 removes that right to take unilateral action for the first three years where there is an absolute increase in imports. However, in return SG Article 8.1 imposed an obligation on the US. Any other conclusion would render the text in SG Article 8.1 meaningless. The obligations under SG Article 8.1 are key parts of the trade-off for the suspension of the right to take unilateral action for three years under SG Article 8.3.

241. The difference under the WTO from GATT 1947 is that where a Member does not comply with SG Article 8.1 in the situation of increased imports, an affected exporting Member's only recourse during the first three years is to pursue multilateral action through the DSU, rather than the unilateral action that was allowed under GATT 1947. This applies whether or not the measure itself is consistent with other provisions of the Safeguards Agreement and GATT 1994 Article XIX. The approach of the US is to try to write this provision out of the WTO. Members will only comply with this provision if they must in order to ensure that their measures are in conformity with the Safeguards Agreement.

242. The US has failed to maintain a substantially equivalent level of concessions and other obligations, since

⁴ No written response was provided by the US to Question 9 at Exhibit AUS-26.

⁵ See for example Article 26 of the Vienna Convention on the Law of Treaties.

⁶ Extract from GATT Article XIX:2.

- (a) the duty payable on the trade outside the tariff quota is inconsistent with the US's tariff bindings under GATT 1994 Article II; and
- (b) the duty payable on imports within the tariff quota is also in breach of the US's tariff bindings under GATT 1994 Article II.

243. Therefore, the US breached its obligation under SG Article 8.1 to endeavour to maintain such a balance of the level of concessions and other obligations. Moreover, in refusing to discuss this issue, the US also thereby acted inconsistently with its obligations under SG Article 12.3 as explained below.

244. Since the US has failed to abide by SG Article 8.1, it has failed to act consistently with the requirements of the Safeguards Agreement in imposing its measure and so the measure does not conform with the requirements of the Safeguards Agreement. This cannot be subsequently cured, since these are key obligations under the Safeguards Agreement. If a Member could simply defer this until after losing a dispute on the matter, then it would amount to no effective requirement. No Member would have any incentive to abide by SG Article 8.1 thereby writing the provision out of the Safeguards Agreement.

245. Therefore, the US has acted inconsistently with its obligations under SG Article 8.1 and so the measure is not in conformity with the Safeguards Agreement.

9. THE US FAILED TO ACT CONSISTENTLY WITH NOTIFICATION AND CONSULTATION REQUIREMENTS UNDER SG ARTICLE 12

9.1 The US failed to act consistently with the notification obligations under SG Article 12.2 to notify the Committee of the justification for the measure

246. SG Article 12.2 requires that the US "provide the Committee on Safeguards with all pertinent information". However, the US has never provided the Committee with information about the basis for the measure that it actually imposed. Indeed it has never published such information, it has never published any submissions on which the measure was based, and has never provided Australia with any information justifying the measure.

247. This is not specifically called for in the non-exhaustive list set out in SG Article 12.2, and so is not specifically called for in the format set out in G/SG/1. However, SG Article 12.2 says: "all pertinent information" "which shall include", i.e. the list in SG Article 12.2 is explicitly not exhaustive. [*Emphasis added.*] Information about the justification of a measure is highly pertinent information. Indeed, it is even more pertinent when the decision-maker has ignored the recommendation contained in the report notified to the Committee. In normal circumstances the published report notified to the Committee contains such information and so a specific extra line was not required in the final notification. However, this was a highly abnormal case where the investigation about the extent of the measure to be imposed was continued in secret and the findings and reasoned conclusions have never been made public let alone notified as required under SG Article 12.2.

248. In addition, the requirement to demonstrate "unforeseen developments" is a pertinent issue of fact and law. This was not notified to the Committee either in the context of the USITC Report or separately. Therefore, this pertinent issue of fact and law was not notified to the Committee in breach of SG Article 12.2, which requires the notification of "all pertinent information".

249. Therefore, the US acted inconsistently with SG Article 12.2.

9.2 The US failed to act consistently with the requirements under SG Article 12.3 for consultations to achieve the objective set out in SG Article 8.1

250. SG Article 12.3 requires that:

"A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, *inter alia*," . . . "reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8."

251. This is a clear, absolute obligation with respect to SG Article 8.1. It is not qualified by limiting the application of SG Article 8.1 to cases where immediate, unilateral retaliation is allowed. However, the US's response to Australia was that:

"Article 8.3 provides that the right of suspension of the application of substantially equivalent concessions or other obligations shall not be exercised for the first three years that a safeguard measure is in effect."⁷

252. An equivalent oral response was received at the consultations on 14 July 1999 to the effect that the US interpreted SG Article 8.3 as providing a three year grace period before it would be required to maintain a substantially equivalent level of obligations.⁸

253. Under SG Article 12.3, the US had at the very least an obligation to enter into consultations in good faith⁹ with a view to achieving the objective of maintaining a substantially equivalent level of concessions and other obligations to that existing under GATT 1994. There was no attempt by the US to achieve this objective. Clearly, it did not make an attempt because it considered that it had no obligation to do anything beyond attending consultations under SG Article 12.3. This is contrary to the clear obligations under SG Article 12.3 to have consultations on this matter in good faith.

254. Therefore, the US acted inconsistently with SG Article 12.3.

9.3 The US failed to act consistently with the notification obligations under SG Article 12.6 regarding the conduct of investigations

255. SG Article 12.6 requires that:

"Members shall notify promptly the Committee on Safeguards of their laws, regulations and administrative procedures relating to safeguard measures as well as any modifications made to them."

Any measure imposed pursuant to laws, regulations or procedures that have not been notified before initiation of an investigation must be inconsistent with the Safeguards Agreement.

256. On page 1 of G/SG/N/1/US/1 the US notified "the Committee that the authority in the United States competent to initiate and conduct investigations relating to safeguards is the United States International Trade Commission."

⁷ See the answer to Question 34 asked at the consultations on 4 May 1999 at Exhibit AUS-25.

⁸ See Question 9 asked at the consultations on 14 July 1999 at Exhibit AUS-26.

⁹ See for example Article 26 of the Vienna Convention on the Law of treaties.

257. The decision on the measure took more than three months and the measure imposed was more restrictive than the recommendation by the USITC. Clearly the issue of the nature of the measure to be imposed was subject to further intensive investigation by US agencies no information on which has been notified to the Committee.¹⁰ Therefore, the US acted inconsistently with its obligations to notify such a procedure under SG Article 12.6. Therefore, the US is in breach of SG Article 12.6.

9.4 Conclusions on notification and consultation requirements under SG Article 1-

258. The US acted inconsistently with its obligations under SG Article 12.2, 12.3 and 12.6 and the measure is not in conformity with the Safeguards Agreement.

10. THE US BREACHED ITS OBLIGATIONS UNDER THE SAFEGUARDS AGREEMENT BY EXEMPTING CERTAIN COUNTRIES FROM THE MEASURE

259. The object and purpose of the Safeguards Agreement and GATT 1994 Article XIX are to allow a Member to impose a border restriction to prevent or remedy serious injury being caused by imports. It is not a matter of finding injury and then applying a measure to just some of those imports. SG Article 2.2 is explicit that "[s]afeguard measures shall be applied to a product being imported irrespective of its source."

260. The Appellate Body at paragraph 114 of *Argentina - Footwear Safeguard* said that:

"We conclude that Argentina, on the facts of this case, cannot justify the imposition of its safeguard measures only on non-MERCOSUR third country sources of supply on the basis of an investigation that found serious injury or threat thereof caused by imports from all sources, including imports from other MERCOSUR member States."

261. The analysis required by SG Article 4 has to be carried out for all imports covered by the injury investigation, and then under SG Article 2.2 the measure has to apply to all such imports. Injury must be caused by imports from those countries to be covered by the measure. The imports from sources not covered by the measure must be considered as other factors under the last sentence of SG Article 4.2(b) in the determination on the existence of serious injury or the threat thereof.

262. At the causation stage, the USITC examined the impact of increased imports from all sources, without any discrimination.¹¹ In *G/SG/N/US/8/3* the US notified the Committee simply that the USITC had made such an injury finding.

263. The remedy finding of the USITC recommended the exclusion from the remedy of Canada, Mexico, Israel and beneficiary countries under CBERA and ATPA although they were included in the injury investigation.¹² The USITC did not revisit the injury determination, and the exclusion, in particular, of Canada, Mexico and Israel was recommended as a result of special conditions under their free trade agreements with the US.

264. The US President accepted the recommended exclusions, which were notified to the Committee in *G/SG/N/10/US/3- G/SG/N/11/US/3*. There was no explanation of the WTO basis for this.¹³

¹⁰ If the US claimed that no such investigation occurred, then the US could not use any work that had been done, to justify the necessity of the measure, which went beyond the USITC recommendation.

¹¹ News Release of 9 February 1999 at AUS-3.

¹² *G/SG/N/8/US/3/Rev.1*.

¹³ Question 13 in Exhibit AUS-26 and Questions 30-32 in Exhibit AUS-27.

265. This exclusion is inconsistent with SG Article 2.2. Since these exclusions were required under separate treaty arrangements of the US, the US would have known in advance that these countries would be excluded from the measure and so their inclusion in the injury determination was inconsistent with SG Article 4.¹⁴ While the level of trade is small from the excluded countries, this is a breach of the US's obligations under the Safeguards Agreement and cannot be cured after the event. Therefore the measure is not in conformity with the Safeguards Agreement.

11. THE US BREACHED ITS OBLIGATIONS UNDER SG ARTICLE 11 BECAUSE THE MEASURE WAS NOT EMERGENCY ACTION AND DID NOT CONFORM TO THE PROVISIONS OF GATT 1994 ARTICLE XIX AND THE SAFEGUARDS AGREEMENT

266. SG Article 11.1(a) requires, *inter alia*, that the action to impose the measure:

- (a) is an emergency action; and
- (b) fulfils the conditions of GATT 1994 Article XIX; and
- © conforms to the provisions of the Safeguards Agreement.

267. For an action to be an "emergency action" it must be to meet a situation that has arisen unexpectedly and requires urgent action. What are the facts in this case? A petition was lodged in October 1998. The basis for the injury finding was on the basis of data to September 1998. The finding was on 9 February 1999. The recommendation went to the US President on 5 April 1999. The decision was made on 7 July 1999 and imposed from 22 July 1999. By no stretch of the language can that be called "urgent" or "emergency". This was a very measured decision to increase protection for a small industry and was not "emergency action" as provided for in SG Article 11.1(a). It was not in compliance with the WTO, and in particular not in compliance with GATT 1994 Article XIX.

268. It has also been shown that the US did not even attempt to act consistently with the requirement in GATT 1994 Article XIX to demonstrate that the increased imports of lamb meat into the US were the result of "unforeseen developments". Accordingly, the US failed to fulfil the requirements of GATT 1994 Article XIX, and so also failed to fulfil the requirements of SG Article 11.1(a).

269. It is also shown in this Submission that the US acted inconsistently with other provisions of the Safeguards Agreement, in particular SG Articles 2.1, 2.2, 3.1, 4.1, 4.2, 5.1, 8.1, 12.2, 12.3, and 12.6.

270. Therefore, the US is in breach of SG Article 11.1(a) and so the measure is not in conformity with the Safeguards Agreement.

12. THE US IS IN BREACH OF THE REQUIREMENTS OF SG ARTICLE 2.1

271. SG Article 2.1 says:

"A Member [*Footnote omitted.*] may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such

¹⁴ There is a clear distinction between imports excluded under SG Article 9.1 and those excluded under other legislation. The exclusion under SG Article 9.1 is only for "**as long as** its share of the product concerned in the importing Member does not exceed 3 per cent . . .". [*Emphasis added.*] Moreover, Canada at least is not eligible for exclusion under SG Article 9.1 as a developing country Member.

product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products."

272. Australia has shown that the US acted inconsistently with SG Article 4.1 and 4.2. Accordingly, the US did not make the injury determination in SG Article 2.1 "pursuant to the provisions set out below".

273. Therefore, the US acted inconsistently with its obligations under SG Article 2.1. This cannot be cured by any subsequent action and the US can only bring itself into conformity with its obligations by revoking the measure without delay.

13. SINCE THE MEASURE IS INCONSISTENT WITH THE SAFEGUARDS AGREEMENT AND GATT 1994 ARTICLE XIX, THE US IS IN BREACH OF ITS OBLIGATIONS UNDER ARTICLE II OF GATT 1994

274. The situation regarding the tariff bindings by the US on the products covered by the measure has been set out above. The bound tariff rate was US 0.8¢/kg in 1999 and is 0.7¢/kg from 2000 onwards. The USITC Report estimated that the tariff in 1997 was about 0.2%.¹⁵

275. The in-quota tariff under the measure started at 9% and declines to 4% by the third year. The out of quota tariff started at 40% and declines to 24% by the third year.

276. Accordingly, the measure is inconsistent with those bindings by imposing duties above the bound levels.

277. This Submission has shown that the measure is not in conformity with the Safeguards Agreement, and so the US has no WTO justification for imposing the measure. Therefore, the measure is in breach of the US's obligations under GATT 1994 Article II, and the US has nullified and impaired Australia's rights under GATT 1994 Article II within the meaning of DSU Article 3.8.

14. CONCLUSION

278. Australia has demonstrated that the procedures followed by the US did not conform with the requirements of the Safeguards Agreement and GATT 1994 Article XIX for the imposition of a safeguard measure. In addition, the measure imposed by the US was not in conformity with the requirement that it be no more than necessary to prevent serious injury from being caused by imports. It also was not in conformity with GATT 1994 Article II.

279. Therefore the US is in breach of its obligations under the Safeguards Agreement and GATT 1994, and so there is nullification and impairment of the benefits accruing to Australia under the Safeguards Agreement and GATT 1994 within the meaning of DSU Article 3.8.

280. The only way in which the US can bring the measure into conformity with the Safeguards Agreement and GATT 1994 is to revoke it without delay.

281. Australia requests that the Panel:

¹⁵ See the fourth full paragraph on USITC II-8.

- (a) to find that the measure is inconsistent with the Safeguards Agreement and GATT 1994 and that the US has acted inconsistently with its obligations under the Safeguards Agreement and under GATT 1994
- (b) to find that therefore the US is in violation of its obligations under the Safeguards Agreement and GATT 1994; and
- (c) to recommend that the US bring the measure into conformity with the Safeguards Agreement and GATT 1994.

EXHIBITS
19 APRIL 2000

EXHIBITS

- 1 USITC Report: Lamb Meat: Investigation No. TA-201-68, Pub. 3176, April 1999.
- 2 USITC Initiation Notice,
- 3 USITC news release on the injury finding, 9 February 1999.
- 4 USITC News Release and accompanying statements on remedy of 26 March 1999, Recommendations, and Additional Statement by Commissioner Crawford, Statements by Commissioners Miller/Hillman, and Koplan.
- 5 Federal Register proclamation, 7 July 1999.
- 6 Federal Register Memorandum, 7 July 1999.
- 7 Federal Register Proclamation, 30 July 1999.
- 8 G/SG/N/6/US/5.
- 9 G/SG/N/8/US/3, Corr.1 and Corr.2.
- 10 G/SG/N/8/US/3/Rev.1.
- 11 G/SG/N/10/US/3- G/SG/N/11/US/3.
- 12 G/SG/N/10/US/3/Suppl.1- G/SG/N/11/US/3/Suppl.1.
- 13 G/L/313-G/SG/19.
- 14 G/L/339-G/SG/N/12/AUS/1-G/SG/N/12/US/1.
- 15 WT/DS178/1-G/L/314-G/SG/D9/1 and Corr.1
- 16 WT/DS178/2 and Corr.1.
- 17 WT/DS178/3.
- 18 WT/DS178/4.
- 19 WT/DS178/5 and Corr.1.
- 20 WT/DS177/5-WT/DS178/6.
- 21 G/SG/N/9/AUS/1.
- 22 G/SG/N/9/IND/2.
- 23 G/SG/N/9/KOR/1 and Corr.1.

- 24 G/SG/N/1/US/1.
- 25 Questions and Answers from Australia to the US for the SG Article 12.3 consultations on 4 May 1999.
- 26 Questions from Australia to the US for the SG Article 12.3 consultations on 14 July 1999.
- 27 Questions from Australia to the US for the consultations under DSU Article 4 on 26 August 1999.
- 28 MLA pre injury hearing Submission - Vol.1 and 2
- 29 MLA post injury hearing Submission
- 30 MLA pre remedy hearing Submission
- 31 MLA post remedy hearing Submission
- 32 Statement by Senator Baucus, (US) Congressional Record, Senate 18 October 1993.
- 33 Inside US Trade (pages 7 and 8 of 18 June 1999): "Clinton Weighs Remedy Decision in Section 201 Case on Lamb" Statement by Senator Baucus, (US) Congressional Record, Senate 18 October 1993.

Table on US lamb meat imports provided by the US following the consultations under DSU Article 4 on 26 August 1999.

ANNEX 1-2

LETTER FROM AUSTRALIA

(9 May 2000)

Australia would like to provide the following preliminary comments on the United States' letter to the Panel dated 5 May 2000 requesting preliminary rulings on certain issues. Australia also intends to provide more substantive comments in line with paragraph 13 of the Panel Working Procedures.

With regard to the United States' request in paragraph 15 of its letter for an immediate ruling postponing the deadline for its first written submission until the panel has ruled on its requests for preliminary rulings, Australia considers that the United States' request for preliminary rulings should not alter in any way its obligation to adhere to the 11 May 2000 deadline established by the panel for the receipt of the United States' first written submission.

Australia can see no reason for any connection to be drawn between the United States' request for preliminary rulings and its obligation to meet the deadline for its first written submission. A request for a preliminary ruling is not a sufficient reason for disrupting the carefully balanced timetable for this panel procedure which was formulated in consultation with all of the parties. Panel processes such as the filing of submissions should continue to be observed pending preliminary rulings by the panel.

Australia also notes that the US elected to defer its request for preliminary rulings until more than two weeks after the receipt of Australia's First Submission (and less than one week before the deadline for its own submission), and that the United States has failed to provide any explanation as to why its concerns have not been raised previously (e.g. at the time of the establishment of the panel).

In summary, Australia respectfully requests that the panel:

- decline the United States' request for an immediate ruling postponing the deadline for its first written submission until the panel has ruled on the requests for preliminary rulings
- defer its consideration of the United States' request for preliminary rulings until the first substantive meeting with the parties scheduled for 25-26 May 2000.

ANNEX 1-3

**COMMENTS OF AUSTRALIA REGARDING THE REQUEST BY THE
UNITED STATES FOR PRELIMINARY RULINGS**

(17 May 2000)

1. This submission is in response to the letter from the Panel on 10 May 2000 inviting Australian views on the request by the USA on 5 May 2000 for preliminary rulings on:

- (A) Insufficiency of Panel Request
- (B) Exclusion of US Statute from Panel Terms of Reference
- (C) Business Confidential Information (BCI).

A. INSUFFICIENCY OF PANEL REQUEST

2. For the reasons provided below, the claims by the USA in its letter of 5 May 2000, that the panel requests made in this case by Australia and New Zealand are deficient, are baseless and should be disregarded.

3. In the first place, the USA waited until after it received Australia's First Submission to make its claim about the sufficiency of Australia's panel request. There were more than four weeks from the date of the constitution of the Panel until Australia submitted its First Submission. The USA, therefore, also had these four weeks in which to act in good faith and notify the Panel and/or the DSB and/or Australia and New Zealand of the alleged deficiencies. In particular it could have, but did not, raise the matter at the first organizational meeting of the Panel on 28 March 2000, more than 5 weeks before the USA raised the matter on 5 May 2000. Moreover, by the time the Panel was constituted in this case, the USA had been in possession of the Australian request for consultations since 23 July 1999 and the request for the establishment of a panel, since 14 October 1999. The USA had plenty of time to raise this issue if it was truly concerned about prejudice.

4. The USA cannot at this stage in good faith request that Australia and New Zealand begin again with the panel request process. The reference to *Guatemala - Cement* is not relevant to this dispute. In that dispute, the Appellate Body found that Mexico failed to specify correctly the measure at issue. The USA is using similar litigation tactics to those for which it was criticized by the Appellate Body in the *United States - Foreign Sales Corporations* case.¹

5. Article 3.10 of the DSU commits Members in a dispute to engage in dispute settlement procedures "in good faith in an effort to resolve the dispute". The Appellate Body in *United States - Foreign Sales Corporations* stated that this principle requires both complaining and responding Members to comply with the requirements of good faith:

"By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules. The same principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies

¹ Appellate Body Report on *United States - Tax Treatment for Foreign Sales Corporations*, WT/DS108/AB/R, at paragraphs 155-166.

to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."²

6. In that dispute, the Appellate Body noted that a year passed between submission of the EC's request for consultations and the first mention of the objection by the USA, despite the fact that the USA had numerous opportunities during that time to raise its objections, including three consultations and two DSB meetings at which the request for establishment of a panel was on the agenda. The Appellate Body considered that the USA acted as if it had accepted the establishment of the Panel in the dispute, as well as the consultations preceding such establishment.³

7. In the dispute before this Panel, the USA again waited 9½ months from the request for DSU consultations to raise this issue. It waited in order to try to delay adjudication of this dispute while Australia's rights under the WTO continued to be nullified and impaired, and until it gained access to the detailed arguments in the First Submissions. The issue of further delay in a resolution of a dispute is particularly relevant for a safeguard measure, since it is time limited. Parties must make use of the dispute settlement procedures in good faith. The Panel should not dismiss a case based on such a demonstration of time-wasting, litigation techniques.

8. Second, from a factual standpoint, the USA cannot credibly claim that it has suffered any prejudice in this case. As the USA itself points out, whether a panel request meets the requirements of DSU Article 6.2 is a case-by-case determination that rests on "the particular circumstances"⁴ of each case.

9. The Appellate Body did not conclude that the listing of treaty articles - where the articles listed establish multiple obligations - would not satisfy Article 6.2 of the DSB.⁵ The Appellate Body considered that there may be situations where the simple listing of the articles of the agreement or agreements involved may, "in the light of attendant circumstances", suffice to meet the standard of clarity in the statement of the legal basis of the complaint.⁶ What is to be taken into account is whether the ability of the respondent to defend itself was prejudiced, "given the actual course of the panel proceedings."⁷

10. The key issue, therefore, is whether the USA has demonstrated that the simple listing in the panel request of the articles asserted to have been violated has prejudiced its ability to defend itself in the course of the Panel proceedings. In its letter to the Panel of 5 May 2000, the USA did no more than assert that the panel requests prevented it from knowing the true nature of the claims made against it and that this limited its ability to begin the task of preparing its defence.

11. The particular circumstances of this case demonstrate the validity and clarity of Australia's and New Zealand's panel requests. The underlying dispute in this case contained a number of discrete issues, many of which were challenged and argued repeatedly before the USITC and raised by Australia and New Zealand in the Safeguards Committee, in SG Article 12.3 consultations, in DSU consultations, and in the DSB. The USA was provided with more than adequate notice of the WTO provisions that Australia considered that it had violated.

² WT/DS108/AB/R, paragraph 166.

³ WT/DS108/AB/R, paragraph 165.

⁴ Appellate Body Report on Korea - Definitive Safeguard Measure on Imports of Certain Dairy Product, WT/DS98/AB/R, at paragraph 131 (Korea - Dairy Safeguard).

⁵ WT/DS98/AB/R, paragraph 124.

⁶ WT/DS98/AB/R, paragraph 124.

⁷ WT/DS98/AB/R, paragraph 127.

12. Moreover, the USA provides no explanation of why it considers that it is being prejudiced in its ability to defend itself, "given the actual course of the panel proceedings". It had 22 days to provide its First Submission after receiving Australia's and this was extended by the Panel to 26 days, compared to the 14-21 days provided for in DSU Appendix 3. It will have 64 days after receiving Australia's First Submission to put in its rebuttal, compared to the 35-56 days provided for in DSU Appendix 3. The period between the receipt of Australia's First Submission and the second substantive meeting with the Panel is 98 days, compared to the 42-70 days provided for in DSU Appendix 3.

13. The USA admits that it did not suffer prejudice in respect of SG Articles 5, 11, and 12 and GATT 1994 Articles I, II, and XIX. The USA makes no reference to SG Article 8 and so it has made no request for a preliminary ruling in respect of any of the articles referenced by Australia and New Zealand other than SG Articles 2, 3, and 4.

14. The USA made no attempt to say what was unknown about SG Articles 2 and 3. Each of the legally pertinent provisions, SG Article 2.1, 2.2, and 3.1 is clearly at issue. The USA made no attempt in its letter of 5 May 2000 to explain why it suffered the alleged prejudice "given the actual course of the panel proceedings". Similarly, in respect of SG Article 4, the core provisions for a threat of injury case, SG Article 4.1(b), 2(a) and 2(b), are necessarily at issue. SG Article 4.1(a) is necessarily at issue either in itself or as incorporated in the other 3 sub-paragraphs as a definition. In addition, as shown below the USA could have been in no doubt that SG Article 4.1(c) is at issue. Again, the USA made no attempt to explain why it suffered the alleged prejudice.

15. This is indeed a case in which the USA violated a wide range of obligations contained in the Agreement on Safeguards, in particular those under SG Articles 2, 3, and 4. These issues had all been raised with the USA. No further specification was necessary to meet the desired level of clarity under DSU Article 6.2.

16. If the USA did not understand what Australia's complaint was about, why did it not ask in the DSU consultations on 26 August 1999? The intent of such consultations provides the opportunity for the respondent to clarify any doubts that it might have about the concerns of the complainant. Of course, after two rounds of SG Article 12.3 consultations, the USA knew all too well what Australia's concerns were. They were made clear also in the DSU consultations. If the USA genuinely did not know which provisions of SG Articles 2, 3 and 4 were being challenged by Australia, why did it not ask at that time or indeed at any time before 5 May 2000, 8½ months later? If the USA did not know that there would be a challenge under some particular provision, it raises the question what provision did the USA think was going to be raised under each of these articles? It is instructive to examine what the USA did in fact know and whether some genuine confusion was possible, and whether that confusion somehow prejudiced the position of the USA. This will include referencing the questions posed to the USA at the various consultations and statements made in the Safeguards Committee and the DSB. Australia's opening statements at the SG Article 12.3 consultations held on 4 May 1999 and at the DSU consultations held on 26 August 1999 (Exhibits AUS-35 and AUS-36) also clearly reiterate where Australia considered that the USA had violated its obligations.

SG Article 4

17. It appears that SG Article 4 is the provision that the USA is most concerned not to have examined by the Panel. Yet, the DSU consultations, supported by both the SG Article 12.3 consultations, made it quite clear that the imposition of the measure on the basis of threat of injury being caused by increased imports would be challenged. The USA has long had notice of Australia's concerns about all aspects of the underlying threat determination, including through a statement made

by Australia at the Safeguards Committee on 23 April 1998.⁸ Thus the USA knew that Australia considered that the "threat" finding was wrong, including in respect of "clearly imminent". Thus SG Article 4.1(b) was at issue. This immediately meant that SG Article 4.2 was at issue, since it is incorporated into SG Article 4.1(b). Australia has also continually raised the fact that the USITC had incorrectly determined what was the "domestic industry". Thus SG Article 4.1(c) was also at issue.

18. Indeed, the underlying USITC investigation and finding of threat of serious injury made it clear that SG Article 4.1(b) and 4.2(a) and (b) are at issue. It is hard to credit that the USA when faced with a challenge to a safeguard measure based on a finding of "threat of serious injury" would not realize which were the main provisions at issue. Further specification was not necessary because each legally pertinent element of SG Article 4 for the determination that serious injury was being threatened to be caused by increased imports is at issue.

19. The USA knew that the consistency of the measure is being challenged under SG Article 4.1(b) and (c) and 4.2(a) and (b). Therefore, no prejudice could be being suffered by the USA in respect of SG Article 4. It is useful to examine what the USA was told about Australia's views.

20. SG Article 4 has two paragraphs each of which has three subparagraphs that will be considered in turn.

Sub-paragraph 1(a)

21. This provides the definition of "serious injury". While this is a threat case, the requirement of "significant overall impairment" is incorporated in sub-paragraph 1(b). It is difficult to believe that the USA had any confusion over this. Australia's views over "significant overall impairment" were clear from, for example, questions 15 and 16 asked at the DSU consultations on 26 August 1999 (Exhibit AUS-27).

22. Therefore, the USA knew that Australia is challenging, in the context of SG Article 4.1(b) and 4.2, its compliance with the requirement to prove that a "significant overall impairment" of the "domestic industry" was being threatened.

Sub-paragraph 1(b)

23. This sub-paragraph defines "threat of serious injury", linking the requirements under SG Article 4.2, and the requirement that a determination be based on fact. The measure was imposed after a finding of threat of serious injury. Australia has made it clear that it did not consider that the threat of serious injury had been demonstrated, including the requirement that it be "clearly imminent".

24. For example, as noted above this was stated at the Safeguards Committee meeting on 23 April 1999.⁹ Moreover, it was clear from questions 6-12 asked at the SG Article 12.3 consultations on 4 May 1999 (Exhibit AUS-25), question 7 asked at the SG Article 12.3 consultations on 14 July 1999 (Exhibit AUS-26), and questions 13, 15, and 18 asked at the DSU consultations on 26 August 1999 (Exhibit AUS-27).

25. Therefore, the USA knew that sub-paragraph 1(b) is at issue.

⁸ See paragraph 60 of G/SG/M/13 - Exhibit AUS-37.

⁹ See paragraph 60 of G/SG/M/13 - Exhibit AUS-37.

Sub-paragraph 1(c)

26. The issue of what constitutes the "domestic industry" in this case was raised by Australia at the Safeguards Committee on 23 April 1999¹⁰, at the SG Article 12.3 consultations on 4 May 1999¹¹ and at the DSU consultations on 26 August 1999.¹² It was a key issue before the USITC enquiry. The USA knew that it is an issue before the Panel.

Sub-paragraphs 2(a) and (b)

27. These sub-paragraphs contain the key requirements for the demonstration that increased imports are threatening to cause serious injury to a domestic industry. It is inconceivable that the USA did not know that Australia was going to challenge the consistency of the measure under these provisions.

28. Moreover, obligations on compliance with paragraph 2 are in any case picked up through sub-paragraph 1(b).

29. Australia had raised its concerns again and again about the failure of the USA to meet its obligations under these sub-paragraphs. For example, it is clear from paragraph 60 of G/SG/M/13 that Australia was challenging the finding of threat of serious injury as well as causation by increased imports, and explicitly the inadequate treatment of other factors. See also questions 13-16 on threat and adequacy of data and questions 17-28 on causation asked at the SG Article 12.3 consultations on 4 May 1999. See questions 9-24 asked at the DSU consultations on 26 August 1999. Therefore, the USA knew all too well that these sub-paragraphs are before the Panel.

Sub-paragraph 2(c)

30. Australia did not indicate that it would raise the question of a breach of sub-paragraph 2(c). However, there would hardly have been any prejudice to the USA, if it had prepared itself to defend the measure in respect of sub-paragraph 2(c).

31. Overall, therefore, the USA well knew what was at issue under SG Article 4. There was no possibility of confusion.

32. Moreover, as shown below there could have been no confusion over the fact that the measure was being challenged under both paragraphs of SG Article 2. However, SG Article 2.1 requires that the USA had, inter alia, fulfilled the requirements of SG Article 4 on injury before imposing the measure. There is a direct link between SG Article 2.1 and SG Article 4. Even if SG Article 4 had not been mentioned at all in the request for a panel, reference could still have been made to the USA's failure to comply with SG Article 4 in demonstrating the inconsistency of the measure with SG Article 2.1.

SG Article 2

33. In fact, Australia and New Zealand have challenged consistency with both paragraphs of SG Article 2, and, therefore, no further detail of specific provisions was either possible or necessary. It would not have affected the USA's situation for Australia to have specified SG Articles 2.1 and 2.2 rather than SG Article 2.

¹⁰ See paragraph 59 of G/SG/M/13 - Exhibit AUS-37.

¹¹ See for example questions 2-5 at Exhibit AUS-25.

¹² See for example questions 7-12 at Exhibit AUS-27.

34. This article has two paragraphs and Australia is seeking findings in respect of each of them.

Paragraph 1

35. Paragraph 1 of SG Article 2 says:

"A Member [*Footnote 1 omitted.*] may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products."

36. This is a critical obligation under the Safeguards Agreement, especially in respect of the injury determination.

37. The USA knew that Australia considered that the USA had not demonstrated that serious injury was being threatened to be caused to the domestic industry by imports of lamb meat. Indeed, why else would SG Article 4 have been cited. It is impossible to credit that the USA did not know that paragraph 1 of SG Article 2 would be raised.

Paragraph 2

38. This paragraph is about non-discrimination in respect of measures under the Safeguards Agreement. The USA was aware that this is an issue of long-standing concern to Australia with regard to US legislation. For example, in the context of the WTO, Australia questioned the USA about this in October 1995.¹³ It was raised in paragraph 59 of G/SG/M/13 on 23 April 1999, in questions asked at the SG Article 12.3 consultations on 4 May 1999 (question 25) and 14 July 1999 (question 13), and the DSU consultations on 26 August 1999 (questions 30-32). Australia also stated at the DSB meeting on 27 October 1999 when it first requested the establishment of a panel that:

"The United States had also breached the non-discrimination obligations of GATT 1994 and the Agreement on Safeguards in the application of its safeguard action"¹⁴;

39. The DSU consultations were attended by Canada who clearly knew that this was an issue. Indeed, the USA allowed Canada to attend on the basis of a substantial trade interest in the matter even though the request was outside the 10 day period provided for in DSU Article 4.11 but denied the EC the right to attend. Moreover, the USA, by admitting that it understood the claim on GATT Article I necessarily knew that paragraph 2 of SG Article 2 was also an issue.

SG Article 3

40. As for SG Article 3, these requirements are purely procedural. Either the USA followed the simple procedural requirements, or it did not. The USA cannot, and indeed does not, set forth any particular prejudice that it suffered because the specific aspects of Article 3 under challenge were not expressed in more detail in the panel request.

¹³ See question 2 in G/SG/W/39 and the answer in G/SG/W/160 at Exhibit AUS-38.

¹⁴ Under Item 5 of WT/DSB/M/70 at Exhibit AUS-39.

41. This article also has only two paragraphs. Even in the absence of knowledge about a case, a reference to SG Article 3 must concern paragraph 1 of SG Article 3 as the legally pertinent provision. Paragraph 2 of SG Article 3 is only about the treatment of confidential information in the investigation. Australia has not raised any issues about the USITC's handling of confidential data, in that Australia has not put forward any concerns about information being leaked by the USITC or the USITC refusing to receive data that an interested party considered should be kept confidential. There was no reason for the USA to consider that paragraph 2 of SG Article 3 is at issue for Australia let alone the only paragraph at issue for Australia. Even if it considered that Australia might raise something under this provision, what possible prejudice could it have suffered?

42. Australia has emphasized its concerns in respect of the procedural aspects of the case after the USITC reported to the US President and the absence of a public report setting out the findings and reasoned conclusions for the actual measure imposed, which go to the heart of compliance with paragraph 1 of SG Article 3. For example, see questions 2-5 asked at the SG Article 12.3 consultations on 14 July 1999 and questions 1-6 and 25 asked at the DSU consultations on 26 August 1999. In addition at the DSB meeting on 27 October 1999, Australia said that:

"the United States had failed to meet its obligations regarding" ... "as well as its obligations in respect of" ... "notification and publication."¹⁵

43. This necessarily meant that Australia was challenging the measure under paragraph 1 of SG Article 3.

44. Therefore, the USA was fully aware that paragraph 1 of SG Article 3 was an issue before the Panel.

Third country rights

45. The USA's sudden concern about the rights of third countries (in paragraph 10 of its letter of 5 May 2000) is unexpected. Moreover, Australia regards it as being misplaced. First, the USA has no standing upon which to raise third country concerns. Second, no other Member has raised such concerns with Australia or in the DSB with respect to the panel requests. Members were given several opportunities to raise such concerns if they failed to understand the request for the establishment of a panel. Australia's first panel request, which was made at the DSB meeting on 27 October 1999, was blocked by the USA. The second panel request was made at the DSB meeting on 19 November 1999. After the Panel was established at the 19 November 1999 DSB meeting, third countries were given ten days in which to reserve their third party rights. Members could have raised concerns at any time or asked questions about the panel, but none did.

46. Of course, four Members did reserve their third party rights. The scope of the complaint was made out adequately through the request for the establishment, which was also complemented by the Australian statement at the DSB meeting on 27 October 1999, and before that Australia's concerns had been set out at the Safeguards Committee meeting on 23 April 1999. Any Member interested in the case had ample opportunity to inform itself of the issues involved. Any Member familiar with the Safeguards Agreement and even slightly familiar with this case, would be fully aware of which legal provisions were at issue.

47. Like the Appellate Body in *Korea – Dairy Safeguard*, the Panel should focus on whether the USA itself has been truly prejudiced by the panel requests at issue.

¹⁵ Under Item 5 of WT/DSB/M/70 at Exhibit AUS-39.

Conclusion

48. Given the manner in which this claim has been raised after so many months and the particular circumstances of this case, the USA's claims of prejudice are simply not credible. Australia urges the Panel to disregard the USA's request in its letter dated 5 May 2000, and thereby permit this case to proceed as scheduled.

B. EXCLUSION OF US STATUTE FROM PANEL TERMS OF REFERENCE

49. Australia is not asking the Panel to make a finding that the US legislation itself is inconsistent with the USA's obligations under the Safeguards Agreement, GATT 1994, and WTO Article XVI:4.

50. On the other hand, Australia is not saying that the legislation is consistent with the requirements of the Safeguards Agreement, but is simply asking the Panel to find that this measure is inconsistent with the requirements of the Safeguards Agreement and GATT 1994 Articles II and XIX. As a matter of fact, Australia does consider that the legislation is flawed, but has sought to simplify the Panel's task by avoiding a mandatory legislation debate over the flexibility of the USITC and the discretion of the President to obtain a WTO consistent outcome.

C. BUSINESS CONFIDENTIAL INFORMATION (BCI)

51. Neither of the confidentiality provisions of the Safeguards Agreement, Articles 3.2 and 12.11, are listed in Appendix 2 of the DSU. Accordingly, they are not applicable to this panel process. Moreover, the USA's domestic legislation on the provision of information is also not relevant, if the Panel considers that it needs the information to carry out its responsibilities under DSU Article 11. Australia is concerned that one reading of the USA's letter would be that this issue might be used to delay the panel proceedings. The confidentiality provisions in SG Article 3.2 and in domestic legislation are aimed at preventing commercially sensitive information being leaked and compromising commercial interests. Australia is not asking for BCI information to be publicly released but only that it be made available under conditions that would prevent commercial interests from being damaged.

52. Australia's view is that the Panel would have difficulty in examining some aspects of the USITC findings in the absence of the BCI in the full USITC Report to the President. Accordingly, the Panel may need to have that information to determine the consistency or otherwise of the measure with the Safeguards Agreement. Of course, the Panel might not require the information sought in paragraph 15 of Australia's First Submission to find that the measure is inconsistent in respect of all of Australia's claims. However, Australia's concern is to ensure that the USA is not allowed to rely explicitly or implicitly on any information to support its case that it is not prepared to provide to the Panel and Australia. In addition, the USA should not be allowed to selectively provide information that supports its case. Thus the Panel would need to draw adverse inferences if the USA is not prepared to provide the information expeditiously.

53. Australia noted that the USA has referred to "business confidential information" in its letter. Australia's request is set out in paragraph 15 of Australia's First Submission. This went beyond the issue of BCI in seeking information from the second phase of the process after the USITC reported to the President. In the absence of that, Australia considers that the Panel should draw adverse inferences about the consistency of the measure with SG Article 5.1 and the USA's obligation to ensure at the time that the necessity test was met. Moreover, without some insight into the process that followed the USITC report to the US President, how could the Panel determine whether there had been a breach of SG Articles 3 and 12?

54. As requested in the Panel's letter of 10 May 2000, Australia is prepared to provide further arguments required in respect of Australia's request for a preliminary ruling on the provision of information by the USA to the Panel.

AUSTRALIAN EXHIBITS 35-39

35. Opening statement by Australia at the SG Article 12.3 consultations on 4 May 1999.
36. Opening statement by Australia at the DSU consultations on 26 August 1999.
37. Extract from the Minutes of the Safeguards Committee Meeting on 23 April 1999 (G/SG/M/13).
38. Replies to questions posed by Australia concerning the notification provided by the United States of laws and regulations under Article 12.6 of the Agreement (G/SG/W/160).
39. Extract from the Minutes of the DSB Meeting on 27 October and 3 November 1999 (WT/DSB/M/70).

ANNEX 1-4

**ORAL STATEMENT OF AUSTRALIA CONCERNING
USA'S REQUEST FOR PRELIMINARY RULINGS**

(25 May 2000)

1. Australia's letter of 17 May 2000 responded to the USA's request for a preliminary ruling on the sufficiency of the panel request. Australia rejects the basis for the US request and considers that in view of the nature of the request no further elaboration was required in this particular case and that no point would have been served in simply listing paragraphs of articles such as Article 2.1 and 2.2 rather than Article 2.
2. It may be useful, however, to the Panel to elaborate further on the allegation of prejudice by the USA. While the USA asserted that it had suffered prejudice, it did not explain what the nature of that prejudice was and how it had affected the USA.
3. The USA said that it did not assert substantial prejudice with respect to claims of the complainants under Articles I, II, and XIX of GATT 1994 and Articles 5, 11, and 12 of the Safeguards Agreement, since it could "discern those subprovisions that would be implicated on the basis of the context of this proceeding." Therefore, the USA did not sustain prejudice in respect of these claims. The USA did not mention SG Article 8 at all, and so did not assert prejudice in respect of Article 8. Thus there is no issue before the Panel in respect of prejudice on any provisions except Articles 2, 3, and 4 of the Safeguards Agreement.
4. As we explained in the letter of 17 May 2000, the USA was well aware of Australia's concerns on these provisions. Australia had dwelt on them at great length in Article 12.3 consultations and DSU consultations to give the USA every opportunity to answer our concerns about the inconsistency of first the USITC finding and recommendation, and then the measure imposed by the USA. This was supplemented by statements in the Safeguards Committee and the DSB.
5. Indeed Australia went much further than is required under the DSU in setting out the detail of our concerns in the form of questions as well as statements. These were bolstered by oral explanations in the May and August consultations in Geneva.
6. The USA has made no allegation that Australia in some sense misled it about what our concerns are. The USA has made no allegation that it thought that it had satisfied Australia about one or more issues and so thought that they would not be raised.
7. In paragraph 7 of its letter of 5 May 2000, the USA said that it was unclear what claims Australia was stating in respect of Article 4.
8. Given that this is a case about threat of serious injury being caused by increased imports and that Australia had objected to the finding right through the USITC proceedings, in the Article 12.3 and DSU consultations, the Safeguards Committee, in the DSB, and at the highest political levels in our two countries, it is inconceivable that the USA did not know that it was going to be challenged by Australia on Article 4.1(b) and hence also on Article 4.2(a) and (b). Moreover, Australia repeatedly raised with the USA the issue of "clearly imminent". We also repeatedly raised issues such as the poor quality of the data, other factors and causation. Indeed, it is difficult to believe that there is any major line of argumentation used in respect of Article 4 that the USA would not have discerned.

9. Again, Australia has been absolutely clear that it was going to challenge the issue of “domestic industry”, i.e. Article 4.1(c). There can have been no doubt in the USA’s mind over this. This was an issue before the USITC inquiry. Australia dwelt on it in the Safeguards Committee and in the Article 12.3 and DSU consultations.

10. The USA was mistaken in its statement in saying that Australia had raised SG Article 4.2(c) in its First Submission.

11. As we explained in our letter of 17 May 2000, we cannot understand how the USA could not discern that the reference to Article 2 included claims relating to both Article 2.1 and 2.2. It is inconceivable that a case, which referenced Article 4 would not take on Article 2.1. Australia, including in the DSB when making the first request for a panel, said explicitly that it was challenging the inconsistency with the non-discrimination provisions of the Safeguards Agreement. That could only be Article 2.2. Similarly, any reference to Article 3 would have to include Article 3.1, and it would have been difficult to imagine that it would have included Article 3.2. In any case, what sort of prejudice would the USA have sustained if it had prepared a defense for Article 3.2?

12. In respect of the issue before us, the USA has made no attempt to say how it sustained any real prejudice.

13. At paragraph 9 of its letter the USA says that it was hampered in the preparation of its defense. As we have shown there is nothing that the USA could not have discerned that was going to be raised. The process between Australia and the USA has been exceedingly open and transparent and it is difficult to see what arguments Australia has run about SG Articles 2, 3, and 4 that the USA would not have expected in one form or another.

14. At paragraph 8 of the USA’s letter, it talks of only having three weeks to prepare its First Submission. It knew what was going to be challenged. This is not a case involving uncertainty or questions about what the measure at issue is. The USITC Report and the subsequent process leading up to the imposition of the measure were always the agenda for Australia, and the USA knew that. In any case the USA did receive an extra four days for lodging its First Submission. The USA now has more than two months between receipt of Australia’s First Submission and having to put in its rebuttal submission. It has a further month until the second meeting with the Panel. It is difficult to see in what way the USA could have sustained any prejudice.

15. If the USA did not understand the case, why did it not say so in at least October 1999? Why did it wait until 5 May 2000?

16. At the end of its paragraph 7, the USA says:

“The United States can only conclude that the claims in this case will continue to evolve, and that this evolution will be uncontrolled by the terms of reference because of the vagueness of the panel requests.”

17. It is unclear to us whether the USA is saying that there is threat of sustaining prejudice. That would be clearly in the hands of the Panel to prevent if the Panel considered at some point in the future that somehow the USA was at risk of prejudice.

18. On third countries, it is difficult to see which Members the USA is talking about in paragraph 10 or how they would have sustained prejudice. Any Member with a systemic interest in the Safeguards Agreement would have been fully aware of the extent of the case by the panel request alone. In addition it would have been alerted by at least Australia’s statement in the DSB on 27 October 1999 and could have indicated third party interest.

19. In relation to what the Appellate Body actually found in *Korea – Dairy Safeguard* on the sufficiency of the EC panel request, Australia notes that the actual finding was conditioned by the particular circumstances of that case.

20. In summary, Australia asks the Panel to reject in full the USA's request for a preliminary Ruling on the insufficiency of the panel request and to consider all of the claims made by Australia on their merits

ANNEX 1-5

ORAL STATEMENT OF AUSTRALIA CONCERNING AUSTRALIA'S REQUEST FOR PRELIMINARY RULINGS

(25 May 2000)

1. The request falls into two parts. Firstly, there is the request for information excluded from the USITC Report. Secondly, there is the information covering the process after the USITC reported to the President.
2. Additional views have been set out in Australia's letter to the Panel on 17 May 2000 regarding the USA's request for preliminary rulings.

USITC Report

3. Australia's concern is that the USA has not been prepared to provide the information in time for Australia prior to the panel proceedings. Yet the USA relies on that data for its defense before the Panel. Australia considers that results in a high degree of procedural unfairness. On the one hand, Australia is challenging the findings of the USITC Report. On the other the USA by relying on the USITC Report, as it must in this case on certain issues, is implicitly saying that the Panel must take for granted the USITC's assessment of confidential issues. The only way around this is either for the USA to provide that information, or for the Panel not to allow the USA to rely on the information either explicitly or implicitly, including in the examination of relevant factors under SG Article 4.2(a).
4. It is difficult to see how the Panel can carry out its responsibilities under DSU Article 11, if it unable to have access to information that the USA considers relevant but is unwilling to provide. The confidentiality provisions of the Safeguards Agreement, i.e. SG Article 3.2 and 12.11, are not listed in DSU Appendix 2 and so are not part of the DSU provisions. Accordingly, they do not affect the Panel's right to seek this information.
5. As a point of clarification, Australia's request is in respect of information omitted from the USITC Report, not for all confidential information from the USITC record.
6. Australia is prepared to consider any reasonable procedures for protecting the information. Australia notes that it is the sole responsibility of the USA to provide access to information that it holds.

Investigation Process after the USITC reported to the President

7. The Australian request is cast widely because Australia does not know precisely what happened. We learn from the USA's First Submission that there was modelling work done, presumably by the USITC. What data was used and what other investigations were carried out, Australia does not know.
8. The problem faced by the Panel is that there was a further internal inquiry and decision-making process after the USITC reported to the President. The Panel may feel that it can find on the basis of what the USA has put in its First Submission that the USA has breached at least SG Articles 3.1, 12.2, and 12.6. However, if it cannot do that, then it will need to determine what the actual process was. Our request for a ruling by the Panel requesting additional information would

help the Panel to fulfil its responsibilities to make an objective assessment and get at the truth of the matter.

9. There is also the issue of whether the USA has complied with SG Article 5.1. The issue is two-fold. Firstly, what the justification was and, secondly, whether it was made before the imposition of the measure, as required by SG Article 5.1. Again we do not see how the Panel can get at the truth of the matter without seeking the information requested.

10. Australia asks that if the USA is not prepared to come forward with the requisite information, then the Panel should draw adverse inferences about this.

11. In the USA's covering letter to the Chair for its First Submission, the USA says:

"As the United States explains in detail elsewhere in this submission (*see* ¶¶ 231-236, 275), the Safeguards Agreement does not require a Member to justify its choice of a safeguards measure. Rather, the only obligation is to ensure that the measure is applied "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment." Any requirement that would seek to reveal the reasons why a Member decided between alternative measures, or between applying a measure and refraining from doing so, would inappropriately intrude on the Member's deliberative process regarding the application of safeguard measures. Australia's request should be rejected."

12. Australia cannot understand the line of argument that on the one hand the USA accepts that there is a WTO obligation, but that on the other it cannot be tested. There were investigatory processes beyond the USITC Report. The USA now admits this in paragraph 216 of its First Submission. The USA says that it ran its own models. Since it does not say that it limited itself to the data on the USITC record, there is a presumption that it used later data of one sort or another.

Conclusion

13. In summary, the provision of the information requested, both that in the USITC Report and that relating to the post-USITC Report investigations, is an issue of fundamental importance to the working of the WTO disciplines. Without this information how can the Panel make an objective assessment of whether the USA has complied with the disciplines of the Safeguards Agreement and Article XIX of GATT 1994.

ANNEX 1-6

FIRST ORAL STATEMENT OF AUSTRALIA

(25 May 2000)

INTRODUCTION

1. This is an important case both for Australia and the WTO safeguards disciplines. In essence, it is a case about industry protection – or rather whether the protective measure taken by the USA is justified and whether in applying this measure the USA has adhered to its WTO obligations. It is not just that Australia disagrees with what the USITC found and recommended - though it does. The US Administration then went on with no public inquiry to impose a more restrictive measure than that found by the USITC to be justified. The USA did this without providing any basis for its decision.

2. The approach taken by the US Administration strikes at the heart of the Safeguards Agreement, which is supposed to ensure a public process where parties can defend their interests and be provided with the findings and reasoned conclusions on which decisions are taken. If the USA is allowed to get away with this approach, then there is the risk that other Members will also seek to write major provisions on transparency and natural justice out of the Safeguards Agreement.

3. In addition this is a case of threat of serious injury being caused by increased imports, i.e. where the USITC found that there was no serious injury being experienced. While clearly under the Safeguards Agreement, it is permissible to impose measures in the case of genuine threat, special care must be taken. Thus SG Article 4.1(b) emphasizes that "[a] determination of threat of serious injury shall be based on facts." It is not easy to make a finding of threat and that is quite appropriate. Safeguard action is permitted under the WTO as a derogation from key provisions of GATT 1994 and so is carefully circumscribed. In the words of the Appellate Body 'safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be in short, "emergency actions."¹ Under the Safeguards Agreement there already is provision for provisional measures in critical circumstances. A Member cannot take pre-emptive action on the basis of a threat finding unless the requirements of the Safeguards Agreement and, in particular SG Article 4, are clearly met. The USA did not meet these requirements.

MAIN POINTS IN AUSTRALIA'S FIRST SUBMISSION

4. Australia's case against the USA falls under the following main headings.

- The failure of the USA to comply with the requirements under GATT 1994 Article XIX regarding the need to show that the threat of material injury being caused by increased imports was the result of "unforeseen developments". It did not show these, and could not have, since there were no such "unforeseen developments".
- The failure of the USA to comply with the SG Article 5.1 to ensure that the extent of the measure was no more than was necessary.
- The failure of the USA to comply with a number of critical procedural obligations on investigations and reports under SG Article 3.1.

¹ At paragraph 86 of WT/DS98/AB/R – *Korea – Dairy Safeguard*.

- The failure of the USA to comply with the obligations under SG Article 4 in demonstrating threat of material injury and causal link in particular:
 - inconsistency of “domestic industry” with SG Article 4.1 (c)
 - inconsistency with SG Article 4.1(b) of the need for the serious injury to be “clearly imminent” and for the finding to be based on facts
 - inconsistency with SG Article 4.2(a): to examine all relevant factors because of the poor quality of the data and the lack of examination of certain listed factors; to demonstrate a significant overall impairment of the position of the domestic industry; and to prove threat of serious injury
 - inconsistency with SG Article 4.2(b) on causation because the USITC failed to set to one side injury that is threatened by other factors.
- The failure of the USA to comply with SG Article 8.1 to endeavour to maintain a substantially equivalent level of concessions or other obligations with Australia.
- The failure of the USA to comply with a number of critical procedural obligations on notification and consultation under SG Article 12.
- The inconsistency with SG Article 2.2 of the exclusion of certain countries from the scope of the measure despite their inclusion in the injury analysis, in particular NAFTA members.
- The inconsistency of the measure with SG Article 11.1(a).
- The inconsistency of the measure with SG Article 2.1.
- The violation of the USA's tariff bindings on lamb meat under GATT 1994 Article II.

5. To avoid belabouring the point throughout, it should be noted that while this statement goes through a range of provisions with which the measure is inconsistent, many of the provisions are closely linked. For example, if the Panel agrees with Australia that the USA's choice of “domestic industry” is inconsistent with SG Article 4.1(c), then automatically the USA has failed to comply with SG Articles 2.1, 4.1(b), 4.2(a), 4.2(b), 5.1, and 11.1(a).

GATT 1994 Article XIX

6. The Appellate Body found in *Korea-Dairy Safeguard* and *Argentina – Footwear Safeguard* that a Member was obliged to comply with GATT 1994 Article XIX as well as the explicit provisions of the Safeguards Agreement and so to demonstrate that it was as a result of “unforeseen developments” that increased imports were threatening to cause serious injury to the domestic industry. The USITC did not address this issue in its Report. Thus the USA did not address this issue before imposing the measure and so did not comply with the requirements of GATT 1994 Article XIX. In any case, as a matter of fact, there were no such “unforeseen developments” as required under GATT 1994 Article XIX.

SG Article 5.1 and the extent of the measure

7. The USITC only found that there was threat of serious injury to the “domestic industry”. It found that no serious injury was being experienced by the “domestic industry”, let alone serious injury being caused by imports. Therefore, the current level of imports was not causing serious injury. Moreover, the USITC did acknowledge that there were other factors impacting on the domestic industry.

8. The USITC found that its tariff quota proposition was **sufficient** to prevent the threat of serious injury being caused by imports. It also proposed other domestic measures to assist with some of the domestic factors that are the real problems facing the various industry segments. However, nowhere does the USITC Report prove that it was **necessary** to impose a tariff quota starting at only the 1998 level of imports with such high out of quota tariffs, and only one small increase in the second year. This was the tariff quota system that was notified to the Committee and the only one for which any pretence at justification was provided.

9. Following its report to the President, and as we are now told the further investigations by the US Government, a much more restrictive tariff quota system was actually imposed. The initial out of quota tariff was twice as high as that found to be sufficient by the USITC. Then to add insult to injury, a very high tariff was imposed on in-quota product.

10. There has been no public report on the findings and reasoned conclusions for imposing this tariff quota system. Nothing has been notified to the Committee. Indeed, what justification could be made for doubling the USITC's recommendation for the tariff quota wall? Given the restrictive nature of the tariff quota, what justification could be made for imposing a punitive in-quota tariff? The USA was obliged to impose a measure no more restrictive than necessary to prevent serious injury being caused by increased imports and to facilitate adjustment. Instead, it imposed a harsh, punitive regime that went well beyond what could be justified. Indeed, if a justification had been made, the USA would presumably have made it public, or at least provided it in the SG Article 12.3 or DSU consultations with Australia.

11. The USA was obliged to have made a legally valid justification of the measure before imposing the measure. By 7 July 1999, there had to be a piece of paper with that justification written on it. If this existed, the USA would have been remiss in its obligations under DSU Article 4 not to have produced it in consultations, so that the claims before the Panel could have been reduced.

SG Article 3.1 - obligations in respect of investigations and reports

12. The procedural obligations under the Safeguards Agreement are critical to its functioning. The Safeguards Agreement is supposed to create a transparent decision making process, in contrast to the hidden internal procedures so often followed for Article XIX under the GATT.

13. After the USITC reported to the President, the matter disappeared from public view apart from the occasional press story. Clearly there was political pressure on the US Administration to impose a measure, and indeed to impose a measure more restrictive than that recommended by the USITC. In the end that is what happened. No information has been forthcoming on what investigations took place or what justification was made for the necessity of the extent of the measure imposed.

14. Clearly something happened. As we now know from the USA's First Submission, there was a further investigation.² This was in breach of the transparency and natural justice requirements of

² At paragraph 216 of the USA's First Submission.

SG Article 3.1. All interested parties should have had access to the material being used and given the opportunity to defend their interests. They were not. There should have been a public report of the investigations. There was not.

15. The USA seems to consider that just because it says that the USITC is the competent authority, transparency stops with the USITC Report. However, if a Member could just decide unilaterally that it could circumvent SG Article 3.1 by limiting the scope of the activity of its competent authority, then that would undermine the effectiveness of this provision, if not write it out of the Safeguards Agreement altogether.

16. The USA appears to consider that it does not matter what the competent authority finds and recommends, the Member can impose something different to its finding and does not have to justify it. This would mean that a Member could reject a negative finding on injury and causation but still impose a measure without further justification.

17. The crux of the issue is that the USA now admits in its First Submission that there was a subsequent investigation, and so the USA has failed to comply with its obligations under SG Article 3.1 in respect of publishing its procedures, reporting the findings and reasoned conclusions, and in giving parties the opportunity to defend their interests.

18. SG Article 3.1 starts off saying that: "[a] Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994."

19. One question facing the Panel is whether "following" has a purely temporal meaning, i.e. it does not matter what the outcome of the investigation is, provided some mock investigation is carried out. Or does it mean that the Member must rely on the outcome of that investigation for the justification of the measure. Only the latter interpretation provides the basis for an effective agreement. However, the latter interpretation finds the USA in breach of SG Article 3.1.

SG Article 4 - the assessment of injury and causation

"Domestic industry"

20. The determination of what is the "domestic industry" is the foundation stone for the injury investigation. If that determination is wrong, then the whole of any injury assessment is fatally flawed and cannot be cured. Similarly, the determination of what is the "domestic industry" is critical to any decision on the measure, since the requirement in SG Article 5.1 to show "necessity" as to the extent of the measure cannot be complied with if the wrong "domestic industry" is being used.

21. The first thing to do in determining the "domestic industry" is to decide what is "like or directly competitive products" in respect of the imported product, lamb meat. In this case, the USITC found that the like product to the imported lamb meat is domestic lamb meat, not breeder lambs, not feeder lambs, and not slaughter lambs, but lamb meat – the product produced by packers and breakers.

22. The USITC determined the "domestic industry" for this case on the basis of "like product" alone and not on the basis of "directly competitive products". The USITC's justification for including growers and feeders was no more than that that was the USITC's practice consistent with statutory provisions for anti-dumping and countervailing. The USITC limited itself to analyzing the application of this practice to the case. It made no attempt to argue why compliance with its own test should mean compliance with the requirements of the Safeguards Agreement. Indeed how could it? For example, growers produce feeder lambs and lambs for breeding, as well as wool and cull ewes,

they do not produce lamb meat, the like product. Feeders produce slaughter lambs bought by packers who produce carcasses, lamb meat.

23. In the USA's First Submission at paragraphs 61-67, it seeks to argue an economic interest test but does not make any argument that this approach has support in the text of the Safeguards Agreement.

24. The USITC by including all the industry segments in its definition of "domestic industry" fundamentally flawed its investigation from the start. This cannot be cured. An injury finding on the basis of the wrong "domestic industry" cannot be used to justify the imposition of a safeguard measure. Therefore, the measure is inconsistent with the USA's obligations under SG Article 4, in particular SG Article 4.1(c).

SG Article 4.1(b) – the requirement for proving "threat"

25. This provision also explicitly incorporates the requirements of SG Article 4.2. Accordingly, these aspects will be dealt with in respect of SG Article 4.2(a) and (b).

26. Two key areas in which the USA has failed to comply with its obligations are: the failure to show that the alleged serious injury to be caused by imports was "clearly imminent"; and the failure to provide the demonstration of the existence of the threat "be based on facts and not merely on allegation, conjecture or remote possibility."

27. The USITC did not say what it meant by "clearly imminent". The USA in the SG Article 12.3 and the DSU consultations refused to say what it meant by "clearly imminent". If there had been a determination that the requirement of "clearly imminent" was met, why did the USITC not prove it. If the USA knew that it had been proved and was somehow in the USITC Report, why did it not tell Australia? Instead, the USA seeks to write the obligation out of the Safeguards Agreement by saying that "imminent" is undefined. So are many words in the WTO Agreement, in which case the normal rules of interpretation must be applied. In order to comply with SG Article 4.1(b), the USA had to have determined that all requirements were fulfilled, including "clearly imminent". It did not, and so the measure is inconsistent with SG Article 4.1(b).

28. The USITC based its injury finding on industry data largely up to September 1998, though in some cases the latest data were for 1997. The injury finding was in February 1999 at which time it was found that the industry segments were not experiencing serious injury. The measure was imposed in July 1999. When was this serious injury going to occur? The USA would not and will not say because it did not know. What could possibly be known about threat of serious injury in late 1999 from 1997 data – nothing. Even for those firms with data up to September 1998 nothing can be said about serious injury going to be caused imminently in July 1999 based on a finding in February 1999.

29. A finding of threat following a finding of no injury must necessarily be based on a dynamic analysis. It can not be based on the static analysis, since that found no injury. Some compelling quantification is required to demonstrate that a significant deterioration in the state of the "domestic industry" was going to occur imminently. The USITC did not provide such an analysis.

30. While addressed also under comments on SG Article 4.2, the poor quality of the data used by the USA is inconsistent with the requirements to base findings on facts. The object and purpose of that is to have an accurate and complete factual picture of the "domestic industry" and the causal link. This was impossible to have, given the data used by the USITC.

SG Article 4.2(a) - proof of threat of serious injury

31. The industry data collected by the USITC for its injury assessment was of such poor quality as to completely flaw any affirmative determination based on it. There was no attempt to justify the data as being representative of the various industry segments either singly or as a whole.

32. Only 110 questionnaires were sent out to growers out of more than 70,000 without any statistical basis. Less than half of these growers sent useful data back. The response rate for the other industry segments was also poor and there was no statistical basis for believing that the responses represented the segments. For growers/feeders, no interim data was provided, i.e. for Jan-Sep 1998. Financial data was only provided by two packers, two packer/breakers and one breaker, i.e. the coverage of the actual producers of the product, lamb meat was risible. There is no evidence that the USITC followed up on questionnaires and sought more information from other firms. It simply accepted what it got, and presumably much of the data that was provided came from those firms associated with the original petition.

33. No objective analysis and determination could be based on the poor quality of data used by the USITC. The poor quality of the data was such that in reality the USITC did not carry out an acceptable analysis for any factor listed in SG Article 4.2(a) and examined in the threat analysis by the USITC on pages I-16 to 21 as set out on page 53 following paragraph 223 of Australia's First Submission.

34. Not only was the information inadequate, the USITC did not even try to carry out an analysis for every one of the factors listed in SG Article 4.2(a) for all of the industry segments as it was required to do, or alternatively explain why the analysis carried out for other segments gave the situation for all the industry segments collectively.

35. There was no demonstration of a significant overall impairment of the position of the domestic industry based on a segment by segment analysis or aggregation of all the firms in the definition of "domestic industry" used by the USITC.

36. Finally, the USITC reached its conclusion on threat of serious injury on the basis of the analysis on pages I-16 - 21. This was a remarkable conclusion. It relied on industry data through to Sept 1998, or in some cases only to 1997, and reached the conclusion of no serious injury being experienced. Then on the basis of the same data, and before it performed any analysis of the impact of imports, reached the conclusion that the "domestic industry" was "threatened with imminent serious injury". No objective basis was provided for this conclusion.

SG Article 4.2(b) - causation and "other factors"

37. There has been a long-term secular decline in the USA's industry segments, in particular in the sheep and lamb industry. This was exacerbated by the removal of the National Wool Act subsidies. The US industries face a number of long term problems, including marketing the product in the USA and halting the decline in consumption. The Australian and New Zealand exporters and importers were engaged in promoting lamb meat consumption in particular by providing more marketable product for niche markets in competition with other meats. The USITC recognized that there are domestic difficulties. Moreover, as was shown at paragraph 144 and the accompanying Graph 3 in Australia's First Submission, imports over the period 1993-1997 were not displacing domestic product but only making up for just some of the shortfall in domestic production.

38. The USITC first found that the "domestic industry" was threatened with imminent serious injury and then went on in a subsequent causation analysis to claim that imports were a substantial cause, i.e. no less important than any other cause.

39. The USITC failed to properly examine and assess the impact of other factors in its causation analysis. SG Article 4.2(b) requires that injury caused by factors other than increased imports must not be attributed to increased imports. The USITC found that there were other causes. However, the USITC did not examine the injury being caused by all the other factors in aggregate. Instead by its approach it attributed to increased imports all of the adverse impact of all factors other than increased imports. This is inconsistent with SG Article 4.2(b).

40. Therefore the USA failed to comply with all relevant provisions in SG Article 4 and the measure is inconsistent with SG Article 4.

SG Article 8.1 - maintenance of an equivalent level of concessions and other obligations

41. Under SG Article 8.1, the USA had an unequivocal obligation to endeavour to maintain a substantially equivalent level of concessions and other obligations with Australia to those existing under GATT 1994. The USA did not try to do so and indeed considered that there was no such obligation for the first three years of a measure. There was a clear nullification and impairment of Australia's rights not only through the high tariff quota walls but also the high in-quota tariff.

42. SG Article 8.3 suspends the right to unilateral retaliation where there is an absolute increase in imports and the measure conforms to the provisions of the Safeguards Agreement. This is a trade-off in the Safeguards Agreement, i.e. that in return for stricter provisions on imposing a measure, the right to immediate unilateral retaliation was removed. Instead Members have to pursue the imposition of a safeguard measure under the DSU.

43. There is nothing in SG Article 8 or elsewhere in the Safeguards Agreement that says that the obligation under SG Article 8.1 is also suspended. The obligation to try to maintain a balance under GATT 1994 remains, even if the failure to do so can only be pursued through a dispute. This is an important element of the balance of rights and obligations under the Safeguards Agreement.

44. The length of time it can take to obtain an outcome through the dispute settlement system will in a practical sense, dissuade Members from taking this issue to a dispute by itself. This provision will only be effective if all Members recognize the clear obligation under SG Article 8.1.

SG Article 12 - notification and consultation

SG Article 12.2

45. The USA did not notify the Committee of the reasons justifying the measure actually imposed. The justification of the measure is "pertinent information" and SG Article 12.2 requires that "all pertinent information" be provided to the Committee. Therefore there was a breach of SG Article 12.2.

46. In addition, USA did not notify the Committee of any finding by the USITC of why the requirement in respect of "unforeseen developments" had been satisfied. However, this, being a legal requirement, is "pertinent information" that should have been provided, if the USITC had fulfilled the requirements of GATT 1994 Article XIX.

SG Article 12.3

47. The nature of the measure was unknown until the President announced it on 7 July 1999. The USA failed to use the consultative process to meet the objective of SG Article 8.1. Indeed, the USA considered that the one meeting on 14 July 1999 concluded the SG Article 12.3 consultations, i.e.

only 7 days after the announcement of the measure. This reflected the fact that the USA had no intention of meeting its obligations under SG Article 12.3 and 8.1.

SG Article 12.6

48. Since the USA apparently carried out an investigation after the USITC reported to the President, then those procedures were not notified to the Committee, in breach of SG Article 12.6.

SG Article 2.2 - non-discrimination

49. SG Article 2.2 requires that measures be applied in a non-discriminatory way. Australia is not arguing whether or not FTA partners can exclude themselves from the application of safeguard measures. Rather a Member has to decide whether its FTA partner is in or out. If it is to be part of the injury analysis, then it has to be subject to the measure in the same way as other countries. If it is to be excluded from the measure, it must be excluded from the injury assessment, except as an "other factor".

SG Article 11.1(a) - conformity with the provisions of GATT 1994 Article XIX applied in accordance with the Safeguards Agreement

50. Since the measure is inconsistent with not only GATT 1994 Article XIX, but also, other provisions of the Safeguards Agreement, the measure is inconsistent with SG Article 11.1(a).

SG Article 2.1 - the injury assessment required to impose a safeguard measure

51. SG Article 2.1 only allows a safeguard measure to be imposed if the Member has determined in accordance with the provisions of the Safeguards Agreement that, in this case, increased imports are threatening to cause serious injury to the domestic industry that produces like or directly competitive products. Since the USA did not comply with the requirements of SG Article 4, the measure is inconsistent with SG Article 2.1.

GATT 1994 Article II - tariff bindings on lamb meat

52. Since the measure is inconsistent with the Safeguards Agreement and GATT 1994 Article XIX, the USA has no legal cover for the tariff quota system, which is inconsistent with its tariff bindings. Therefore, the USA is in violation of its bindings on lamb meat under GATT 1994 Article II, both for the out of quota tariff rate and the in-quota rate.

COMMENTS ON USA'S FIRST SUBMISSION

53. We shall now provide initial comments on the USA's First Submission. More detailed comments will be provided in the context of Australia's rebuttal submission.

Standard of review

54. The USA mischaracterizes the responsibilities of a panel in reviewing what was done by a Member to justify the use of the derogation under GATT 1994 Article XIX and the Safeguards Agreement to take emergency action in the form of a safeguard measure. Australia set this out in paragraphs 119 and 120 of Australia's First Submission.

55. At paragraph 42 of the USA's First Submission, the USA seeks to paraphrase the standards set down in the Argentina and Korea safeguard panels and Appellate Body reports and so to inject its own version of the standard of review in Article 17.6 of the Anti-Dumping Agreement by stealth. There is no basis for the USA's position as was found by the Appellate Body at paragraph 118 of *Argentina - Footwear Safeguard*, the Appellate Body found that DSU Article 11 sets forth the appropriate standard for reviews for panels. Indeed here the USA is arguing that the USITC should be shown utmost deference by the Panel, indeed more deference than was shown to the USITC by the US Government in rejecting its recommendation on remedy.

56. At paragraph 43, the USA continues by arguing that the Panel must show complete deference to the US Government in determining the extent of the measure. Since the USA argues in its First Submission that it does not have to provide any justification for the choice of the measure, its view seems to be that, unless the measure is a QR, SG Article 5.1 entails no obligation, or at least no obligation that a complainant is allowed to bring to a panel.

57. The USA also alleges at paragraph 43 that Australia is asking the Panel to carry out a *de novo* review. This is simply not true. Australia is asking for no more and no less than that the Panel should follow DSU Article 11 in carrying out its responsibilities.

58. Tellingly, the USA after accusing Australia of seeking a *de novo* review, then went ahead with a *de novo* reconstruction of the USITC Report. In paragraphs 78 to 82 the USA rewrites what the USITC did and confuses the threat analysis with the causation analysis. The USITC's finding that the "domestic industry" was "threatened with imminent serious injury" was on the basis of the analysis on pages I-16-21 in the section titled "Serious injury or threat of serious injury". There was no analysis of such factors as projected imports and shifts in the mix of product being imported in the finding that the "domestic industry" was "threatened with imminent serious injury". This reconstruction by the USA is illuminating. It reveals that the USA considers that the USITC should have done this analysis as part of its investigation - but it did not.

"Inferences about the Imminent Future"

59. At paragraphs 134-136, the USA mischaracterizes the issue, again in effect seeking to be allowed to conduct a *de novo* investigation. The facts show that the analysis being described by the USA is not what the USITC did to determine threat of serious injury. The attempt by the USA to now include such an analysis implies that the USA agrees that a sequential analysis is bound to be flawed, as the USITC one is.

"Clearly imminent"

60. Paragraph 134 mischaracterizes the record of the USITC Report. It confuses the threat of injury finding and the subsequent causation analysis by the USITC.

61. Australia is not trying to be highly prescriptive about what the USITC might have done. However, benchmarks are required for such a determination in relation to what serious injury was and when it would occur. Analysis and justification is required given that injury can occur at different times and in different degrees to different segments. Australia submits that the USA should not be able to simply sidestep the substantial obligations under the Safeguards Agreement because its choice of "domestic industry" makes it difficult to comply with the obligations under the Safeguards Agreement.

"Unforeseen developments"

62. In a similar vein, in addressing the issue of "unforeseen developments" under GATT 1994 Article XIX, the USA undertakes an analysis in paragraphs 47-60 to show that: "[t]he USITC's findings demonstrate, as a matter of fact, circumstances constituting unforeseen developments".³ Again this is illuminating.

63. First, the USA makes no attempt to argue that there was no obligation for it to demonstrate "unforeseen developments" at the time as part of the USITC Report. Indeed, since this is a legal requirement for a safeguard measure to be imposed, it necessarily has to be demonstrated before a measure is imposed. It is not a question of whether the USITC might have been able to construct a case, but whether the USITC did demonstrate that this legal requirement was fulfilled. The USA has not rebutted Australia's claim that the USITC did not do so. Recall that the Appellate Body said at paragraph 98 in *Argentina - Footwear Safeguard* that: 'whether the Argentine authorities have, in their investigation, demonstrated that the increased imports in this case occurred "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions ...".' This reinforces the point that this was a legal requirement that the USA must have met before imposing the measure. It did not do so.

64. The USA in its First Submission tries to remedy this in paragraphs 47-60. However, the deficiency can not be cured after the event. Nevertheless, we shall look briefly at what the USA says.

65. The USA relies on the change in market shares of fresh or chilled and frozen imports. It implies that this was a significant factor in the USITC's considerations and that this was an "unforeseen development". However, to the contrary, the USITC Report concludes that fresh, chilled and frozen lamb meat are used in the same way. The USITC's analysis of this product mix was really aimed at trying to rebut respondents' claims that imported and domestic lamb meat are not like product. The USITC Report does not examine changes in the market shares of fresh or chilled and frozen lamb meat and draw conclusions on "unforeseen developments" in the way implied by the USA's First Submission.

66. In any event, it is unclear what the USA is seeking now to prove. It seems to be arguing that there was injury because of changes to the product mix. That is not the issue. What is at issue is whether, inter alia, increased imports occurred as a result of "unforeseen developments" etc. This is not even mentioned by the USA let alone the USITC.

67. Even if the USITC had made such a comment, it is unclear in what way a change in the mix of the like product under investigation could be regarded as an "unforeseen development". Such

³ At paragraph 60 of the USA's First Submission.

changes are part and parcel of normal trade and are to be expected rather than being unforeseen. Thus the USA is left in paragraphs 47-60 with the only change addressed by the USITC being increased imports, which it addresses in paragraph 57 and 58. However, increased imports can not satisfy the requirement of "unforeseen developments". Safeguard action can not be taken at all unless there is an increase in imports. If an increase in imports were to be considered as being "unforeseen developments", then that would be to write this condition out of GATT 1994 Article XIX. Rather the USA had to prove before imposing the measure that: "the increased imports occurred as a result of unforeseen developments etc."

SG Article 5.1 - extent of the measure

68. On the one hand the USA seems to accept that there is a WTO obligation under the first sentence of SG Article 5.1, but on the other is trying to ensure that the obligation cannot be effectively challenged in a dispute. The cursory explanation in paragraphs 216ff does not constitute a justification under SG Article 5.1. All the USA is saying is that safeguard measure imposed by the President was justified. There is an obligation on the USA to ensure that the measure was no more restrictive than necessary.

69. No reason is given in paragraph 218 why the higher out of quota tariff rate was necessary. Indeed at paragraph 202 the USA is saying that a 40 per cent tariff is no more restrictive than a 20 per cent tariff. While this is clearly nonsense, the implications of the statement are interesting. Firstly, if that was true, why did the USA impose the higher out of quota tariff? Secondly, through this statement the USA is admitting that it had no justification for imposing a 40 per cent rate rather than a 20 per cent one, and so is in breach of Article 5.1.

70. In paragraph 217 the USA simply says that the additional in-quota tariff was projected to lead to higher domestic prices. That is not an unexpected result, but is not a justification under SG Article 5.1.

71. The USA's First Submission at paragraphs 206-209 seeks to argue that the USITC actually made a range of recommendations to the President. Under US law there was only one recommendation from the USITC, the plurality recommendation. That was the only recommendation notified to the Safeguards Committee. Individual Commissioners put in their own comments as individuals. If a Member can say that it could pick and chose between any comments made, then that would simply throw away any discipline. The USITC process is the approach under US law, but US law does not alter the USA's WTO obligations. Moreover, if the USA's argument is correct, it would also apply to injury determinations. Thus if an investigating authority came to a split decision on injury with the recommendation under law being no injury but with a minority report of injury, the Member could reject the majority report and impose any measure that it wants. The Member could then turn around and tell affected Members and any Panel that it is inappropriate to pry into the justification for this action. That would effectively undermine the Safeguards Agreement.

Change in the proclamation

72. At paragraph 222, the USA discusses the modification to the measure so that the TRQ applies from the date of export rather than the date of entry into the USA. Australia certainly did welcome this to deal with product on the water, given that it would otherwise have been subject to the punitive 9 per cent in-quota tariff. However, it is not accurate to say that it allowed the entry of additional product that would not be subject to the TRQ. What it did was push the effective period of application of the measure out. For example, if the measure nominally terminated on 22 July 2002, then any product shipped by that date would still be subject to the measure even though it entered the USA after 22 July 2002.

Duration of the measure

73. At paragraph 201 the USA argues that the measure is less restrictive in some way than the USITC recommendation, since its duration is only for three years and a day rather than four years. Unless the USA is making an undertaking that the measure will not be extended beyond the three years and a day, that does not make any sense. The USA could have terminated the four year measure in less than three years and the USA might seek to extend the current measure. The maximum period of each is eight years and the conditions for a WTO consistent extension would presumably be similar. In any case, what is at issue is whether the measure is no more restrictive than necessary as it applies to actual trade.

"Domestic industry"

74. We shall now briefly look at the USA's arguments on the "domestic industry" issue. The USA relies on the assertion that there is a coincidence of economic interest among all the industry segments. The USA does not explain the relevance of this economic interest test to SG Article 4.1(c).

75. The USA makes play of vertical integration of the industry segments, but again does not explain why this is relevant to the Safeguards Agreement. Moreover, a claim of vertical integration is difficult to sustain; for example, consider growers. There are more than 70,000 growers. Only a small fraction of these would be integrated into feed lots. Of the 49 growers for which the USITC had financial data 42 were not feeders. Clearly there is no vertical integration of growers to feeders let alone to packers. The USA does not point to any provision of the Safeguards Agreement that says all upstream industries should be included as producers in the definition of "domestic industry" provided that together they add up to a large proportion of the total value added.

76. Moreover, while for a grower that sells lambs to feeders, this may be the largest part of the business, it is not the only source of revenue. For example, in Fiscal Year 1997, Table 12 on II-27 of the USITC Report suggests that for a grower that is not a feeder, the sale of feeder lambs accounted for only 2/3rd of revenue, with sales in particular of cull ewes and wool.

77. The USA's First Submission referred to *United States - Definition of Industry Concerning Wine and Grape Products*. There the issue was whether there was separate identification of the production of grapes and wine:

"the Panel found that, irrespective of ownership, a separate identification of production of wine-grapes from wine in terms of Article 6:6 of the Code was possible and that therefore in fact two separate industries existed in the United States - the growers of wine-grapes on the one hand and the wineries on the other."⁴

78. There is clearly a separate identification of the production of feeder lambs and lamb meat with little vertical integration into feeders and virtually none from growers into packers and breakers.

Quality of the evidence

79. Regarding the comment at paragraph 161, that the information was "comprehensive as practicable" and "most comprehensive data available", there is a positive obligation on the USA to obtain demonstrably representative information. The USA did not do this even for the actual producers, the packers and breakers. It failed to do so completely for growers and feeders. In the absence of either a high level of responses by all companies in an industry or a statistically valid set of responses by companies, information can not be assumed to apply to an entire industry or industry

⁴ At paragraph 4.3 of *United States - Definition of Industry Concerning Wine and Grape Products*.

segment. The most that can be said is that the findings relate to some companies without any information about the industry or industries as a whole.

80. Unless the investigating authority demonstrates that the data is representative, no conclusion can be drawn for the producers as a whole. To take one breaker and assume that that applies to all breakers is mere conjecture. To take what the USITC admits is not a representative sample of 42 non-feeder growers and assume that that applies to 70,000 other growers is mere speculation.

Non-treatment of factors in SG Article 4.2(a)

81. Safeguard action is an extraordinary act that impacts adversely on affected Members. In particular the requirements in SG Article 4.2(a) are that all relevant factors, including those listed must be evaluated. To consider a factor the data must be reliable, otherwise the factor can not be evaluated.

82. The poor quality of the data means that wherever the USITC relies on such data for examining factors, in particular those listed in SG Article 4.2(a), the USITC did not evaluate them in respect of the industry segment at issue. While the USITC uses language that implies that it is talking about sets of producers as a whole in reality it is simply talking about a small, or in the case of growers a truly minuscule, subset of producers. This does not satisfy the strict obligations under the Safeguards Agreement.

83. At paragraphs 167-171, the USA argues that the USITC only had to evaluate a factor listed in SG Article 4.2(a) when it had "objective and quantifiable" data. SG Article 4.2(a) requires the evaluation of all relevant factors of an objective and quantifiable nature, in particular all those listed, i.e. those listed are deemed to be relevant factors of an objective and quantifiable nature. It is not good enough to say that they are difficult to measure, or that it would be too much trouble to obtain accurate, representative survey data.

84. A feed lot is just like any other business. It is difficult to believe that a firm will construct a feed lot and conduct business without knowing how much product is, and could be, produced. Similarly, it is difficult to believe that a grower with a breeding flock has no idea of how many lambs it does, and could, produce for lamb meat.

Determination of the industry as a whole or for each segment

85. With regard to paragraph 125 of the USA's First Submission, the issue is what is meant by "overall impairment to the position of a domestic industry" especially in a threat case. The USA accepts that it was obliged to look at the position of the producers as a whole. It had to show that serious injury was clearly imminent to the producers as a whole. The USITC finding is neither fish nor fowl. There is no clear finding about what injury will be caused to each industry segment or when it will be caused. If the USA is saying that USITC did not have to do an analysis on a segment by segment basis, then what exactly did the USITC show? It did not attempt to aggregate the impact on the industry segments. It admits, as does the USA in paragraph 129, that the impact and timing of market cycles differs from segment to segment. Therefore, the USITC did not prove that serious injury was clearly imminent to the producers as a whole or to each of the segments. It made no attempt to argue that three or some other number of segments would do.

86. This is an issue that arises because of the choice of "domestic industry" and is exacerbated by the fact that it is a threat case, not a case of actual serious injury. However, the USITC having gone down that path had to live with it. Of course, the Safeguards Agreement does not talk about how to deal with 4 separate industries producing quite distinct products in a vertical chain because that is not

envisaged under SG Article 4.1(c). But that does not relieve the USA of its obligation to comply with SG Article 4.1(b) and 4.2.

"Displacement"

87. At paragraph 97, the USA mischaracterizes what Australia said at paragraph 144 and showed in Graph 3. The fact that imports during the period were less than 1/3rd of the drop in production underlined the fact that imports were not displacing domestic production but were only slowing the drop in consumption. Without imports, consumption would have fallen even further.

National Wool Act subsidies and "other factors"

88. The USA says at paragraph 98 that the USITC found that there had been some recovery by 1997 from the removal of the National Wool Act subsidies. It goes on at paragraph 100 to say that: "apart from the effects of imports, the prior decline had largely come to an end by 1997."

89. Contrary to the comment in paragraph 100 cited above, nowhere does the USITC find that the endogenous factors behind the decline in the US lamb industry and the other industry segments had been removed. Indeed it would be remarkable that the removal of a subsidy could so quickly make a sick industry healthy, and begs the question why the USA did not remove the subsidy many years earlier, if its removal was the magic elixir for the lamb and other industry segments.

90. The issue here is two-fold. Firstly, the recovery tended to be on the financial side because the flock liquidation following the 1994 legislative action removing the subsidies led to a temporary lift in prices. The subsequent fall in prices due to the instability following the removal of the subsidies cannot be attributed to imports. The USITC attempted to show a decline in the position of the industry segments by comparing Jan-Sept 1998 with this one-off high price period. Secondly, there continued to be a decline in the flock without these subsidies, which underwrote the inefficient lamb industry. Again, this lack of government action cannot be attributed to imports.

91. If a Member could simply say that there is injury and there are imports, therefore the causation requirement is met, that would effectively write the causation requirement out of the Safeguards Agreement. In order to get to first base under the Safeguards Agreement, there must be increased imports. SG Article 4.2(b) requires a more stringent test of separating out the injury attributable to all other factors. Moreover, under the final sentence of SG Article 4.2(b), it is the injury caused by "factors other than increased imports" that must not be attributed to increased imports. Thus the impact of all other factors must be cumulated and that injury not attributed to increased imports.

SG Article 8.1

92. We note that at paragraphs 259-267, the USA discusses SG Article 8.1 but does not address the issue that SG Article 8.3 only suspends the right to take unilateral action and does not suspend the obligation on the importing Member and the right to take the issue to a dispute.

SG Article 2.2

93. We shall just make two comments at this time. Firstly, on the issue of what Australia does, an Australian investigation would not include imports of New Zealand origin in the injury assessment. Indeed they would be an "other factor" and Australia would not apply a safeguard measure to product of New Zealand origin. This is of course the opposite of what the USA does.

94. At paragraph 242, the USA said that it was required to apply SG Article 9.1. If it applied SG Article 9.1, then why did it not notify that? Of course the terms of the exclusion under SG Article 9.1 and that for CBERA and ATPA beneficiary countries are different.

95. At paragraphs 244, 254, 255, and 257 the USA says in various ways that (using the words for Canada) "Australian and New Zealand are simply wrong in claiming that Canadian lamb meat imports figured in the USITC's threat of serious injury determination."

96. This is at odds with both the USITC's findings and the US statute. Today we shall focus on Canada. It is quite clear from I-26 of the USITC Report that the consideration of Canada under section 311(a) of the NAFTA Implementation Act took place only after the USITC had made its affirmative injury determination. The exclusion of Canada (and Mexico) was under a separate statute. There is nothing in the Safeguards Agreement that allows some countries to be excluded on different thresholds. SG Article 2.2 provides for non-discrimination, whereas the USA discriminated in favour of Canada as one of the countries subject to the injury investigation and finding.

CONCLUSION

97. In sum, Australia has shown that the measure is inconsistent with SG Articles 2.1, 2.2, 3.1, 4.1(b), 4.1(c), 4.2(a), 4.2(b), 5.1, 8.1, 11.1(a), 12.2, 12.3, and 12.6. The USA has failed to rebut the arguments made by Australia, but has confirmed the inconsistencies shown by Australia.

ANNEX 1-7

ANSWERS BY AUSTRALIA TO QUESTIONS BY THE PANEL

(22 June 2000)

Was the "unforeseen developments" provision of Article XIX:1 of GATT 1994 fulfilled?

1. You seem to argue (citing to the Appellate Body reports in *Korea Dairy* and *Argentina Footwear*) that since developments subsequent to the negotiation of a trade concession could have been foreseen there was no basis for the safeguard measure to be applied to US imports of lamb meat. How could it ever be proven by a Member that has applied a measure that it could not have foreseen or did not foresee a given development occurring after its negotiation of a concession?

Answer 1:

Australia's arguments were limited to the circumstances of this case. The circumstances to establish "unforeseen developments" will differ from case to case. The issue is that increased imports have resulted from "unforeseen developments", not that all developments have to have been able to be foreseen or expected. In this case, the increased imports of lamb meat must have been as the result of "unforeseen developments" after the concession has been *incurred*, i.e. after the Member has made itself subject to the concession, which is the date of entry into force of the concession.

Where this is not the case, a Member cannot take safeguard action under the Safeguards Agreement and GATT 1994 Article XIX. This is appropriate given the extraordinary nature of safeguard action.

Finally, Australia's arguments were not simply that "unforeseen developments" did not exist but also the legal requirement that the USA was obliged to address the issue before applying the measure, i.e. in the USITC Report, but it did not do so. The argument about the lack of "unforeseen developments" is an argument in the alternative.

2. You seem to argue that the existence of "unforeseen developments" in the sense of Article XIX is a "prerequisite" (NZ) or a "legal requirement" (AUS). The Appellate Body in *Korea - Dairy Safeguard* and *Argentina - Footwear Safeguard* explicitly stated that "unforeseen developments" do not constitute an "independent condition" for the application of a safeguard measure but rather constitute a "circumstance" the existence of which "must be demonstrated as a matter of fact". By arguing that it is a "prerequisite" or "legal requirement", are you not in effect arguing that "unforeseen developments" constitutes a "condition"? How would you define the difference if any between a "legal condition" and a "factual circumstance"?

Answer 2

Australia's argument was that, since the existence of the circumstance "must be demonstrated as a matter of fact"¹, it is a "pertinent issue of fact and law" that must be addressed, in this case, by the USITC in its report. The purpose of a procedural agreement, is to have a Member ensure that the requirements for taking an action are satisfied before taking that action.

¹ For example, at paragraph 85 in the Appellate Body report on *Korea - Dairy Safeguard* (WT/DS98/AB/R).

If "unforeseen developments" "must be demonstrated as a matter of fact", then this demonstration must occur at or by some particular time. The two obvious times are (for this case) in the USITC Report and an *ex post facto* examination of the circumstances during the panel process of the USITC record by way of a *de novo* review. Australia's argument is that this is a pertinent issue that was required to deal with in the USITC Report.

In respect of the Panel's question on the distinction between "legal condition" and "factual circumstance", Australia reads the Appellate Body² as contrasting the three subsequent "independent conditions" [*Underlined emphasis added.*] set out in GATT 1994 Article XIX:1(a) and "circumstance" the existence of which "must be demonstrated as a matter of fact". This does not make it any the less a legal requirement to demonstrate the existence of "unforeseen developments" as a matter of fact.

3. You also seem to argue that there must be an explicit "finding" of, in so many words, "unforeseen developments" in a report on an investigation. If this is your position, on what treaty language do you base this contention, particularly in the light of the above-quoted language of the Appellate Body? If the "existence" of "unforeseen developments" can be discerned from the report of a competent authority, even if these precise words are not found in that report, why would this element of Article XIX not be fulfilled?

Answer 3

This is also dealt with in the answer to the previous question. The Appellate Body considered that the existence of "unforeseen developments" must be demonstrated as a matter of fact. To demonstrate in this context is to:

"establish by logical reasoning or argument, or by practical proof; prove beyond doubt, prove the existence or reality of".³

By contrast to discern in this context is to:

"make out by looking".⁴

Thus to meet the finding by the Appellate Body, it would not be sufficient to simply allow the existence of the circumstances to be able to be discerned by a Panel in a dispute from the USITC Report .

In addition, the USA had an obligation to conform with its obligations under the Safeguards Agreement, e.g. under the *pacta sunt servanda* rule⁵, A Member could only do that in respect of "unforeseen developments" by a determination before applying the measure. Unless the USA had demonstrated this before applying the measure, it could not have known that it was in compliance with its WTO obligations. The demonstration of the existence of the circumstance is a pertinent issue of fact and law. Thus it must be covered in the report by the competent authority.

Moreover, GATT 1994 Article XIX:1(a) says:

² For example, again at paragraph 85 in the Appellate Body report on *Korea - Dairy Safeguard* (WT/DS98/AB/R).

³ New Shorter Oxford English Dictionary, CD Edition, January 1997 (NSOED).

⁴ NSOED.

⁵ As codified in Article 26 of the Vienna Convention that a treaty must be performed in good faith.

"If, as a result of unforeseen developments ... the Member shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession."

This entails that the Member is only "free" to impose a measure if the existence of "unforeseen developments" has been demonstrated, i.e. the demonstration must occur first.

Finally, it is implicit in the Appellate Body findings in *Argentina - Footwear Safeguard*⁶ that a *demonstration* of "unforeseen developments" made as part of an investigation by the competent authority is a legal requirement under GATT 1994 Article XIX:1(a). After resting its ultimate decision in the case on other grounds, the Appellate Body found it unnecessary to further inquire "whether the Argentine authorities, have *in their investigation*, demonstrated that the increased imports in this case occurred as a result of unforeseen developments". [*Emphasis added.*] Thus, while the Appellate Body considered that it was not necessary to complete the analysis, it considered that the issue involved a demonstration in the actual investigation, i.e. in this case by the USITC in its report.

4. You seem to focus in your arguments concerning unforeseen developments on the contention that the increase in imports, as such, must be the result of "unforeseen developments" and in turn must cause or threaten to cause serious injury, for a safeguard measure to be permissible. The relevant language of Article XIX:1 of GATT 1994 seems broader than this, however, in that it refers to imports "in such increased quantities and under such conditions" resulting in part from unforeseen developments. The Appellate Body in Korea – Dairy Safeguard and Argentina – Footwear Safeguard also referred to both "increased imports" and "under such conditions" in its discussion of unforeseen developments. The text of Article XIX:1 thus might imply that in a given case, the "unforeseen developments" might be in respect of the "conditions" under which the increased imports are competing in the importing country market, rather than solely in respect of their quantity. In such a case, this "unforeseen" change in the conditions of competition (rather than some other unforeseen factor bringing about an increase in imports as such) might be the reason that the increased imports are causing or threatening to cause serious injury. Please comment.

Answer 4

In the Hatters' Fur case⁷, at paragraph 4 the Working Party agreed that one of the three sets of conditions that had to be fulfilled was:

- "(a) There should be an abnormal development in the imports of the product in question in the sense that:
- (i) the product in question must be imported in increased quantities;
 - (ii) the increased imports must be the result of unforeseen developments and of the effect of the tariff concession; and
 - (iii) the imports must enter in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products."

⁶ WT/DS121/AB/R.

⁷ GATT/CP/106, 27 March 1951.

The Appellate Body at paragraph 98 of *Argentina - Footwear Safeguard* said:

"For this reason, we do not believe that it is necessary to complete the analysis of the Panel relating to the claim made by the European Communities under Article XIX of the GATT 1994 by ruling on whether the Argentine authorities have, in their investigation, demonstrated that the increased imports in this case occurred "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions ... "."

This confirms that the Appellate Body considered that there had to be a demonstration, in the investigation in respect of "increased imports". Moreover, it also clearly implies that the Appellate Body considered a demonstration of "unforeseen developments" necessary to comply with GATT 1994 Article XIX.

Australia has focused on the requirement for the US' authorities to have, in their investigation, demonstrated that the increased imports in this case occurred "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions ... ".'

GATT 1994 Article XIX reads: "in such increased quantities and under such conditions ...". [*Emphasis added.*] If "and" could have been read as "or", i.e. that "as a result of unforeseen developments" need not apply to "in such increased quantities", then recourse to Article XIX would have been allowed even in the absence of increased imports, contrary to interpretation under GATT 1947.

It is difficult to imagine what "change in the conditions of competition" would satisfy the requirement to demonstrate the existence of "unforeseen developments" to satisfy GATT 1994 Article XIX. This would have to be looked at on a case by case basis.

Australia submits that it certainly does not apply in the case before the Panel. While imports of some cuts may have increased more than others, this is no more a change in the "conditions of competition" than would apply for any increase in imports. To allow that as a "demonstration" of the existence of "unforeseen developments" would be to say that any increase in imports is such an "unforeseen development": this would have the effect of writing this requirement out of the WTO.

Is the definition of the "domestic industry" that was used in the USITC's investigation consistent with the Safeguards Agreement and GATT 1994?

5. The USITC noted some vertical integration and common ownership between companies operating in the grower, feeder, packer and breaker industry segments. Australia and New Zealand do not contest that fact *per se* but argue that there are few such examples in the US industry. In WTO dispute settlement practice (e.g., *EC – Bananas III*) vertically integrated companies have been deemed potential suppliers of like distribution services. By the same token, any grower or feeder of live lambs could at the same time actually or potentially enter the packing or breaking business. On what basis could such potential producers of lamb meat be excluded from the domestic industry producing like or directly competitive products?

Answer 5

Regarding the Panel's comment, Australia contests any implication by the USA that there is a high degree of vertical integration through the four industry segments, and indeed any claim that there can be no separation out of activities. The USA has not produced any evidence that "vertical integration" was an issue affecting the USITC's ability to assess financial information to determine whether the actual producers were experiencing or were going to imminently experience serious injury. Indeed all the evidence in the USITC Report is that "vertical integration" is very limited. Virtually none, if indeed any, of the 70,000 growers is part of a vertically integrated operation to the packers and/or breaker stage. If "vertical integration" was an issue, it would have been expected that such firms would have been significant in the USITC's selection of firms. However, what we see is that out of the 49 firms growers and grower/feeders providing financial information as growers, 42 were not even integrated with feeder operations let alone packer and or breaker operations. While the USITC Report says at page II-12 that "[s]ome growers engage in more than one sheep-raising activity, such as feeding and sometimes slaughtering their lambs" the implication here is that they are not integrated into packers or breakers as substantial commercial operations (despite the implication in paragraph 66 of the USA's First Submission). If those operations are to be considered as part of the packer and/or breaker industry segments, then the packer/breaker activities of such firms should have been part of the USITC questionnaire survey - it appears that they were not. Moreover, the fact that some packers might have feeder operations, and that some different feeders might have grower operations, does not justify sweeping up such feeders into the "domestic industry", let alone independent growers.

In respect of the analogy drawn with *Bananas II*⁸, the definition of "domestic industry" in SG Article 4.1(c) refers to "the producers as a whole". It does not talk of "potential" producers but only actual producers. This case is about actual producers of lamb meat and whether serious injury caused by increased imports was clearly imminent to those producers as a whole. A firm that does not produce lamb meat, including one that no longer produces lamb meat, cannot be threatened with serious injury caused by increased imports of lamb meat. The WTO agreements on anti-dumping and countervailing have definitions of injury that include "material retardation of establishment". However, this does not apply to the Safeguards Agreement. For this particular dispute there is common ground that the "domestic industry" exists, the difference in view is over the true scope of that industry.

With regard to *Bananas III* the Appellate Body said at paragraph 227 of WT/DS27/AB/R:

'In our view, even if a company is vertically-integrated, and even if it performs other functions related to the production, importation, distribution and processing of a product, to the extent that it is also engaged in providing "wholesale trade services" and is therefore affected in that capacity by a particular measure of a Member in its supply of those "wholesale trade services", that company is a service supplier within the scope of the GATS".'

Suppose for the sake of analogy that there was a firm that was vertically integrated from grower to breaker. That part of the firm producing and so supplying feeder lambs, could potentially sell those feeder lambs to an outside feed lot. It would be involved in selling, but it would not be selling the same product as the breaker part of the firm. That grower part of the firm would still be carrying on the same activities as independent growers and would not be producing carcasses or primal and sub-primal cuts of lamb meat, but would be "engaged" in producing feeder lambs. A trading firm could buy feeder lambs from growers and sell them to feedlots. Such a firm would be involved in the same

⁸ WT/DS27/R/USA

potential service but it would not be producing feeder lambs as a good, let alone producing sub-primal cuts of lamb meat.

On the other hand, for a grower to enter the packing or breaking business, i.e. to be "engaged" in producing carcasses or cuts, requires a substantial investment. It is not something that can be done at whim. If it did, then it would be producing lamb meat, but until then it would not. Similarly, any company can become a packer or breaker. In particular, any packer or breaker of meat other than lamb meat could move into the industry. This is irrelevant to the question whether such firms are already part of the "domestic industry" for this dispute and were imminently about to suffer serious injury caused by increased imports of lamb meat.

6. Suppose a market situation where virtually all of the value of the end-product is added through raw materials and intermediate goods and where the industry segment producing the end-product is highly concentrated and has the market power to "pass back" virtually all injury caused by imports of like or directly competitive end-products to producers of those raw materials or intermediate goods. In such a situation, why should not all of these producers be included in the domestic industry? In your view, in the absence of serious injury suffered by the industry producing the end-product due to the "pass-back" effect, would it simply become practically impossible to impose safeguard measures on like or directly competitive end-products of foreign origin? How would Australia or New Zealand treat such a situation under their own domestic safeguard procedures? Please explain in detail.

Answer 6

The Safeguards Agreement specifically defines the relevant industry as the producers as a whole of the "like or directly competitive products" to the product under investigation. There is nothing in the text of the Safeguards Agreement regarding the issue of being able to "pass back" injury in some sense from breakers to growers, nor in the normal meaning of the word, "producer".

Moreover, the hypothetical case posited by the Panel would seem not to be relevant to the dispute before the Panel. As noted by the Panel in Question 10, the USA has asserted that it could have come to the same injury determination if it had limited the "domestic industry" to packers and breakers. Therefore, the USA is not asserting that there was no injury to packers and breakers, and so as a result growers and feeders should be included in the "domestic industry".

The USITC determined the "domestic industry" on the basis of "like product" because there were producers of the "like product", which was in this case domestic lamb meat. The determination of "domestic industry" had then to be done on the basis of who produced "domestic lamb meat".⁹ Findings on issues of injury, including causation, can only be made in the context of the decision on the "domestic industry". The "domestic industry" cannot be chosen on the basis of which set of firms will give an affirmative injury finding and which set will give a negative finding - that would lead to an à la carte approach to the Safeguards Agreement, which would undermine its disciplines.

The Australian safeguard procedures are set out in G/SG/N/1/AUS/2 and reflect the text of the Safeguards Agreement. It would be up to the designated competent authority (the Productivity Commission) to interpret them on a case by case basis, and then up to the Government to decide whether it would be consistent with Australia's WTO obligations to impose a measure on the basis of the Productivity Commission's report. Australia has not introduced a safeguard measure under Article XIX since 1983 and has not applied a measure under the WTO Safeguards Agreement.

⁹ Hypothetically, if the USITC had gone to "directly competitive products", then its task would have been to decide what they were and who produced them.

Did the USITC demonstrate that there was a "threat of serious injury" due to "increased imports"?

7. Could you specify how a *prospective* analysis of injury factors should be conducted in order to assess whether a "threat of serious injury" exists? Under which conditions would you consider projections of how injury factors would develop in the near future a sufficient basis for an analysis of threat? What in your view are the flaws of the US methodology in making such projections in this case? Would you consider that certain injury factors are more important for an analysis of "threat" than others? If so, which ones? How could any such "prospective" analysis about future developments in the various injury factors be anything other than "allegation, conjecture or remote possibility"?

Answer 7

SG Article 4.1(b) requires that a determination of "threat of serious injury" be based on evidence that the serious injury is "clearly imminent". Where a determination of serious injury is not supported by the evidence and, therefore, not made, an analysis supported by facts must demonstrate that the situation of the domestic industry will change markedly and that such a change is imminent. (In the case before the Panel it was found that serious injury was not being experienced.) It is not sufficient to take a static analysis which does not support a determination of serious injury and simply base a threat determination on:

"In view of the declines during the period of investigation in the domestic industry's market share, production, shipments, profitability, and prices, among other difficulties that the domestic industry is facing, we conclude that it is threatened with imminent serious injury."¹⁰

The Period of Investigation was 1993 to Sept. 1998. These conclusions were based on an inadequate data set, which ran to Sept 1998 for some firms and only to 1997 for others in the "domestic industry". There is no analysis in the USITC Report how "the declines" and "other difficulties" during the Period of Investigation proved that serious injury was clearly imminent in February 1999 let alone July 1999 when the decision was taken to apply the measure.

If firms in the "domestic industry" are unable to come forward with prospective facts to allow an evaluation to determine that serious injury will occur imminently, then a safeguard measure cannot be applied. Since a measure can only be applied if such serious injury is clearly imminent, this is not a matter of long or even medium term forecasts.

Action on the basis of threat alone are deservedly rare. Given that action can be taken quickly under SG Article 6 if critical circumstances arise, there is limited justification for action on the basis of "threat of serious injury". Such action can only be taken where the Member has sufficient evidence to determine that serious injury is imminent. The Safeguards Agreement does not provide for action on the basis of "threat of serious injury" as a precautionary action, or as a consolation prize to the petitioners, where an investigation fails to prove actual serious injury.

8. Please clarify your argument at para. 13 of New Zealand's oral statement and para. 37 of Australia's oral statement (and the similar arguments in your first written submissions). In particular, you seem to be arguing both that the US industry is in a long-term decline because of declining consumption, as demand for lamb meat has contracted due to changing consumer tastes, (i.e., that US supply was significantly in excess of demand), and that the reason that imports increased was to fill demand that was not being filled by domestic supply (i.e., that US

¹⁰ At page I-21 of the USITC Report.

supply was significantly below demand). Is this a correct understanding of your argument? Please explain.

Answer 8

Notwithstanding the fact that total consumption of lamb meat in the USA is declining, US supply is insufficient to meet US demand. As a result, there is a gap between domestic supply and demand, which is being filled by imports. The fact that the gap is increasing (i.e. that increased imports are necessary to fill demand) is a function of US supply decreasing at a faster rate than US demand. To the extent that supply is contracting faster than demand, imports will increase. This does not mean that imports are displacing US production. In fact, quite to the contrary, as US supply decreases it creates demand for imports.

On the supply side, US lamb production has declined persistently because the grower industry segment is inefficient with high costs, low returns and consequently low investment relative to other US agriculture production systems. As a result, production resources continue to be shifted to other uses with higher returns - especially beef production. That trend dominates the grower industry segment and is diminishing production in spite of high prices for lambs and lamb meat in relation to other red meats marketed in the USA. This situation has been true for several decades.

Because lamb production is declining, consumption of lamb meat, in turn, is also restricted. Very high and growing US incomes, strong preferences for lamb by many ethnic groups, and the growth in numbers of those ethnic groups in the USA, have not benefited lamb meat in the USA at the retail level. Declining availability limits the ability of retailers to promote lamb meat, keeps prices above those of other meats, and restricts the ability of lamb meat to compete with other meats at the retail level. Indeed, total red meat consumption continues to increase while lamb meat consumption declines as US production continues to fall.

While both US production and consumption of lamb meat were falling, the data for 1993-97 in Graph 3 on page 40 of Australia's First Submission¹¹ show that imports were not displacing domestic product over the period of the investigation. Indeed, imports were not able to stabilize supplies.

The USITC focused extensively on the increase in imports in 1998, but the trend in imports during that period does little to refute the fact that imports were not displacing domestic production. Specifically, when domestic supply stopped falling in 1998, the rate of increase in imports declined reflecting the slight increase in domestic supply. However, at the same time there was an increase in domestic consumption, which accounted for the increase in imports in interim 1998.

On the demand side, the sector has tended to miss the market with wasteful, heavy lambs, has failed to develop any "fast-food" markets in contrast to their effective promotion by beef and poultry, and has not worked effectively with retailers to promote lamb or make it attractive to new customers.

Thus, it is a combination of domestic supply and demand developments that are causing chronic problems for the all the industry segments, rather than competition from imports.

9. What specific information in the USITC report shows that the effect of the termination of the Wool Act subsidies had not finished by 1996?

¹¹ Also at Exhibit 10 of Vol. 1 of Exhibit AUS-28.

Answer 9

The Australian argument is not just based on the findings in the USITC Report, since there is a difference in view about what the implications are as shown, for example, at pages II-78-79. Australia argues that the USITC Report understates the impact of the removal of the subsidies

Thus Australia's concerns over the treatment of the subsidies relate not only to the market destabilization but the flawed comparison that the USITC Report makes between different periods. While the last payments were made in 1996, a comparative analysis requires that the effect of the removal of the subsidies be taken into account in considering other factors.

The impact of the termination of the National Wool Act subsidies appears throughout the USITC Report.

On the issue of comparison, as was shown in the table on page ¹² of Australia's First Submission, drawn from data in the USITC Report, any decline in the apparent profitability of growers was entirely due to the removal of the National Wool Act subsidies. Similarly, on page II-78 of the USITC Report, it is estimated that US wool producers would have received an additional US\$60m. if the phase-out had not taken place (presumably over the period of the investigation).

The discussion on pages II-78-79 (last paragraph and first three full paragraphs, respectively) set out (conflicting) views on the impact of the termination of the subsidy programme.

The last paragraph on page I-24 going on over to page I-25 of the USITC Report recognizes that there is an ongoing impact beyond 1997.

Other references to the National Wool Act are at the last paragraph on page I-17, the second dot on page I-30, and the second final paragraph on page 31.

10. The United States has argued that even if the domestic industry would be defined as comprising only packers, packers/breakers and breakers, the investigation would have led to a determination that a safeguard measure is necessary to prevent a "threat of serious injury" and facilitate adjustment. On the basis of which specific elements in the USITC report do you consider that this statement is unfounded?

Answer 10

There is the critical legal issue of whether the USA can only apply a measure following a valid finding on injury by its competent authority, or whether it is possible to rewrite an invalid finding after the event to validate measures applied pursuant to an invalid finding. The USITC Report is based on a particular definition of "domestic industry". If that is flawed, then the investigation and determination are flawed and cannot be cured.

In fact, the USA admitted at paragraph 123 of its First Submission that the USITC had not made a determination on the basis of a definition of "domestic industry" other than its flawed definition:

"While the USITC gathered data with regard to the various economic factors for each of the four industry segments, the USITC did not make, and was not required to make, separate threat of injury determinations with respect to each of the segments."

¹² Following paragraph 153.

Having not made a determination based on a properly defined "domestic industry," for the Panel to uphold the application of measures based on a properly defined "domestic industry" it would have to both determine that the record evidence permitted such a determination and make a *de novo* investigation on the basis of the USITC record. The Panel's function is to determine whether the application of measures are consistent with the obligations of the Safeguards Agreement not to conduct a *de novo* investigation to determine whether the application of measures could have been consistent with the Safeguards Agreement if the underlying determination had been made in a manner consistent with the Safeguards Agreement.

The analysis of causation is also fundamentally different depending on the definition of "domestic industry." The situation of the growers and feeders is no longer part of the injury analysis, but instead part of the analysis of the factors causing injury to the breakers and packers. The USITC Report does not attempt to address this issue or provide record evidence addressing this issue.

Therefore, Australia submits that the USA cannot cure the incorrect definition of "domestic industry" by rewriting the USITC Report.

Nonetheless Australia does make the following comments in the alternative.

For the packers and breakers, apart from lamb meat production and shipments, the USITC Report's investigation was based essentially on its questionnaire survey. The USITC's sample of firms had no statistical basis and any conclusions drawn from it are speculative and so do not meet the requirements of SG Article 4.1(b). Similarly, due to the quality of the data, the analysis of factors is inadequate and so SG Article 4.2(a) is also not satisfied. While the flaws for packers and breakers are also set out in the context of Australia's First Submission, the following is relevant.

USDA data showed an increase in shipments in Jan-Sept 1998 compared to Jan-Sept 1997.¹³ USITC data showed production by packers fluctuated during the period of investigation, while that of breakers trended upwards during the period of investigation.¹⁴

Moreover, for packers capacity rose during the latter part of the period of investigation, a major cause of the decline in capacity utilization. The capacity of breakers increased significantly during the period of investigation and this, not imports, was the cause of the fall in capacity utilization.¹⁵

For both packers and breakers productivity remained constant during the period of investigation.¹⁶

The USA did not collect data on employment for packers and breakers in breach of SG Article 4.2(a).

No information is indicated on profits and losses as such by packers and breakers in the public USITC Report apparently in breach of SG Article 4.2(a).

The same arguments by Australia also apply to the failure by the USITC Report to demonstrate that serious injury was clearly imminent. Similarly, the same problem of anecdotal information apply.

¹³ The third full paragraph on page I-18 of the USITC Report.

¹⁴ Footnote 78 on pages I-18-19 of the USITC Report.

¹⁵ See second full paragraph on page I-20 of the USITC Report.

¹⁶ See third full paragraph on page I-20 of the USITC Report.

In addition, the USITC Report describes its injury finding at Footnote 61 on page I-16 thus:

"While we find that all sectors show evidence of a threat of serious injury, we recognize that the economic effect of the increase [*unspecified*] may manifest itself in different ways and at different times in the four different sectors." [*Italicized comment inserted.*]

Thus the USITC Report only found that "all sectors *show evidence* of a threat of serious injury" [*Emphasis added.*]. The USITC Report also acknowledged that the economic effect may manifest itself in different ways and at different times. Nothing can be read into this about what this would mean for packers and breakers by themselves. Indeed, it just reinforces comments by Australia about the inconsistency with SG Article 4.1(b) and 4.2(a) and (b) for the USITC Report's definition of "domestic industry". This admits that the USITC did not find that serious injury was clearly imminent, and could not have found serious injury being threatened for its "domestic industry", since it did not seek to cumulate its findings across the four segments and so could not have made a finding for the producers as a whole.

Accordingly, the USITC Report did not demonstrate in a manner consistent with SG Article 4.1(b) and 4.2(a) that packers and breakers were threatened with imminent serious injury.

Moreover, even if the Panel allowed the USA to do a *de novo* investigation on the basis of the USITC Report regarding the issue of whether there was a threat of imminent serious injury for packers and breakers, this would still leave the question of causation. As noted above the analysis of causation is fundamentally different depending on the definition of "domestic industry". The causation analysis in the USITC Report is again for all four industry segments and the assertions on substantial cause are such that they could not be revisited for a *de novo* investigation on the basis of the USITC Report. In addition, there would be the question of what the basis would be for the USA to claim compliance with SG Article 5.1 - if the demonstration had been carried out for the wider definition of "domestic industry" in the USITC Report, how would that now be valid for the narrower "domestic industry" comprising just packers and breakers.

Therefore, Australia submits in the alternative that even if the USA were to be allowed to attempt to cure the incorrect choice of "domestic industry" through a re-examination of the USITC Report, it would still fail to meet the requirements of the Safeguards Agreement.

11. On what statement(s) in the USITC report do you base your argument that the USITC made a "finding" that there was no serious injury?

Answer 11

For example, the first paragraph on page I-29, says:

"the US lamb industry is not currently experiencing serious injury, but rather is threatened with serious injury."

Apart from the above quote, the USITC Report seeks to determine whether increased imports are a substantial cause of serious injury or threat thereof to the "domestic industry". In so doing it first looks at whether the "domestic industry" is experiencing serious injury or whether it is threatened with serious injury. If in this first step it only finds threat, it is limited to threat in the causation analysis. Therefore, logically a finding by the USITC Report of threat alone in the first stage means that actual serious injury was absent.

Is the USITC's finding that increased imports were a "substantial cause" of threat of serious injury consistent with the Safeguards Agreement and GATT 1994?

13. We note New Zealand's arguments (i) that if there were three equal causes of a threat of serious injury of which imports was one, imports would be a "minority cause" of the threat of serious injury (para. 51 of New Zealand's oral statement), and (ii) that a determination that a threat of serious injury has been caused by increased imports when in fact not *all* of that injury has been caused by increased imports constitutes blaming increased imports for injury caused by other factors (para. 57 of New Zealand's oral statement).

- (b) **To Australia: Is it your position that imports must be the sole cause of serious injury or threat thereof for a safeguard measure to be permissible? If so, how do you reconcile your position with the reference in Article 4.2(b) to factors other than increased imports that are causing injury "at the same time"? If this is not a correct understanding of your argument, please explain.**

Answer 13

Under both SG Articles 2.1 and 4.2 of the Safeguards Agreement, to apply a measure increased imports must have been proven to be causing or threatening to cause serious injury to the "domestic industry". If increased imports only cause or threaten to cause a lesser level of injury¹⁷, the requirements of SG Articles 2.1 and 4.2 are not met.

SG Article 4.2(b) reinforces the requirement that a measure cannot be applied where the domestic industry is experiencing serious injury but some portion of that injury is due to factors other than imports. The last sentence of SG Article 4.2(b) reads:

"When factors other than increased imports are causing *injury* to the domestic industry *at the same time*, such *injury* shall not be attributed to increased imports."
[Emphasis added.]

The text sets out that if imports and other factors combine to cause serious injury or threat thereof, that increment of the injury caused by other factors cannot be included in the analysis of whether imports are causing serious injury. By referring to "injury" rather than "serious injury," the text reinforces that in determining the existence of serious injury, *any* contributing effect of factors other than imports to the injured state of the "domestic industry" must be excluded so long as its effects on the domestic industry are simultaneous (i.e. "at the same time") with the effects of imports. Once *all* injury attributable to other factors is excluded, if the injury caused by imports is not serious, measures may not be applied.

14. **In a hypothetical situation in which increased imports were one of three equal causes of serious injury, in your view would this by definition mean that a safeguard measure could not be applied? What if it could be shown that the portion of the injury attributable to increased imports by themselves could be characterized as "serious" injury (i.e., that the total injury suffered by the industry far surpassed the "serious injury" threshold, such that one-third of that level of injury was still "serious")?**

¹⁷ Such as, for example, only "material injury" in the sense of the WTO agreements on anti-dumping and countervailing.

Answer 14

Please also see the answer to question 13.

If increased imports are causing serious injury to the "domestic industry" within the meaning of SG Article 4, then that condition for the application of a measure is satisfied. However, the situation outlined above is unlikely to occur, especially in a case of "threat of serious injury".

Is the measure imposed by the US President, which differs from the USITC's recommendation, consistent with the United States' obligations under the Safeguards Agreement and the GATT 1994?

15. It appears to be your view that Article 5.1 requires, where a measure is to be applied, that that measure be *the* least trade restrictive measure that would prevent or remedy serious injury and facilitate adjustment. Is this a correct understanding of your position? If not, please explain. How in your view should the burden of proof be allocated under Article 5.1?

Answer 15

Regarding the question on what SG Article 5.1 requires, the Appellate Body said at paragraph 103 in *Korea - Dairy Safeguard* that:

“For these reasons, we uphold the Panel's finding, in paragraph 7.101 of its Report, that the first sentence of Article 5.1 imposes an *obligation* on a Member applying a safeguard measure to ensure that the measure applied is not more restrictive than necessary to prevent or remedy serious injury and to facilitate adjustment” [*Emphasis added.*]

Australia's position is that the necessity must be seen in the context of the increased imports, not only because that is the purpose of the action taken under the Safeguards Agreement and GATT 1994 Article XIX, but also because the measure is a border measure and so must be aimed at the increased imports.

The issue of the burden of proof depends on the obligation. Australia submits that the USA was obliged to ensure that the conditions of SG Article 5.1 were satisfied before applying the measure. In accordance with Article 26 of the Vienna Convention, Members have an obligation to ensure compliance with the WTO Agreement, including the Safeguards Agreement and GATT 1994 Article XIX. This can only be done before the application of the measure and not afterwards in a dispute. Thus the USA must have reached a formal determination before 7 July 1999. Of course, Australia also argues that that should have been notified to the Safeguards Committee and the findings and reasoned conclusions published. But even in the absence of that, the USA must still have reached the determination.

If the Panel agrees that the determination should have been notified to the Safeguards Committee and the findings and reasoned conclusions published, then the USA is in breach and the measure is inconsistent, since it admits that it did not.

If, alternatively, the Panel disagrees with the last point but does agree that the USA had to have made the determination before applying the measure, then Australia submits that the USA still has the obligation to produce the evidence. In that case, the burden of proof shifts to Australia to rebut the USA's case. Of course, if the USA cannot produce the evidence because it does not exist, then the USA is in breach and the measure is inconsistent. If the USA refuses to produce the evidence

but refuses to admit that it does not exist, then Australia submits that the Panel should draw adverse inferences.

As a further alternative, even if the Panel found that Australia needed to establish a *prima facie* case on the facts rather than on the legal requirement for the USA to have made the determination before imposing the measure, Australia has done this. As Australia has shown the USITC Report came to a conclusion that the measure should be less restrictive than that imposed. Moreover, the USITC Report found that the "domestic industry" was not experiencing serious injury even with the increased imports of the 1998 level. No reasons were given why imports should be restricted to that level. Moreover, for that level of increased imports, serious injury was not being experienced let alone being caused by the increase imports, thus there is no basis for restricting those imports by the punitive additional tariff surcharge. Australia established a *prima facie* case that the measure is inconsistent with SG Article 5.1. Therefore, the burden of proof to show that it has complied with SG Article 5.1 lay with the USA. The USA's comments in its First Submission and in its statements at the meeting of the Panel on 25-26 May 2000 will be further addressed in Australia's rebuttal submission.

16. In view of the infinite number of potential safeguard measures that could be applied, how could a Member ever conclusively determine that the measure that it chose to apply in fact was *the one measure* that was the least trade restrictive measure that would prevent or remedy serious injury and facilitate adjustment”?

Answer 16

It could not. Australia has not argued that it could.

17. On what basis, specifically, do you argue that the measure applied by the United States is more restrictive than the measure recommended by the USITC, given that the recommended measure was of four years duration, while the measure applied is of three years duration only?

Answer 17

The actual measure is more restrictive than the USITC recommendation, since:

- it imposes an additional tariff on in-quota imports in all three years, whereas the USITC recommendation was for the bound rate to apply
- it imposes a much higher tariff on out of quota imports in all three years. Indeed, the rate for the third year (24 per cent) is still higher than the rate recommended by the USITC for the first year (20 per cent).

As Australia noted at paragraph 73 in its Opening Statement on 25 May 2000, it cannot see the relevance in the USA's comment about the difference in duration in respect of the issue of "more restrictive". If the USA had imposed the USITC recommendation, then it could have terminated it before the end of the four-year period. Similarly, in the absence of an undertaking by the USA that it will not extend the actual measure, then it might well extend it up to a total of eight years. In sum, the initial announced period of application does not determine the duration of the measure. Therefore, the difference in the periods of the recommended and applied measures is irrelevant to the issue of whether one is more restrictive than the other.

Moreover, SG Article 7.1 says that:

"A Member shall apply safeguard measures only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment."

This is a separate obligation from SG Article 5.1, i.e. the obligations with regard to "the extent" of the measure and the "period of time" of the measure are distinct obligations. Thus, if the USA had imposed the USITC recommendation, and if it had then found during its mid-term review of the measure that it was no longer necessary to have it for four years, it would have had a WTO obligation to terminate the measure earlier than the four years.

18. Article 5.1 provides that "a Member shall apply safeguard measures only to the extent necessary to prevent ... serious injury and to facilitate adjustment". In order to fulfill that standard, does a Member imposing a safeguard measure have to apply, e.g., (i) an "effective" measure, (ii) the least-trade restrictive measure, (iii) a "proportionate" measure, or something else?

Answer 18

In a case of "threat of serious injury" the application of the border measure is necessarily focused on the increased imports that are alleged to be going to cause serious injury imminently. Thus it would be "effective" in the sense of being *potentially* restrictive against the projected level of increased imports. However, that does not mean that it would be restrictive in terms of the current level of trade. For example, it had been determined that imports were going to double starting immediately and that anything over a 50 per cent increase would cause serious injury, then imports could be restricted to a 50 per cent increase.

SG Article 5.1 requires that the measure be "not more restrictive than necessary ... ". There will necessarily be no unique prescription of how to arrive at the extent of the measure, which has to be on a case by case basis.

The measure has to be limited to dealing only with the injury attributed to increased imports and not with all other factors affecting the "domestic industry" in question. Thus the measure cannot be disproportionate to the circumstances.

Is the exclusion of Canada, Mexico and Israel from the safeguard measure consistent with the Safeguards Agreement and GATT 1994?

19. In the light of the interpretative note to Annex 1A to the Agreement Establishing the WTO, what is the relationship between Article 2.2 and the last sentence of footnote 1 to Article 2.1 of the Safeguards Agreement, on the one hand, and Article XXIV:8(b) of GATT 1994 on the other?

Answer 19

The final sentence of Footnote 1 to SG Article 2.1 only refers to the relationship between Articles XIX and XXIV:8. That sentence does not refer to any other paragraph of Article XXIV, in particular it does not refer to Article XXIV:5.

Focusing on FTA's, the final sentence of Footnote 1 simply says that the provisions of the Safeguards Agreement cannot be used to resolve the issue whether the use of Article XIX action is allowed between parties to a FTA claiming to comply with the definition in Article XXIV:8(b).¹⁸

If the provisions of a FTA preclude the parties taking Article XIX action against each other, then the last sentence of Footnote 1 to SG Article 2.1 must be interpreted to allow a derogation from SG Article 2.2 for the sentence to have any meaning. Any other interpretation would have the effect of writing the provision out of the Safeguards Agreement, which is not permitted under the principle of effectiveness in the interpretation of treaties.

Assume for the sake of argument that parties to a particular FTA were able to apply Article XIX to each other and still comply with the definition in Article XXIV:8(b). There is nothing in either Article XIX or Article XXIV:8(b) that stipulates or even implies that this can be done in anything but a MFN, non-discriminatory, manner. Even if Article XXIV:5 could be interpreted to allow discriminatory treatment in the application of such Article XIX action, this would not be subject to the last sentence of Footnote 1. In such a case there would be a conflict between provisions of GATT 1994 and the Safeguards Agreement. In light of the General interpretative note to Annex 1A of the WTO Agreement, the provisions of the Safeguards Agreement would prevail. Thus, if the definition of a FTA under Article XXIV:8(b) allows safeguard action between its parties, any such action must be on a non-discriminatory basis, to be consistent with SG Article 2.2.

As the Appellate Body has said in paragraph 81 of *Korea - Dairy Safeguard*:

'In light of the interpretive principle of effectiveness, it is the *duty* of any treaty interpreter to "read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously.'" [*Footnote 43 omitted.*]

In this context, Australia has also made arguments in its First Submission based on the principle of parallelism about the inconsistency with SG Article 4 of the inclusion of FTA parties in the injury assessment but their discriminatory exclusion from the application of the measure.¹⁹ This is the only reading that gives meaning to SG Article 2.2 in such a circumstance. This leads to the conclusion of inconsistency with SG Article 2.2 of such discriminatory action and the consequent inconsistency with the Safeguards Agreement of any such measure.

¹⁸ These comments refer to trade covered by the FTA.

¹⁹ See paragraphs 259-265 in Australia's First Submission.

ANNEX 1-8

SECOND SUBMISSION OF AUSTRALIA

(29 June 2000)

TABLE OF CONTENTS

	<u>Page</u>
1. INTRODUCTION.....	106
1.1 SUMMATION OF ARGUMENTS.....	106
2. STANDARD OF REVIEW AND BURDEN OF PROOF	108
2.1 STANDARD OF REVIEW.....	108
2.2 BURDEN OF PROOF.....	109
3. KEY LEGAL ISSUES.....	110
3.1 "UNFORESEEN DEVELOPMENTS".....	110
3.1.1 Australia's arguments.....	110
3.1.2 US's assertions	110
3.1.3 Conclusion on "unforeseen developments".....	111
3.2 SG ARTICLE 5.1, 3.1, AND 12.2.....	111
3.2.1 US's obligations	111
3.2.2 US's assertions	112
3.2.2.1 The US misconstrues the scope of SG Article 3 to involve only issues of injury and not the extent of the measure applied.....	112
3.2.2.2 The US's interpretation of SG Article 5.1 threatens to eliminate the obligation to demonstrate compliance with the Safeguards Agreement.....	114
3.2.2.3 Arguments by the US defending the extent of the measure fall short of a demonstration that the measure was not more restrictive than necessary.....	116
3.2.2.4 The US assertions about SG Article 12.2.....	117
3.2.3 Conclusion on SG Articles 5.1, 3.1, and 12.2.....	118
3.3 "DOMESTIC INDUSTRY".....	118

3.3.1	Australia's argument	118
3.3.2	US's assertions	119
3.3.2.1	The US's arguments concerning "Vertical Integration" are irrelevant in this case and further belie the fact that the USITC's investigation did not establish a basis for treating the "domestic industry" as if it were vertically integrated.....	119
3.3.2.2	The US confuses a "coincidence of economic interest" with matters related to the definition of its "domestic industry", as opposed to matters related to injury.....	120
3.3.2.3	Producers and Output	120
3.3.2.4	In defending its actions, the US erroneously implies that it can apply the remedy crafted for one definition of "domestic industry" to a subset of firms without a new investigation into injury, causation, and remedy	121
3.3.2.4.1	<i>The USITC's determination is wholly based on a wrong definition of "domesti industry"</i>	122
3.3.2.4.2	<i>Facts about packers and breakers</i>	122
3.3.3	Conclusion on "domestic industry"	123
3.4	"THREAT OF SERIOUS INJURY"	123
3.4.1	"Clearly imminent"	123
3.4.1.1	A determination of threat of serious injury must be based on a finding that serious injury will be experienced absent a significant change in circumstances	123
3.4.1.2	In the threat context, serious injury must be imminent.....	124
3.4.1.3	The US seeks to rewrite the USITC Report on "imminent"	124
3.4.1.4	The US seeks to rewrite the USITC Report on "threat of serious injury".....	125
3.4.2	Consideration of all relevant factors	125
3.4.2.1	Australia's argument	125
3.4.2.2	US's assertions	126
3.4.2.2.1	<i>The inadequate data for growers</i>	126
3.4.2.2.2	<i>The inadequate data for grower/feeders</i>	126
3.4.2.2.3	<i>The inadequate data for packers and breakers</i>	127
3.4.2.2.4	<i>Numbers of firms in each industry segment provided in answers to questions from the Panel and Australia</i>	127
3.4.2.2.5	<i>Australia did not suggest that the USITC should have "compelled" firms to answer questionnaires</i>	129
3.4.2.2.6	<i>Panel's responsibilities in assessing the adequacy of data and consideration of the examination of factors under SG Article 4, in particular those listed in SG Article 4.2(a)</i>	129
3.4.3	Causation	131
3.4.3.1	Australia's arguments.....	131

3.4.3.2	US's assertions	131
3.4.3.2.1	<i>The US's reference to the Atlantic Salmon Code panel is wrong</i>	132
3.4.3.2.2	<i>The US seeks to rewrite the USITC Report on causation</i>	133
3.4.4	Conclusion on "threat of serious injury"	134
3.5	MAINTAINING A SUBSTANTIALLY EQUIVALENT LEVEL OF CONCESSIONS AND OTHER OBLIGATIONS.....	134
3.6	NON-DISCRIMINATION - SG ARTICLE 2.2	137
3.7	THE MEASURE IS IN VIOLATION OF THE US'S OBLIGATIONS UNDER GATT 1994 ARTICLE II	138
4.	CONCLUSION	138
5.	ATTACHMENT A.....	139

1. INTRODUCTION

1. This second submission:

- rebuts certain statements and assertions by the US in its First Submission, at the first substantive meeting with the Panel, and in answers to the Panel's questions of 31 May 2000; and
- recalls the main claims and arguments by Australia in this case.

2. The other points of law, procedure and fact already advanced by Australia should also be considered to be confirmed here.

1.1 SUMMATION OF ARGUMENTS

3. The Appellate Body explicitly ruled in *Korea – Dairy Safeguard* and *Argentina – Footwear Safeguard* that compliance with GATT 1994 Article XIX:1(a) entails, *inter alia*, a demonstration of the existence of the circumstance of “unforeseen developments” as a matter of fact. It is also implicit in the Appellate Body’s findings in *Argentina – Footwear Safeguard* that such a demonstration by a Member must take place in the investigation by that Member’s competent authority. In the instant case, this means by the USITC in its report.¹

- The USITC Report, which is the basis for the record upon which this case must be decided, is devoid of any consideration or demonstration of “unforeseen developments.”
- The US argues that “unforeseen developments” can be discerned from the USITC Report given the Report’s comments on the change in proportions of imported chilled and frozen lamb meat. The US arguments are both misleading and insufficient to establish a positive demonstration of “unforeseen developments.” In fact, the USITC Report only discussed the mix of chilled and frozen lamb meat in the context of substitutability of domestic and imported lamb meat.
- Even if the Panel accepted the US’s arguments that a mere mention of the rising proportion of chilled lamb meat somehow constituted a demonstration of “unforeseen developments,” it would leave the necessity of the US’s resulting measure highly suspect. Specifically, the US’s arguments on the extent of the measure are based on all imported lamb meat. If the US considers chilled lamb meat to be the source of the threat to the “domestic industry,” then its assertions on the basis for the measure, including action against frozen lamb meat, are fundamentally flawed.
- Therefore, the US has not complied with GATT Article XIX:1(a) and the measure is inconsistent with GATT Article XIX, and hence also not in conformity with the Safeguards Agreement, in particular SG Article 11.1(a).

4. The demonstration of compliance with SG Article 5.1 is a highly pertinent issue of fact and law, which should be subject to an investigation and public report provided for under SG Article 3.1 and notified under SG Article 12.2. SG Article 5.1 requires that the US ensure that the measure applied in the instant case was not more restrictive than necessary. A plain reading of SG Article 5.1 in conjunction with SG Articles 3.1 and 4.2(c) further dictates that such an assurance by the US must take place before the measure was applied – i.e. in the investigation and USITC Report.

¹ See Questions by the panel to the Parties – 31 May 2000, Answers by Australia, answer to Question 3.

- There was no demonstration, or effort to demonstrate, in the USITC Report or by the President that the measure applied was not more restrictive than necessary, whether implicit or explicit.
- The US claims doing modelling work after the USITC Report to ensure compliance, but has not produced evidence of such work or any justification of its actions or findings. It does not even claim that it demonstrated that the measure was not more restrictive than necessary. Indeed, the USITC recommended a measure that it considered *sufficient* (but did not show that it was not more restrictive than necessary) to prevent serious injury and to facilitate adjustment, while the actual measure applied was even more restrictive. Thus, the measure eventually applied was applied with no demonstration either by the USITC or the President that it was not more restrictive than necessary.
- The US cannot now “ensure” compliance. An explicit finding had to be made before the measure was applied and not conjured into existence through a *de novo* review of the USITC Report or *ex post facto* rationales.
- Finally, Australia has demonstrated that even the USITC recommendation was more than necessary given that this was a case of threat with no serious injury being experienced.

5. The definition of “domestic industry” in the USITC Report has no basis in the Safeguards Agreement and is inconsistent with SG Article 4.1(c).

- There is common ground on the “like product” in this case – lamb meat. No effort has been made by the US to identify a “directly competitive product.” Instead, the US includes producers of *unlike* products by asserting that where self-defined conditions of “continuous line of production” and “substantial coincidence of economic interest” prevail, the “domestic industry” includes upstream producers. In a multi-tier industry structure such as lamb and lamb meat, this has the effect of equating live lamb to lamb meat. There is no textual basis within the Safeguards Agreement for the US to apply these conditions.
- “Substantial coincidence of economic interest” as applied by the US to find the “domestic industry” in the instant case confuses issues of causation with issues of definition of the “domestic industry.” There is no basis within the Safeguards Agreement to have defined “domestic industry” based on a “coincidence of economic interest.”
- The analytic framework changes substantially based on the definition of “domestic industry.” Because the USITC investigation did not comply with the SG Article 4 it cannot be cured. The measure remains inconsistent with SG Articles 2.1 and 4.

6. The USITC Report did not demonstrate that its “domestic industry” was going to suffer from serious injury imminently within the meaning of SG Article 4.1(b) and 4.2(a).

- The USITC Report made no positive demonstration that serious injury was threatened and imminent. Specifically, the USITC failed to identify the new or changed circumstance that would cause serious injury to the domestic industry. Moreover, the USITC failed to demonstrate why this serious injury was “clearly imminent.”
- The USITC relied on inadequate data to reach a finding of threat of serious injury, in the process choosing not to examine some factors for some of the industry segments without explanation. It relied on a static analysis on data to Sept 1998 and in many cases only to 1997, which cannot provide the basis for proving that serious injury was “clearly imminent.”

- Overall, questionnaire data used by the USITC was inadequate as evidence to prove threat of serious injury or a causal link to increased imports. As a consequence, the USITC did not examine the factors listed in SG Article 4.2(a) in an adequate manner to enable it to reach an affirmative decision.
- Because the USITC's flawed approach is inconsistent with SG Articles 2.1 and 4, it cannot be cured. It remains inconsistent with the Safeguards Agreement.

7. The US's evidence of a causal link required in SG Article 4.2(b) is not objective and the causation analysis is irremediably flawed.

- The USITC's causal link cannot be based on "domestic industry" data that are plainly inadequate and sometimes limited to information only through 1997.
- Beyond the use of inadequate data, the USITC Report did not effectively take into account "other factors" that may be the cause of injury, thereby failing to demonstrate that serious injury was imminent due to increased imports.
- Because the USITC's causation analysis is flawed, the measure is inconsistent with SG Articles 2.1 and 4.2, and cannot be cured.

8. The US admits that it did not comply with the requirements of SG Article 8.1 and 12.3 regarding consultations on the maintenance of a substantially equivalent level of concessions and other obligations. This cannot be cured by the US, making the measure inconsistent with the Safeguards Agreement.

9. By including its FTA partners in the injury assessment but excluding them from the measure, the US has acted inconsistently with SG Article 2.2. This cannot be cured and the measure remains inconsistent with the Safeguards Agreement.

10. Finally, since the measure is not in conformity with Safeguards Agreement and GATT 1994 Article XIX, the measure is in breach of the US's tariff bindings on lamb meat as demonstrated in Australia's First Submission. Therefore, the measure is in violation of the US's obligations under GATT Article II.

11. In total, the US is in breach of its obligations under Articles II and XIX of GATT 1994 and of Articles 2.1, 2.2, 3.1, 4.1(b) and (c), 4.2(a) and (b), 5.1, 8.1, 11.1(a), 12.2 and 12.3 of the Safeguards Agreement. These inconsistencies cannot be remedied and the US should revoke the measure without delay.

2. STANDARD OF REVIEW AND BURDEN OF PROOF

12. The approach taken by the US in its First Submission and statements at the first substantive meeting of the Panel confuse the task of the Panel in addressing the standard of review and the burden of proof required in this case.

2.1 STANDARD OF REVIEW

13. The Safeguards Agreement, as with the other trade remedy agreements on anti-dumping and countervailing, is a procedural agreement that sets out the requirements of a Member seeking to apply a measure that is inconsistent with its obligations under GATT 1994, in particular for safeguard measures, GATT 1994 Articles II and XI. The Safeguards Agreement and GATT 1994 Article XIX

set out the detailed procedures a Member must follow, including transparency and natural justice requirements. Compliance with these procedures is an essential part of the derogation provided in allowing an importing Member to impose such extraordinary measures in taking safeguard action.

14. The US accepts² that it must at least rely on the USITC determinations of injury, including causation, even if it considers that the USITC recommendation has no bearing on the restrictiveness of actual measure applied. Accordingly, the US is dependent on the actual USITC Report and its reasoning. This is not a matter of whether the USITC could have come to the same conclusion by different reasoning or whether it could have used its record to have argued differently. The US cannot redo the case, even on the basis of the record, or ask the Panel to do so.

15. The positions of the complainant and the respondent are asymmetrical. It is the Member applying the measure that is claiming a derogation to its obligations under GATT 1994, it is the complainant whose rights to trade in accordance with commitments under GATT 1994 have been abridged. The Member imposing the measure is obliged to defend what it did before applying the measure to ensure that it was complying with the prerequisites set out in the Safeguards Agreement and GATT 1994 Article XIX. Moreover, as the panel report on *Korea - Dairy Safeguard* said at paragraph 7.30:

"For us, an objective assessment entails an examination of whether the KTC had examined all facts in its possession or which it should have obtained in accordance with Article 4.2 of the Agreement on Safeguards (including facts which might detract from an affirmative determination in accordance with the last sentence of Article 4.2 of the Agreement on Safeguards), whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of Korea. Finally, we consider that the Panel should examine the analysis performed by the national authorities at the time of the investigation on the basis of the various national authorities' determinations and the evidence it had collected."*[Emphasis added.]*

Thus the Panel has the responsibility of not just looking at the findings in the USITC Report, including the analysis by the USITC set out in its Report, but also, *inter alia*, determining whether the data collected by the USITC was an adequate basis for its findings.

2.2 BURDEN OF PROOF

16. Similarly, the US has raised the issue of the burden of proof in this case. This may be because it is challenging what its procedural obligations were. Australia agrees that the burden of proof lies initially with Australia to establish a *prima facie* case. However, in four key areas, the claims by Australia relate to the failure of the US to comply with procedural requirements of the Safeguards Agreement and GATT 1994 Article XIX, i.e. those relating to: "unforeseen developments" under GATT 1994 Article XIX; the decision on the extent of the measure under SG Article 5.1; SG Article 8.1; and SG Article 12. For these four areas, the US does not seek to argue that it has complied but rather that it had no such obligations.

17. Australia has also argued in the alternative and demonstrated, that for "unforeseen developments" and the extent of the measure, the requisite circumstance of "unforeseen developments" did not exist and that the measure applied was more restrictive than required under SG Article 5.1. For example, in respect of SG Articles 5.1 and 3.1, the issue of the burden of proof depends on what precisely the Panel considers to be obligations of the US before applying the

² For example, at its answer to Question 2 from Australia.

measure.³ Consequently, Australia has provided in its submission a layered approach of demonstrating its case according to the obligation.

3. KEY LEGAL ISSUES

3.1 "UNFORESEEN DEVELOPMENTS"

3.1.1 Australia's arguments

18. The Appellate Body found that:

"The first clause in Article XIX:1(a) – "as a result of unforeseen developments and of the obligations incurred by a Member under the Agreement, including tariff concessions ... " – describes certain *circumstances* which must be demonstrated as a matter of fact".⁴

19. The USITC Report did not seek to demonstrate the circumstance of "unforeseen developments", and so the US did not demonstrate it. Australia has dealt with this issue at length in its First Submission and in its answers to Questions 1-4 of the Panel. Accordingly, Australia will focus here on assertions by the US.

3.1.2 US's assertions

20. In its First Submission, its statements to the Panel on 25&26 May 2000, and in its answers to questions by the Panel, the US seeks to rewrite the USITC Report. The US focuses on an argument that the "unforeseen development" was the change in the mix between fresh/chilled and frozen lamb meat. This is not a valid argument, since it amounts to no more than a statement that imports have increased. Moreover, for the purpose of this section, the point is that this argument was not even made in the USITC Report. It is not just that the USITC Report does not address "unforeseen developments" explicitly, but that the mix argument was not put forward as being the reason for the increased imports. The change in the mix was raised in the context of the substitutability of imported and domestic lamb meat under conditions of competition. To suggest that the USITC had in mind or that the USITC Report purports to prove that the change in product mix was an "unforeseen development" leading to increased imports misrepresents the facts. The US is obliged to stand on the USITC Report, since that is what it put forward and published as being the justification for the application of a safeguard measure.

21. In paragraph 4 of its answer to Question 1(a) from the Panel, the US says that:

"The choice of "If, as a result of" makes plain that, as the Appellate Body concluded in *Korea–Dairy* (at ¶ 85), "unforeseen developments" do not constitute an additional condition for the application of a safeguard measure. Rather, its focus on result rather than causation suggests that the "unforeseen developments" language is meant to characterize the unexpected ("unforeseen") nature of injurious import surges of the type described in Article XIX:1(a). Seen in this light, "unforeseen developments" are simply a restatement of the "emergency" character of those situations that Article XIX is designed to address."

22. The Appellate Body did not say that "unforeseen developments" is not an additional condition. It said that it is not an "independent condition". The argument put forward by the US that

³ As Australia set out in its answer to Question 15 from the Panel.

⁴ At paragraph 92 of the Appellate Body report on *Argentina - Footwear Safeguard*.

the "unforeseen developments" language is a *characterization* of import surges and so is simply a *restatement* of the "*emergency*" *character* of Article XIX situations would have the effect of writing out of the WTO the obligation found by the Appellate Body to require the Member applying a safeguard measure to *demonstrate the circumstance of "unforeseen developments" as a matter of fact*.

23. In the last sentence of paragraph 8 of its answer to Question 1(a) from the Panel, the US says:

"Because Members cannot be presumed intentionally to place their industries in jeopardy through the grant of tariff concessions, it must be presumed that later developments which imperil their producers are of a kind that were "unforeseen" when the concessions were negotiated."

Such a presumption would write the obligation set out by the Appellate Body out of GATT 1994 Article XIX.

24. The US in paragraph 9 in answer to Question 1(b) from the Panel is simply stating the US's position in *Hatters' Fur*, a position different from that taken by all other members of the Working Party. The other members of the Working Party found that the fact that hat styles had changed did not constitute an "unforeseen development".

25. In any case it is irrelevant to this dispute. There was no change in consumption preferences. US consumers did not suddenly prefer chilled product. To the extent that there were increased imports of chilled product, this is part of the increased imports of the product subject to the measure. To claim that increased imports of chilled lamb meat was an "unforeseen development" is to say that increased imports of the product under investigation was an "unforeseen development". This is simply the same attempt by the US to write the obligation out of the WTO Agreement.

3.1.3 Conclusion on "unforeseen developments"

26. The US did not comply with its obligation to have demonstrated the circumstance of "unforeseen developments" set out in the first clause of GATT 1994 Article XIX:1(a) as a matter of fact before applying the measure. Therefore the measure is inconsistent with GATT 1994 Article XIX, and hence it is also not in conformity with the Safeguards Agreement, in particular SG Article 11.1(a).

3.2 SG ARTICLE 5.1, 3.1, AND 12.2

3.2.1 US's obligations

27. The US was obliged:

- to ensure that the extent of the measure was not more restrictive than necessary to prevent serious injury being caused by the increased imports and to facilitate adjustment;
- to have done this formally before applying the measure; and
- to have done this consistently with SG Article 3.1 through public inquiry and report and also to have notified the Committee.

28. If the Panel agrees that the US had to have complied with the last of these obligations, then the measure is immediately inconsistent with SG Articles 3.1 and 12.2, since the US did not do so.

29. If the Panel agrees that the US had to comply with the second of these, then again the measure is immediately inconsistent with SG Article 5.1, unless the US is prepared: to produce proof that there was such an investigation to ensure compliance with SG Article 5.1; and to submit the basis of the decision on the extent of the measure. The issue then is whether that demonstration was satisfactory.

30. Finally, on the first obligation, Australia has shown in its First Submission and in its answers to Questions 15, 17, and 18 by the Panel that the measure was beyond the extent necessary, and indeed even the USITC's recommendation was beyond the extent necessary.

3.2.2 US's assertions

3.2.2.1 *The US misconstrues the scope of SG Article 3 to involve only issues of injury and not the extent of the measure applied*

31. The US asserts that the obligations under SG Article 3.1 are limited to the injury investigation.⁵ This is despite the fact that this would make SG Article 4.2(c) effectively redundant. It is also despite the fact that, if SG Article 3.1 refers only to the injury determination under SG Article 4, it begs the question why it does not say so.

32. The principle of effectiveness in the interpretation of treaties does not allow an interpretation that would have the effect of writing a provision out of the Safeguards Agreement. Moreover as the Appellate Body says in paragraph 81 of *Korea - Dairy Safeguard*:

'In light of the interpretive principle of effectiveness, it is the *duty* of any treaty interpreter to "read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously.'" [*Footnote 43 omitted.*]

33. Australia submits that the only harmonious way in which to read SG Articles 3.1 and 4.2(c) in conjunction with the obligation under SG Article 5.1, is to require the investigation and public report under SG Article 3.1 to include the analysis on the extent of the measure as well as injury considerations.

34. Paragraphs 232 and 233 of the US's First Submission confuse two separate issues. The US argues that a Member does not have to explain its decision whether to apply a safeguard measure, or indeed the nature of the measure. Australia agrees that the government's decision whether or not to impose a measure does not have to be justified, and is clearly a matter for the government. Moreover, where there is a report on the extent of the measure, the Safeguards Agreement does allow flexibility in the choice of the measure, e.g. quota or tariff quota or flat tariff, though the last sentence of SG Article 5.1 does say that: "Members should choose measures most suitable for the achievement of these objectives."

35. The US's approach seeks to divert attention from the issue that a Member has to comply with SG Article 5.1 regarding the extent of the measure. This is about minimizing the nullification and impairment of exporting Members' rights. A Member does not have to justify why it imposed a less restrictive measure than it has demonstrated that it could have applied in compliance with SG Article 5.1. However, it is obliged to ensure that it is not more restrictive than necessary to comply with SG Article 5.1. The US recognizes this in, for example, paragraph 184 of its First Submission.⁶ Thus the extent of the measure and its justification are issues of "fact and law" under

⁵ For example, paragraphs 225-239 of the US's First Submission, in particular paragraph 226. See also paragraph 149 in its answer to Question 18(b) from the Panel.

⁶ "Taken as a whole, the sentence says that safeguard measures may be applied only to the degree required to prevent or remedy serious injury and facilitate adjustment."

the Safeguards Agreement. The US makes no attempt to explain why some issues of fact and law should be covered by SG Article 3 and some not.

36. In, for example, paragraphs 235 and 236 of its First Submission, the US seeks to distinguish between the Member and the "competent authority". Australia submits that a Member cannot reduce its WTO obligations by its choice of "competent authority". This is simply the particular way in which the government of each Member complies with the obligations of the Member under the WTO. Of course, it is the Member that ultimately applies a measure, and the government of that Member that takes the decision and implements it according to domestic law. To seek to distinguish in respect of WTO obligations on the basis of one particular set of domestic arrangements in a text drafted to cover a wide range of domestic legal systems would be inconsistent with any reasonable standard of interpretation of the object and purpose of the treaty.

37. The paradox in this case is that the US's statute is set up to allow it to comply with the Safeguards Agreement, including having the USITC provide a justification with SG Article 5.1. The fact that the statute allows greater flexibility to the government to impose a more restrictive measure does not mean either that such a measure is WTO compliant or that the US statute is WTO inconsistent. The matter at issue before the Panel is that, in this particular case, the US did not comply with its WTO obligations and that the measure is inconsistent with the Safeguards Agreement.

38. At paragraph 145 of its answers to the Panel's Question 18(b), the US says that:

"New Zealand and Australia have suggested that Article 3.1 requires competent authorities to justify, in the reports they are required to publish under that article, the ultimate safeguard measure that a Member chooses to apply."

This is a mischaracterization of what Australia argues. Australia has not argued that the government is bound in a way that would not allow it to apply a less restrictive or no measure at all. Neither does Australia argue that the matter cannot be subject to further investigation and report. Australia argues that the government must in the first place demonstrate that it will be complying with SG Article 5.1 - SG Article 5.1 says "only to the extent necessary" it can be less restrictive than that without breaching the Safeguards Agreement, but cannot be more restrictive. Australia also argues that that demonstration is covered by SG Articles 3.1 and 12.2.

39. At paragraph 147 of the US's answers to the Panel's Question 18(b), the reference to an assistance package would seem to be a red herring. On the one hand, recourse to a derogation from GATT 1994 Articles II and possibly XI under GATT 1994 Article XIX and the Safeguards Agreement is not a matter that is necessary for the assistance package. On the other, action under the Safeguards Agreement does not provide a derogation from other WTO provisions such as on agricultural domestic support or the Subsidies Agreement. There is no legal basis for that and it is not an issue before the Panel.

40. At paragraph 149 of its answers to the Panel, the US notes that SG Article 4.2(a) refers to "the investigation to determine" on injury. This simply refers to the fact that there is an investigation on the injury side and this is dealt with under SG Article 4. This, if anything, indicates that there is a second line of investigation that needs to be pursued, i.e. in respect of the measure. Indeed, this is a natural way of describing the two-stage nature of a safeguards inquiry, first the injury and causation analysis, and then the remedy analysis.

41. At paragraph 151 of the US's answers to the Panel, the reference to the clause in SG Article 3.1 allowing for public interest submissions on whether there should be a safeguard measure does not indicate that an investigation on the actual measure is not called for. It simply ensures that a wide breadth of parties are allowed to make presentations to the investigation. The

reason for a reference to "a safeguard measure" is that "the safeguard measure" does not exist until it is applied, and so submissions to the investigation could hardly be about "the safeguard measure".

42. The Appellate Body found that there was an *obligation* to ensure conformity with the first sentence of SG Article 5.1 before applying the measure. Thus this is a legal requirement and so a highly pertinent matter of fact and law under both SG Article 3.1 and 12.2. The implication of paragraph 153 of the US's answers to the Panel is that the scope of "all pertinent issues of fact and law" subject to investigation and report under SG Article 3.1 does not include recommendations and comments on proposals for a measure.

43. In contrast the final sentence of paragraph 161 of the US's answers to the Panel says:

"The question of whether a Member has applied a safeguard measure that is commensurate with the serious injury or threat of serious injury that domestic producers have sustained should be discernible by examining the measure in light of the findings and determinations set out in the competent authority's report."

44. The US's argument, however, is that there is no need for any investigation or report on the measure. If the US's argument were to be accepted, then it would mean that in the context of its own domestic legal arrangements, the US could dispense with the remedy phase of the USITC's work and simply publish the injury findings. It is difficult to see how compliance with SG Article 5.1 would be discernible from such an abbreviated report in most circumstances. Moreover, in the Lamb Meat case, the US rejected the measure that the USITC found was "commensurate". If the USITC could not discern the actual measure from its own full Report and record, how could other Members be expected to be able to do so, especially if the US's view were to be followed and the published report be reduced to pages I-16-26 (on injury and causation).

3.2.2.2 *The US's interpretation of SG Article 5.1 threatens to eliminate the obligation to demonstrate compliance with the Safeguards Agreement*

45. The US at paragraph 209 of its First Submission acknowledges that:

"in imposing a safeguard measure Members must ensure that the measure imposed – whatever form it takes – is appropriate for the purpose of preventing or remedying the serious injury and facilitating adjustment and is not applied beyond the time and extent necessary to accomplish those objectives."

Thus the US agrees that ("in imposing") the Member must have ensured compliance before applying the measure. However, it proposes a lower threshold than the Safeguards Agreement, i.e. simply that it must be "appropriate", presumably in the eyes of the government of the Member applying the measure.

46. The US goes on in the last sentence of paragraph 209 of its First Submission to say:

"Australia and New Zealand have not established a *prima facie* case that the US lamb meat safeguard measure fails that test."

47. The US confuses the obligation to have demonstrated compliance in advance with the issue of whether that demonstration satisfied the requirements of the Safeguards Agreement. Australia in the first place asked to see whether there had been such a demonstration and whether it was satisfactory. Once having been provided with that demonstration, then Australia would have had the opportunity to make a *prima facie* case rebutting that demonstration. In the absence of access to the actual demonstration, if it exists, it is not possible to make a rebuttal of whether the demonstration satisfied

the requirements of the Safeguards Agreement. If it were accepted that such a demonstration need not be provided, it would have the effect of making it impossible to assess the consistency of the demonstration and place this requirement of consistency beyond the reach of the WTO dispute settlement system.

48. The US's approach to the obligation to have undertaken the demonstration in respect of SG Article 5.1 is in effect that there is an obligation but it is not justiciable, since it is impossible to provide a *prima facie* case rebutting something that is unavailable. This would be to write the obligation out of the Safeguards Agreement except for quantitative restrictions under the second sentence of SG Article 5.1. Of course, it is also possible, though more difficult, to provide a *prima facie* case about the extent of the measure, but that is an issue distinct from the obligation to have performed the demonstration in advance.

49. The US had an obligation to conform with its obligations under the Safeguards Agreement, e.g. under the *pacta sunt servanda* rule.⁷ A Member could only do that in respect of SG Article 5.1 by an assessment and determination before applying the measure. The US has conceded that it ran models before determining the extent of the measure. However, that is not the same as determining that the extent was not more than was necessary.⁸ The US has yet to produce the required determination. Australia submits that the Panel should take an adverse view of the existence and content of such an assessment unless the US is prepared to produce and allow it to be tested. In this context the US has seemingly taken care not to assert that it met the obligation, for example, in paragraph 212 of its First Submission, it says:

"it is prepared for purposes of completing the factual record in the case to describe the basis on which it designed that measure and why the measure is appropriate in light of the objectives of that article."

Thus the US talks of the measure being appropriate and deliberately avoids saying that the modelling work proved that the measure was applied "only to the extent necessary". This approach was continued in answer to Australia's Question 8, which said:

"What aspect of this model did the US use to ensure that the measure was applied "only to the extent necessary" in order to satisfy SG Article 5.1"

and to which the US answered

"The United States used the model to try to predict the effects of various combinations of in-quota and out-of-quota tariffs. The United States explained the model's predictions in ¶¶ 217-219 of its first written submission."

See also the US's answers to Questions 17 and 20 from the Panel where again the US avoids the issue of whether it did perform a demonstration of the compliance with SG Article 5.1.

50. In respect of paragraph 116 of the US's answers to Question 17 from the Panel, Australia considers that the issue of the extent of the measure is a matter of fact and law, and so falls within SG Article 3.1, including the requirement of the first sentence of SG Article 3.1. It would provide *carte blanche* to governments to impose punitive measures beyond what is allowed for under

⁷ As codified in Article 26 of the Vienna Convention that a treaty must be performed in good faith.

⁸ Paragraph 216 of the US's First Submission does skirt around this by saying:

"used an economic model to test various combinations of in-quota and out-of-quota tariffs in order to find the combination of variables that would address the injury without going beyond the extent necessary."
[Footnote 220 is omitted.]

SG Article 5.1, if the rules said that there is no need for an investigation on the extent of the measure and that a government can essentially do what it likes by way of a measure once there has been a finding on injury and causation. Given the length of time for a dispute to be resolved through the DSU, there would be little incentive for a government not to give in to demands by its industry for protection.

3.2.2.3 Arguments by the US defending the extent of the measure fall short of a demonstration that the measure was not more restrictive than necessary

51. To provide an argument in the alternative, Australia will now address the US's assertions about the restrictiveness of the measure.

52. The US's First Submission deals with this issue in paragraphs 210-224. In subparagraph 210(4) the US agrees with the Appellate Body that a not more restrictive than necessary standard applies.

53. Paragraph 216 of the US's First Submission reveals that the US used an economic model after the USITC Report was made, but the information in paragraphs 217-219 of its First Submission simply says no more than that the "US industry" would benefit from the measure. This was hardly a proof that the measure was not more restrictive than necessary. Also the US focuses on the first year of the measure without reference to subsequent years.

54. In addition, the US provides no explanation of which segments of the "domestic industry" were going to benefit and by how much - any demonstration of "not more restrictive than necessary" would have to have some analysis along those lines. Paragraph 219 of the US's First Submission says that the TRQ in the first year was estimated to reduce exports by between 4.4 per cent and 11.9 per cent from the 1998 level. Thus, even though the USITC found that there was no serious injury being experienced at the 1998 level of imports, the US seeks to justify the measure on the basis of modelling that estimated that the measure would reduce imports by up to 12 per cent below that level in the first year. That is clearly far more than necessary to prevent serious injury being caused by increased imports. Moreover, in respect of adjustment, this same paragraph estimates that domestic consumption will fall by 4 to 12 per cent in the first year, thereby accelerating the long-term trend of declining lamb meat consumption in the US. Such an outcome would not facilitate adjustment by the "domestic industry".

55. The US's competent authority, the USITC, came forward in the first place with a measure that it considered to be sufficient to deal with the case. Australia showed in the answer to Question 17 of the Panel that the measure imposed by the US was more restrictive than that recommended by the USITC. Clearly, a 40 per cent out of quota tariff in the first year is more restrictive than the 20 per cent level found by the USITC to be sufficient. If it was not, why did the US not apply the 20 per cent recommended by the USITC? Similarly, in subsequent years the out of quota tariff of the measure is much higher and more restrictive than that recommended by the USITC Report. The punitive in-quota tariffs imposed by the measure, starting at 9 per cent in the first year are more restrictive than the bound rate of about 0.2 per cent. Indeed, the US's model on which it based its decision estimated that the 9 per cent, together with the 40 per cent out of quota tariff, would limit trade to below the 1998 level, i.e. the quota level. Accordingly, the US designed the measure on the basis that it would be more restrictive than the USITC recommendation. Therefore, the US had in the first place to rebut the determination of its own competent authority to demonstrate that the USITC's recommendation of a less restrictive measure could not prevent serious injury and facilitate adjustment.

56. The US at paragraphs 4, 25, and 206-209 of its First Submission seeks to argue that the USITC Report contains several recommendations on remedy. However, as Australia pointed out at

paragraph 71 of its Opening Statement on 25 May 2000, under US law there is only one recommendation by the USITC, and that was the only recommendation notified to the Safeguards Committee.

57. At paragraph 218 of its First Submission, the US pursues the same theme in referring to findings by three USITC Commissioners. None of this goes to the required demonstration, but is an attempt at an *ex post facto* justification for applying a more restrictive measure.

58. Australia, however, also showed that the USITC's recommendation was in any case more than was necessary. Even on the basis of the USITC Report the "domestic industry" was not experiencing serious injury at the level of 1998 imports of lamb meat. There was no basis for limiting imports to a level of 1998, i.e. a level where no serious injury was being experienced. No indication is given that some modest increase in imports would suddenly tip the scales to not just serious injury but serious injury caused by increased imports.

59. Therefore, the measure is far more restrictive than allowed under SG Article 5.1, and so is inconsistent with the Safeguards Agreement.

3.2.2.4 *The US assertions about SG Article 12.2*

60. At paragraph 273 in its First Submission the US's reference to the Appellate Body's view that found that SG Article 5.1 did not impose a general requirement to justify a measure is inaccurate. The Appellate Body in *Korea - Dairy Safeguard* found that SG Article 5.1 did not impose an obligation to notify that justification. Australia argues that the requirements on notification (and publishing and publishing) are found in SG Article 12.2 (and SG Article 3.1).

61. The extent of the measure is a critical issue in the application of the measure. Once a Member has taken the decision to impose some measure, the extent of the measure will determine the adverse effects on exporters. It is difficult to see what information is more pertinent than why a Member is going to impose one level of restriction on imports rather than another. Without such information, how can a Member defend its interests or make an informed decision about possible dispute action under the WTO. The more that the importing Member considers that it should be granted discretion in determining injury and the extent of the measure, the more there is the necessity for it to provide information on the justification of the measure.

62. In paragraph 275 of its First Submission, the US said:

"As noted earlier in connection with Article 3.1, any requirement that would seek to reveal the reasons why a Member decided between various alternative measures, or between applying a safeguard measure and refraining from doing so, would intrude on the Member's deliberate process, including its communications with other Members."

63. This misrepresents what Australia is arguing. Australia has never said that the US needed to justify, or indeed say, why it chose a tariff quota regime rather than a flat tariff or a quota. Australia has never said that the US had to justify, or indeed say, why it decided to apply a measure rather than exercise its discretion not to impose a measure.

64. Australia argues that under SG Article 5.1 the US had an obligation to ensure that the extent of any measure it applied was not more restrictive than necessary to prevent serious injury and to facilitate adjustment. Such an obligation means that the US must at the very least have justified the measure to itself before applying it. Australia has gone on to argue that, given this obligation and the importance of the nature of the actual measure, this justification was highly pertinent information under SG Article 12.2 and one of the "pertinent issues of fact and law" under SG Article 3.1.

3.2.3 Conclusion on SG Articles 5.1, 3.1, and 12.2

65. The US has not complied with SG Article 5.1 and the measure is inconsistent with the Safeguards Agreement. In addition, the US has not complied with SG Articles 3.1 and 12.2 in this context.

3.3 "DOMESTIC INDUSTRY"

3.3.1 Australia's argument

66. The issues on SG Article 4.1(c) are straightforward. The USITC included upstream industries in its determination of "domestic industry" on the basis of:

"(1) there is a continuous line of production from the raw to the processed product, and (2) there is substantial coincidence of economic interest between the growers and the processors." *[Footnote 31 omitted.]*⁹

67. The US has gone back through two layers of producers to include growers without any analysis of why they should be included as a class within its "domestic industry". There has been no attempt by the US to explain how it applies the requirements of SG Article 4.1(b) and 4.2(a) and (b) to such a diverse group of industries in regarding them as "producers as a whole".

68. It is common ground between Australia and the US that the "like product" is "domestic lamb meat". The USITC relied on "like product" rather than "like or directly competitive products".¹⁰ The US has not sought to use a directly competitive products argument in its submissions and answers to date. Accordingly, the issue focuses on who can be considered to produce the "like product".

69. The firms producing lamb meat are not producing "like product" to growers and feeders, which are producing feeder lambs and slaughter lambs.

70. In order to sustain the US's definition of the domestic industry producing the "like product", the Panel must make two determinations. First, whether the US's criteria for determining the "domestic industry" are consistent with the definition of "domestic industry" in SG Article 4.1(c). More specifically, whether upstream producers may be included in the domestic industry producing the like product based on a "continuous line of production" and a "substantial coincidence of economic interest" between upstream and downstream producers. Second, if these criteria are consistent with the Safeguards Agreement, whether the record of the USITC investigation demonstrated that these two criteria were satisfied.

71. These are threshold issues for the Panel. The US has established its own test for deciding when to expand the scope of "domestic industry" to producers of upstream products. The question is whether this test is consistent with the Safeguards Agreement and, if so, whether its application warranted the inclusion of growers and feeders in the "domestic industry" of firms producing lamb meat.

72. Australia has shown and elaborates further below that this test has no textual basis in the Safeguards Agreement. The US has failed to prove any link between its test and the Safeguards Agreement, SG Article 4.1(c) in particular. Thus the US is not justified in doing this, i.e. to include growers and feeders in the definition of "domestic industry".

⁹ Page I-12 of the USITC Report.

¹⁰ See paragraph 107 in Australia's First Submission.

3.3.2 US's assertions

3.3.2.1 *The US's arguments concerning "Vertical Integration" are irrelevant in this case and further belie the fact that the USITC's investigation did not establish a basis for treating the "domestic industry" as if it were vertically integrated*

73. Whether "vertical integration" should be able to be taken into account in determining the "domestic industry" is a legitimate question, which may need to be looked at on a case by case basis. However, the extent of vertical integration and the form of such integration (e.g. common ownership of upstream and downstream stages of production and contractual relationships) are not relevant to the Panel's deliberations, since there is no evidence that the US packers/breakers and the growers/feeders were vertically integrated through common ownership or through other forms of integration. This issue has also been addressed by Australia in response to Question 5 from the Panel.

74. The USITC's investigation did not establish any basis for treating the "domestic industry" as if it were vertically integrated and included both growers/feeders and packers/breakers. Indeed, the only evidence of vertical integration is that there is little vertical integration between all the industry segments. There is absolutely no evidence of other forms of relationships between growers/feeders and packers/breakers that would provide a comparable level of vertical integration as common ownership. For example, there is absolutely no evidence of tolling arrangements, the use of cooperatives formed and controlled by growers/feeders to break and pack the product, or any other form of risk sharing, such as contractual agreements to share the risks of price fluctuation of the finished product, between the various stages of production going from growing the lamb to the production of retail cuts of lamb meat. In these circumstances, the Panel does not even need to consider whether and to what extent vertical integration must exist to include upstream producers in the "domestic industry", since there is no evidence of any significant level of vertical integration of any kind.

75. A brief review of the record evidence in the USITC Report makes this clear. If any significant proportion of the more than 70,000 growers were part of a vertically integrated operation to the packers and/or breaker stage, it would have been expected that such firms would have been significant in the USITC's selection of firms for its questionnaire survey. However, what we see is that out of the 49 growers and grower/feeders providing financial information as growers, 42 were not even integrated with feeder operations let alone packer and or breaker operations.¹¹ While the USITC Report says at page II-12 that "[s]ome growers engage in more than one sheep-raising activity, such as feeding and sometimes slaughtering their lambs" the evidence here is that they are not integrated into packers or breakers as substantial commercial operations (despite the implication in paragraph 66 of the US's First Submission). If those operations are to be considered as part of the packer and/or breaker industry segment, then the packer/breaker activities of such firms should have been part of the USITC questionnaire survey- it appears that they were not. Moreover, the fact that some packers might have feeder operations, and that some different feeders might have grower operations, does not justify sweeping up such feeders into the "domestic industry", let alone independent growers.

76. As noted below the figures about the number of feeders provided by the US in its answers to Questions 4 and 14 from Australia and the Panel, respectively, are inaccurate and misleading on this issue. The US said that there were 11 feeders in paragraph 7 in its answers to Australia. This could give the impression of some degree of integration with packers. However, as noted below (see also

¹¹ At paragraph 5 in its answers to Australia's questions on 31 May 2000, the US said that: "[a]pproximately 20 per cent of all growers and grower/feeders who responded to USITC questionnaires indicated they were both growers and feeders."

Attachment A) the 1995 USITC report quoted the National Lamb Feeders Association as saying there were at that time about 100 large-volume feedlots and many small-volume feedlots.

77. At paragraph 69 of its First Submission, the US asserts that to limit the "domestic industry" would impede the "all relevant factors" analysis where there was extensive integration. However, the USITC Report had no difficulty in looking at packers and breakers separately from growers and feeders. Either that or such firms were not included in the questionnaire survey list.

78. If "vertical integration" was a genuine issue in this case, the USITC Report would have needed to do no more than look at the grower activities of packers and breakers, not focus, as it did, on independent growers.

3.3.2.2 The US confuses a "coincidence of economic interest" with matters related to the definition of its "domestic industry", as opposed to matters related to injury

79. The issue of coincidence of economic interest was also addressed in Australia's answer to Question 6 from the Panel. Regardless of whether there was complete pass back, some pass back or no pass back, the relevance of the issue remains unclear. The US has not explained why the finding by the USITC of "coincidence of economic interest" allows the inclusion of upstream industries, in particular growers. The USITC has not adequately documented that a "coincidence of economic interest" even exists. Neither the US in this proceeding nor the USITC in its determination provided any rationale for making a "coincidence of economic interest" a consideration in the definition of "domestic industry" rather than a consideration in the determination of causation. The US has made assertions about the economics but provided neither a factual nor a legal basis for these assertions.

3.3.2.3 Producers and Output

80. In paragraph 30 of its answers to Question 3 from the Panel, the US argues that (Footnotes 21 and 22 referring to different dictionaries are omitted):

'The ordinary meaning of the term "product" is defined as the "output" of an industry or firm'

and

' "production" is defined as the "total output especially of a commodity or an industry." '

81. SG Article 4.1(c) says:

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

82. The US is arguing that where something is called an "industry" the concept of "production" and "output" can be attributed to the earliest upstream products (i.e. the feeder lambs) as well as the intermediate products (i.e. the slaughter lambs) of that "industry", rather than the actual output of that "industry", the "like product" (i.e. the lamb meat). The concept of "firms" producing the "like product" is, therefore, in the US's eyes, not relevant.

83. The US is trying to argue implicitly that in the expression "producers as a whole of the like or directly competitive products" the individual firms, i.e. the "producers", need not actually produce the

"like product", but need only contribute to its production as part of the "industry". Not only is there no dictionary definition to support this proposition, it is inconsistent with the clear definition of the "domestic industry" in the Safeguards Agreement.

84. Australia submits that "producers as a whole of the like or directly competitive products" refers to the producers of the actual "like product" (in this case, since the US relies on "like product"). Thus in the next phrase "those whose collective output ... " refers to producers whose aggregate output is a major proportion "of the like product" output. To argue otherwise would result in "those whose collective output ... " being a larger group of firms than "the producers as a whole" of the "like product" and, according to the US's definition, could include any number of producers of upstream inputs into the "like product".

85. Australia submits that the US has not established any basis for such an interpretation of the text of the Safeguards Agreement. Moreover, while the US claims to limit its practice to certain circumstances (processed agricultural products), there is similarly no support for special treatment for certain products in the text of the Safeguards Agreement. If the US's interpretation were to be adopted, it would expand the definition of the "domestic industry" to producers of upstream inputs into the "like or directly competitive products" without providing any clear guidelines for when upstream producers should be included.

86. The US's approach would extend the Safeguards Agreement and remedies thereunder well beyond any plausible interpretation of the "domestic industry" producing the "like or directly competitive products". For example, the "domestic industry" for imports of passenger motor vehicle would include not just the final manufacturers, but also all the domestic component producers, regardless of their relationship to the final manufacturers. Similarly, an industry manufacturing steel products would presumably include all upstream producers, potentially including suppliers of iron ore, coal, coke, scrap and other inputs into the steel making process. If the US's interpretation were to be adopted, then in many cases involving fabricated products, the Member would *have* to include all upstream industries. The US does not do this - no Member does it. There is nothing in the Safeguards Agreement that suggests that the scope of the definition of "domestic industry" is so expansive, that import relief is intended to be so all encompassing, or that Members may expand the definition of "domestic industry" beyond those producers whose "output" actually is the "like product" (or "like or directly competitive products".)

3.3.2.4 In defending its actions, the US erroneously implies that it can apply the remedy crafted for one definition of "domestic industry" to a subset of firms without a new investigation into injury, causation, and remedy

87. The US is arguing, or at least leaving scope to argue, that even if the "domestic industry" was just packers and breakers, the USITC's findings would have been the same. Australia also responded to this issue in its answer to Question 10 from the Panel.

88. Redefining the "domestic industry" to include just the packers/breakers fundamentally alters all aspects of the analysis of injury and causation, as well as the determination of the remedy in compliance with SG Article 5.1. In terms of injury, the fact that a "domestic industry" defined as growers, feeders, packers, and breakers is going to experience serious injury in the aggregate, does not allow an *ex post facto* determination that the packers/breakers are going to experience serious injury. In terms of causation, removing the growers/feeders from the "domestic industry" means that they are a potential cause of injury to the remaining "domestic industry", the packers/breakers. Finally, a remedy targeted at the growers, feeders, packers, and breakers and complying with SG Article 5.1 is unlikely to be the same as a remedy targeted at a more narrowly defined "domestic industry". Certainly, the *demonstration* that the measure is "not more restrictive than necessary" must be different for the two cases. In short, the analytical frameworks for causation and remedy - and the factual determinations change depending on the definition of "domestic industry".

3.3.2.4.1 *The USITC's determination is wholly based on a wrong definition of "domestic industry"*

89. The USITC defined the "domestic industry" that it would use in its determination of injury, causation, and remedy. All aspects of the USITC's determination are based on this threshold determination. It is not simply a matter of the analysis on pages I-16-21 of the USITC Report but also the subsequent causation analysis, the USITC's determination, the USITC's recommendation of the remedy, and the ultimate determination by the US of the actual measure. The USITC's choice of "domestic industry" affected each and every phase of the investigation and determination, and then the ultimate decision on the actual measure by the US.

90. One of the purposes of the requirements for a public report and to make notifications to the Committee is to enable an affected Member to challenge the basis for the measure under the WTO dispute settlement system. If a Member could simply rebut arguments by revising the reasons for a decision, it would make disputes a farce. It would also fundamentally weaken the obligations on a Member and shift the goal posts about what a complainant has to prove.

3.3.2.4.2 *Facts about packers and breakers*

91. Nevertheless Australia will make some comments in the alternative, if the Panel considers that it should consider whether US could have come to the same conclusion with a "domestic industry" limited to packers and breakers. As already noted Australia has also made comments on this in its answer to Question 10 from the Panel.

92. The failures of the USITC Report to obtain adequate evidence and to examine all relevant factors apply to packers and breakers in the same way as they applied to the USITC Report's consideration of the "domestic industry" comprising all four industry segments. Similarly, there is the same failure to comply with SG Article 4.1(b) and 4.2(a), including the issue of proof that serious injury was "imminent".

93. Moreover, what can be made of the findings on pages I-16-21 of the USITC Report given that there was no attempt to give any weighting or significance to the seriousness of injury to the various industry segments.

94. In addition, on the basis of the indexed data provided by the US at Exhibit US-41, there is no evidence of "threat of serious injury" to packers and breakers.

95. For *packers*, Table 8¹² shows that for Interim 1998, there were only very small falls in production and shipments, with the reduction in capacity utilization almost entirely due to the increase in capacity. Table 16 shows that net sales were up, and, while it is difficult to read such indexed data, the drop in profits appears to be due to increases in direct labour and other processing costs. Even so the packers are still making a profit. Table 21 shows that there was massive capital expenditure in 1997 (around 12 times the normal annual level).

96. For *packer/breakers*, Table 18 shows that net sales, profit and cash flow were all up for Interim 1998. Table 21 shows that capital expenditure was up in Interim 1998. Table 21 shows that there was massive capital expenditure in 1995 and 1996 (or about 10 times the level over 1993 and 1994).

¹² Reference to tables in this sub-section are to Exhibit US-41.

97. For *breakers*, Table 3 shows that for Interim 1998, production was up, shipments were up in both volume and value. The decline in capacity utilization was due solely to the very large increase in capacity. An indexed version of Table 20, "Results of operations" has not been provided.

3.3.3 Conclusion on "domestic industry"

98. Thus the definition of "domestic industry" used by the USITC is inconsistent with SG Article 4.1(c). This "domestic industry" was used by the USITC to reach its injury findings, including causation, and its recommendation on remedy. This "domestic industry" was also used in whatever the US did after the USITC Report in deciding on the extent of the measure. Accordingly, the findings on injury and on the measure are irretrievably flawed and cannot be cured. Therefore, the measure is inconsistent with SG Articles 2.1, 4, and 5.1.

3.4 "THREAT OF SERIOUS INJURY"

3.4.1 "Clearly imminent"

99. It is an explicit part of the definition of "threat of serious injury" under SG Article 4.1(b) that serious injury to the "domestic industry" must be "clearly imminent". If it has been determined (as in the current case) that the "domestic industry" is not experiencing present serious injury, then there must be some new or changed circumstance that will cause serious injury to be experienced by the "domestic industry". This must involve also a significant change in the overall position of the "domestic industry".

100. The USITC provided no explanation of what circumstances were changing that would cause serious injury or why the serious injury was "clearly imminent". The US was not prepared to explain what it meant in SG Article 12.3 or DSU consultations. The US has still not addressed the question of what is meant by "clearly imminent", either in its First Submission or in its Opening and Closing Statements on 25&26 May 2000. In Australia's view this means that the US accepts that it has not met this requirement, out of many, in the determination of threat of serious injury.

101. There are two aspects: (1) it must be demonstrated that there are circumstances that will lead to serious injury occurring; and (2) the occurrence of the serious injury must be imminent.

3.4.1.1 *A determination of threat of serious injury must be based on a finding that serious injury will be experienced absent a significant change in circumstances*

102. It cannot be a matter of conjecture or mere possibility that serious injury is going to occur. Where there is no serious injury being experienced, the finding must be that it will occur unless there is some significant change in circumstances. This is quite different from what the USITC Report says in concluding its finding on threat at page I-21:

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

Thus the finding is based on the period 1993 to Sept 1998 (period of investigation) without any substantial reason why there would be some significant change in circumstance so that there would be serious injury in 1999.

103. Moreover, the US in its First Submission¹³ adduces as proof the USITC questionnaire survey of Australian and New Zealand exporters about imports in 1999. However, that discussion on imports in the USITC Report comes later than the finding of "threat of serious injury" on pages I-16-21, it is part of the causation analysis. This is a rewriting of the USITC Report by the US.

104. A fundamental problem with the USITC Report approach in reaching the conclusion of threat of serious injury is that it is a static analysis that gives no basis for reaching conclusions on what will happen or when it will happen.

105. Moreover, the USITC Report concluded that the increase in imports would be much lower than the quotation from the US above. For example, at Footnote 171 on page I-34 of the USITC Report projected that imports in 1999 would only rise by 4.5 per cent. If the US is relying on the figure of 21 per cent for proof, then that is at odds, not only with the sequence of reasoning of the USITC Report, but also with the finding of its own competent authority on the projected number.

3.4.1.2 In the threat context, serious injury must be imminent

106. The issue of when the serious injury is going to occur is critical. The US treats this as if "imminent" means no more than injury may occur at some time in the future without any indication of when that might be. In this case the USITC made a finding in February 1999 on the basis of data to Sept 1998 (or in some cases only to 1997) about threat without any indication of when it would occur. The USITC Report was not released until April 1999 and the measure was not imposed until July 1999. Under the Safeguards Agreement the measure was applied in July 1999 on the basis that the "domestic industry" was going to suffer serious injury imminently. The US could not have known what was going to happen and when it was going to happen on the basis of the USITC Report.

107. Australia elaborated on the meaning of "imminent" in its First Submission, in particular at paragraphs 189-206. A threat case is necessarily about the future. To refuse to attribute any substance to "imminent" is to say that it has no meaning. That is to try to write the term out of the Safeguards Agreement. A safeguard measure is an extraordinary measure for emergency action.¹⁴ How more extraordinary then is safeguard action on the basis of threat where no serious injury is being experienced let alone being caused by increased imports. Such action can only be justified under the stringent conditions laid down in SG Article 4.1(b).

108. The approach taken in the USITC Report to the issue of "threat of serious injury" on pages I-16-21 in practice probably precluded it from reaching a meaningful conclusion about "clearly imminent" (regardless of the circumstances of this particular case). However, its approach did not relieve the US of its obligations to have made a meaningful determination in respect of "clearly imminent" before applying the measure.

3.4.1.3 The US seeks to rewrite the USITC Report on "imminent"

109. The US has sought in a number of places in its First Submission to rewrite the USITC Report on "imminent". Its comments essentially misrepresent what the USITC Report claims that the USITC did. For example, the comments on "imminent" are at paragraphs 134-136. In paragraphs 134 and 136 of its First Submission, the US says that the USITC looked at the shift in the mix of imports and the trends in projections for 1998 and 1999. In the second sentence of paragraph 136, the US says:

¹³ At paragraphs 24 and 84.

¹⁴ See Appellate Body reports on *Korea - Dairy Safeguard* and *Argentina - Footwear Safeguard* at paragraphs 86 and 93, respectively.

"Three of the USITC Commissioners expressed the additional view that they did not believe the exporters would have exaggerated their near-term future exports to the United States, since an overstatement would not likely have been in their interest. [Footnote 167: USITC Report at I-23 n.23.]"

110. The problem with this rewrite is that the USITC Report came to the conclusion on "imminent" in the section on "Serious injury or threat of serious injury" on pages I-16-21. However, the arguments the US makes referred to above, are in the section on causation on pages I-21-26. The comment quoted above obviously did not represent the actual facts - at Footnote 171 on page I-34 the USITC projected exports in 1999 to increase by 4.5 per cent.

3.4.1.4 The US seeks to rewrite the USITC Report on "threat of serious injury"

111. At paragraphs 79-82 of its First Submission, the US sets out what it describes as "the essence of the USITC's threat determination". The four points claimed were: the surge and projected surge of imports from Australian and New Zealand; the change in the mix of fresh/chilled and frozen products; falling prices and the USITC finding that prices would continue to fall in the future; and the economic indicators of the "domestic industry" stabilized in 1996 but deteriorated in 1997 and 1998 and when imports surged the deterioration was projected to continue into 1999.

112. A major problem that the US faces with this alleged "analysis" is that it never happened. The US has taken bits and pieces from the threat analysis, from the causation analysis, and from the factual section of Part II and sought to weave them into a new argument. The first three points were not argued by the USITC in its threat analysis - as discussed in the context of causation they are also a rewrite of what the USITC report said. The fourth point is also a blend of misquotation and mixture of causation and threat analysis. The points on imports were again under the section on causation. The only point on stabilization in 1996 or at any other time in the section on threat is at pages I-17-18:

"While not truly healthy during any part of the period of investigation, by 1996 per capita lamb/ mutton consumption appeared to be stabilizing to some degree, and lamb prices were generally higher, offsetting in part the loss of the Wool Act payments in that year. In mid-1997, economic indicators relating to the industry began to fall. As described below, the deterioration in these indicators that occurred after 1996 confirms that the industry is threatened with serious injury." [Footnotes 59 and 60 omitted.]

113. The stabilization of consumption is shown at table 36 on page II-69, which is no more than that per capita consumption of lamb and mutton was 1.1lbs per capita over 1995, 1996 and 1997, falling from 1.2lbs per capita in 1994. The USITC did not say that "the economic indicators relating to the health of the domestic industry had stabilized by 1996 after the termination of the US Wool Act". Indeed, this would have been untrue. What happened was that there was a temporary spike in prices due to flock liquidation that continued to destabilize the markets.

3.4.2 Consideration of all relevant factors

3.4.2.1 Australia's argument

114. Australia in its First Submission proved that the USITC had relied on inadequate data for its conclusions. Thus the USITC failed to examine those factors for which it relied on such data.

115. The USITC also even in the context of that inadequate data failed to examine all the relevant factors listed in SG Article 4.2(a) as required.

3.4.2.2 *US's assertions*

116. The US said at paragraph 150 in its First Submission that regarding USITC questionnaire response data:

"Complainants have not suggested any reason why this approach constituted anything less than an objective evaluation of the evidence."

117. The US uses the same term "objective evaluation" for the heading of the section V.D.5.a.

118. This is simply untrue, unless this is a play on words with the use of "evidence", i.e. the evidence used by the USITC. The US is seeking to lower the requirements of the Safeguards Agreement. SG Article 4 requires an "evaluation of all relevant factors of an objective and quantifiable nature" and the evaluation must be based on "facts". Australia's argument, in part, is that the data set, and the evaluation, were grossly inadequate for an assessment to satisfy the requirements of SG Article 4. Australia proved this in its First Submission.

3.4.2.2.1 *The inadequate data for growers*

119. At paragraph 150 of its First Submission, the US says that:

"The USITC noted that the sheer size of the domestic industry – over 70,000 growers in 1997 – made it impossible for the USITC to canvass a large percentage of the industry or even to develop the kind of statistically valid sample used for smaller, less dispersed industries. "

120. No explanation is given by the US either of the basis for the choice of the 110 growers as recipients of the 110 questionnaires or why some form of statistically valid sample could not have been obtained. The USITC Report relies on its questionnaires for financial data. For this it had only 47 responses from growers and only 42 responses from growers that were not feeders. This is 42 out of more than 70,000 without any justification for why this should be considered in any way representative. Moreover, only 27 of the growers had information on operations in Interim 1998. Australia submits that this cannot be considered to be an adequate evaluation of the financial condition of the industry segment, which is the basis for the USITC finding on "threat of serious injury".

3.4.2.2.2 *The inadequate data for grower/feeders*

121. Paragraph 164 of the US's First Submission says:

"Australia complains that the USITC obtained data from only three grower/feeder operations, and that the USITC did not receive interim 1998 data from these firms that would have been relevant to a threat finding. It is not clear what point Australia is trying to make here. In finding that the domestic industry was threatened with serious injury, the USITC based its decision in part on the deterioration in the condition of the industry during interim 1998. To the extent that the USITC did not have interim 1998 data on grower/feeder operations, it did not rely on such data."
[Footnote 196 omitted.]

122. Australia complains that for grower/feeders, the USITC only had information to 1997. Where the US says above that

"the USITC based its decision in part on the deterioration in the condition of the industry during interim 1998"

this must be on the basis of the condition of other industry segments, since the USITC had no information on 1998 for this group of firms.

123. Australia's argument is that there is no way on the basis of a small number of firms with data only to 1997 that the USITC could have made an adequate examination of the factors concerned to arrive at the conclusion in 1999 that these firms were being threatened with imminent serious injury.

124. Moreover, while the information provided to the Panel in Exhibit US-41 is indexed, Table 14 shows that sales and net sales values by grower/feeders were at record levels in 1997. (Table 14 only contains data to 1997.)

3.4.2.2.3 *The inadequate data for packers and breakers*

125. The USITC Report says nothing about the coverage of the one breaker, or even of the coverage of the two packer/breakers and the one breaker, of the processing operations for lamb meat.

126. Paragraph 165 of the US's First Submission also says:

"As the authority's report indicates, many of the packers and breakers devote only a portion of their overall operations to the processing of lamb [*Footnote 200: USITC Report at II-15.*] and were unable to provide separate data on lamb meat operations." [*Emphasis added.*]

The comment after the footnote (underlined in italics) does not appear at the same reference and appears to be an interpolation.

127. Nonetheless, the US is saying that because there were no separate data on lamb meat operations those firms should not be considered. The firms at issue move between lamb, older sheep and other species without fuss. If they did not have separate data, it would be reasonable to assume that they were not suffering injury or even threat of serious injury: certainly, the contrary would be pure speculation. In effect these firms were excluded from the consideration of "domestic industry" because there was no injury issue in respect of imports of lamb meat. Nothing in the Safeguards Agreement allows the USITC to pick and choose in this way. The US has said in its First Submission, e.g. at paragraph 124, that the USITC made its determination of "the industry as a whole". Firms that pack or break other meats as well as lamb meat are just as much part of the industry producing lamb meat and cannot simply be disregarded.

3.4.2.2.4 *Numbers of firms in each industry segment provided in answers to questions from the Panel and Australia*

128. The US provided some data on the numbers in its answers to Questions 14 and 4 from the Panel and Australia, respectively.

129. The number for feeders (11) is misleading and appears to be no more than the number of firms responding to questionnaires. A similar comment may be true for feeder/growers (7). The 1995 USITC report said that:

"Officials of the National Lamb Feeders Association report that there are probably only 100 large-volume lamb feedlots in the United States, although there are many small-volume feedlots."¹⁵

This is inconsistent with the US's responses to the Panel's and Australia's questions. Moreover, given the 571 packers, it says exist, 18 feedlots would provide an unusual industry structure.

130. The number of breakers is given at "less than 10 major firms". However, the Panel's question was how many breakers there are. Questionnaires were sent to 16 firms. Presumably, breakers are registered with the government and could be identified. Indeed, given the premium received by domestic lamb meat for being USDA graded, essentially all firms breaking lamb meat would be registered with the USDA.

131. At paragraph 95 of the US's answers to the Panel, the 4 packer/breakers corresponds to the number identified through questionnaires - this says nothing about how many there are.

132. The reference in paragraph 97 of the US's answers to the Panel to receiving useable data on 5 packing operations, from 2 packer/breakers and 4 breakers presumably involves some double counting, or only minimal data was provided by most. On Page II-24 the USITC Report says that data were provided on lamb meat operations by 2 packers, 2 packer/breakers and 1 breaker.

133. At paragraph 98 of the US's answers to the Panel, it is unclear how the figure of 6 per cent is arrived at given that there are two separate products here, feeder lambs and slaughter lambs. The reference to useable data, neglects the fact that only 27 growers and no feeder/growers provided data for Interim 1998 - even though this is a "threat of serious injury" case.

134. At paragraph 100 the US is implying that the USITC Report relied on a major proportion argument. This is not evident from the USITC Report. Moreover, while Australia agrees that the Safeguards Agreement is not prescriptive about what constitutes a major proportion, it must be "those [producers] whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production" of lamb meat. Nowhere does the USITC Report indicate how it determines this in a multi-tier "domestic industry" such as it uses in this case. The US dwells on the proportion of value added by growers. If this is its basis of "major proportion", then it highlights the problem of reaching a determination on the basis of only 27 growers out of more than 70,000 providing no data for Interim 1998.

135. The US notes in paragraph 102 in its answer to Question 15 by the Panel that the growers were selected for the questionnaire survey on the basis of being the largest recipients of National Wool Act subsidies. This emphasizes the non-representative nature of the growers selected and may reflect a greater vulnerability to the termination of the National Wool Act subsidy programme.

136. At paragraph 106 of its answer to Question 16 from the Panel, the US says that:

"Indeed, nothing in the Agreement requires the authority to issue questionnaires at all."

137. Australia does not dispute this. However, the Safeguards Agreement does require that the investigation be based on facts and as the *Korea - Dairy Safeguard* panel report at paragraph 7.30 said:

¹⁵ At page 2-5 of electronic copy -see Attachment A.

"For us, an objective assessment entails an examination of whether the KTC had examined all facts in its possession or which it should have obtained in accordance with Article 4.2 of the Agreement on Safeguards (including facts which might detract from an affirmative determination in accordance with the last sentence of Article 4.2 of the Agreement on Safeguards), whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of Korea. Finally, we consider that the Panel should examine the analysis performed by the national authorities at the time of the investigation on the basis of the various national authorities' determinations and the evidence it had collected." *[Emphasis added.]*

Thus, as a practical matter, in virtually all cases questionnaires would be required in order to comply with the evidentiary requirements of the Safeguards Agreement.

3.4.2.2.5 *Australia did not suggest that the USITC should have "compelled" firms to answer questionnaires*

138. At paragraph 160 the US's First Submission says that:

"Australia's suggestion that the USITC should have compelled answers to questionnaires, or obtained a particular response rate or level, has no basis in the Safeguards Agreement. The Agreement sets forth no specific standard of investigative thoroughness." [Footnote 191 omitted.]

139. It is simply untrue to say that Australia suggested that the USITC should have compelled answers to questionnaires in respect of growers or any of the industry segments. Australia submits that there is an obligation on a Member to ensure that an investigation is thorough and is properly carried out in all details. The Safeguards Agreement does set forth a high standard of investigative thoroughness on all issues, including the injury investigation under SG Article 4.

140. There is no obligation under the WTO for a Member to take safeguard action. The US did not have to do this. The investigation was being held, and the measure was imposed, to benefit the "domestic industry". All parts of this "domestic industry" were supposed to be being threatened with imminent serious injury. Indeed, the petitioners argued that serious injury was already being experienced. However, the US is saying that to have got more than 27 growers, 8 feeders, 0 grower/feeders, 2 packers, 2 packer/breakers, and 1 breaker to provide data on lamb and lamb meat operations for Interim 1998, the USITC would have had to have *compelled* them to answer. The situation begs the question why the USITC was reluctant to ask a wider number of firms and why so many of those firms asked, who allegedly considered that they were suffering serious injury caused by increased imports, were so reluctant to answer questionnaires. All the USITC had to do would have been to point out that it would be in their interest to respond, since without adequate data it would have to reach a negative determination. If the case was genuine with widespread support, then such a statement should have been sufficient to draw forth a high level of responses.

3.4.2.2.6 *Panel's responsibilities in assessing the adequacy of data and consideration of the examination of factors under SG Article 4, in particular those listed in SG Article 4.2(a)*

141. As set out at paragraph 120 of Australia's First Submission, Australia submits that: "the Panel needs to assess objectively whether the US met its obligations in examining the data that it had collected. However, the Panel also has the responsibility to decide whether the US met its obligations in collecting the right data to allow it to make a determination in conformity with the requirements of the Safeguards Agreement, and in particular SG Article 4."

142. The Panel's assessment of adequacy must also be against the background of what the USITC claimed to have found. In particular the USITC Report made a finding of threat of serious injury on the basis of poorly collected data up to September 1998, or in some cases only to 1997, where it also found that serious injury was not being experienced on the basis of the same data.

143. Paragraph 151 of the US's First Submission says:

"In view of the relatively small coverage of these responses, the USITC did not place decisive weight on questionnaire data received from growers."

144. This is a revealing acknowledgement in light of what the questionnaire data show for the factors listed in SG Article 4.2(a) for growers:

- increase in imports - none for feeder lambs (not questionnaire data)
- share of the domestic market - 100 per cent for feeder lambs (not questionnaire data)
- changes in the level of sales - increased
- production - increased
- productivity - not calculated for questionnaire data but would appear to have increased in 1998 (see Footnote 78 at pages I-18&19)
- capacity utilization - not examined
- profits and losses - net income without subsidies positive compared to negative for each year over 1993-96 (see Table on page 42 following paragraph 153 in Australia's First Submission)
- employment - increased.

145. At the top of page I-19 the USITC Report notes the emphasis that it puts on the financial data from the questionnaires ("in particular questionnaire data on the declining financial condition of the industry") in its threat finding. On page II-24, the USITC Report says that: "[t]here is no data available from the USDA on the financial condition of the lamb industry." Without the questionnaire data the USITC Report would have failed to provide even comment on even more of the factors listed in SG Article 4.2(a). For example, for growers, the questionnaire data was required for profits and losses and for employment, and was used for sales. The USITC Report was similarly dependent on questionnaire data for the other industry segments.

146. The WTO Agreement does allow such an extraordinary action as applying a safeguard measure, but only if the requirements of the Safeguards Agreement and GATT 1994 Article XIX have been properly complied with, which includes a thorough investigation. The investigation in this case fell well below what was required of the US.

147. The US has not answered the key issue about inadequacy of the data in examining the factors on which a finding the industry segments were threatened with imminent serious injury.

3.4.3 Causation

3.4.3.1 Australia's arguments

148. As shown in Australia's First Submission, the USITC Report's finding on causation was seriously flawed:

- the "domestic industry" was not experiencing serious injury - indeed there is no indication in the USITC Report that any industry segment was experiencing serious injury - let alone serious injury being caused by imports
- it was not possible to determine what would happen in the future without some prospective analysis of the conditions prevailing for the "domestic industry"
- no indication was given of the different conditions expected for the different segments of the "domestic industry" and why there was to be serious injury going to be caused to "producers as a whole"
- the finding that the "domestic industry" was threatened with imminent serious injury was based on inadequate data to Sept 1998 or in some cases only to 1997
- the same inadequate data was used for the causation analysis
- no rationale was provided how the USITC could reach a conclusion about causation of serious injury in 1999 on the basis of data to Sept 1998 for the "domestic industry", with data for some groups in the "domestic industry" only to 1997
- not all factors set out in SG Article 4.2(a) were examined even on the basis of the inadequate data
- the USITC Report recognized that other factors were having an adverse effect on the "domestic industry", and indeed were "causes of the threat of serious injury" but made no attempt to assess the collective injury then and in the future attributable to them.

149. SG Article 2.1 requires that increased imports "cause or threaten to cause" serious injury to the "domestic industry". SG Article 4.2(b) provides that the causal link between imports and serious injury or threat thereof must be demonstrated on the basis of objective evidence and in consideration of relevant factors outlined in SG Article 4.2(a). Injury caused by other factors cannot be attributed to increased imports. In light of these requirements, the USITC Report provides an inadequate and flawed causation analysis both in terms of the data used, the factors examined in assessing serious injury, and the USITC's failure to ensure that it did not attribute to increased imports injury caused by other factors.

3.4.3.2 US's assertions

150. At paragraph 90 of its First Submission the US says:

"Moreover, the USITC found that the payments had gone only to part of the industry, to lamb growers and feeders; *the packer and breaker segments of the domestic industry never received payments under the Wool Act.*" [Footnote 131 omitted.]

151. Australia never claimed that packers and breakers received National Wool Act subsidies. The issue is that the removal of those subsidies had a destabilizing impact on growers and the consequent flock liquidation not only reduced the basis for future production of lambs and hence also

lamb meat, but also led to a brief price spike in 1996 and 1997. The impact of this destabilization continued on and led to an incorrect assessment of causation in the USITC Report.

152. The removal of those subsidies affected packers and breakers because it not only destabilized prices but also led to a resumption of the downward trend in the flock size and so to a reduction of the throughput of domestic lamb meat for packers and breakers.

3.4.3.2.1 *The US's reference to the Atlantic Salmon Code panel is wrong*

153. Paragraphs 54ff and 74ff in the US's answers to Questions 7 and 10 from the Panel, respectively, refer to the panel report on *United States - Atlantic Salmon from Norway* under the Tokyo Round Anti-Dumping Code (ADP/87). At paragraph 55 of its answers, the US approvingly quotes paragraph 555 of the Code panel:

'As the panel noted, the Tokyo Round Anti-Dumping Code contained no affirmative guidance on how other causal factors were to be examined. Rather, as it found, the primary focus of the relevant Code provisions concerning injury determinations was on specific factors that authorities should consider in examining the effects of imports. It concluded there was no requirement, "in addition to examining the effects of the imports" under those provisions, that "the USITC should somehow have identified the extent of injury caused by these other factors in order to isolate the injury caused by these factors from the injury caused by the imports from Norway. [Footnote 50 omitted.] "'

154. While WTO panels can of course seek guidance from the arguments and reasoning of Code panels, the report was not adopted by the CONTRACTING PARTIES but by Parties to the Code. Thus the adoption was not under GATT 1947 and so not part of GATT 1994.

155. Moreover, there are significant differences between the two cases.

- *United States - Atlantic Salmon* was under the Anti-Dumping Code and was not about safeguards under Article XIX.
- The text of Article 3:4 of the Code is very different from that in SG Article 4.2(b).
- Indeed the text of Article 3:4 of the Code is different from that in Article 3.5 of the WTO Anti-Dumping Agreement.

156. The Code panel's analysis of the provision focused (in its paragraphs 550-553) on the contrast between the specific and mandatory nature of the analysis required in the first sentence of Article 3:4 (including Footnote 4) and the less specific language of the second sentence, using "may" (and using "can" in Footnote 5), regarding the examination of other factors.

157. This language was strengthened in the WTO Anti-Dumping Agreement, suggesting that care should be taken when using the reasoning of the *United States - Atlantic Salmon from Norway* panel. Moreover, despite what the US says about the differences in the language with that in the Safeguards Agreement being insubstantial¹⁶, the differences are marked.

158. The Code text was:

¹⁶ Footnote 69 of the US's answers to the Panel's questions.

"It must be demonstrated that the dumped imports are, through the effects [*Footnote 4 omitted*] of dumping, causing injury within the meaning of this Code. There may be other factors [*Footnote 5 omitted*] which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports."

159. SG Article 4.2(b) says:

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

160. There is nothing non-mandatory about the language in SG Article 4.2(b). The finding under the second sentence of SG Article 4.2(b) regarding the impact of other factors is necessary for the final determination in the first sentence on the existence of the causal link between increased imports and serious injury or threat thereof. In order to do this an examination is needed of the *collective* effect of *all* other factors. Once the injury¹⁷, present or future, being caused collectively by other factors has been determined, then, and only then, can a determination be made about whether increased imports of themselves are (in this case) going to cause serious injury imminently to the "domestic industry".

3.4.3.2.2 *The US seeks to rewrite the USITC Report on causation*

161. Australia will not go over the same ground as before but limit itself to three points.

162. Firstly, the characterization in paragraphs 79-82 of the US's First Submission misrepresents what was actually in the USITC Report section on causation. In particular, it mixes up the sections on "Conditions of competition" and "Analysis of causation". In so doing it misrepresents the issue on product mix of fresh/chilled and frozen. The analysis on the last paragraph of page I-22 of the USITC Report is to the effect that domestic lamb meat and imported lamb meat are substitutable.¹⁸

163. Secondly, the US seeks to mix up the lines of analysis by the USITC, e.g. at paragraph 88 of the US's First Submission, the US says:

"The USITC also found that financial performance across all industry segments deteriorated sharply in 1997 and interim 1998, and attributed this decline largely to falling prices *caused by increased imports*. [Footnote: 124: USITC Report at I-20.]"
[*Emphasis added.*]

164. The emphasized phrase is not in the USITC Report at page I-20, either explicitly or implicitly - the US has simply added it here to support its argument.

165. Thirdly, an example of where Australia does disagree with the USITC Report (despite the US comment in paragraph 86 of its First Submission), is the issue of the adjustment time of growers and feeders. The USITC Report itself (e.g. page II-52) puts the feed lot time at 2-4 months. This is the time cycle that confronts feeders. Moreover, to the extent that the US argues that feeders can push prices down for growers, then the less that feeders are adversely affected by lower prices for lamb

¹⁷ In SG Article 4.2(b), this refers to all levels of injury and not just "serious injury".

¹⁸ Even that finding was qualified by the USITC Report saying: "[t]here is, nonetheless, evidence of differences between products from different sources."

meat - they may make larger or smaller profits depending on how and when they buy feeder lambs and how and when they sell slaughter lambs in the context of market fluctuations. However, they can adjust quickly. To put the period of 2-4 months in perspective, there were more than 9 months between the filing of the petition with the USITC and the application of the measure. There is no argument in the USITC Report to suggest how an industry with this type of cycle could suffer threat of injury in this manner. If serious injury to feeders was clearly imminent in February 1999, then it must have been over by the time the measure was actually applied.

3.4.4 Conclusion on "threat of serious injury"

166. Thus the USITC Report failed to fulfil the requirements of SG Article 4 on the determination of "threat of serious injury" caused by increased imports. Therefore, the measure is inconsistent with SG Articles 2.1 and 4.

3.5 MAINTAINING A SUBSTANTIALLY EQUIVALENT LEVEL OF CONCESSIONS AND OTHER OBLIGATIONS

167. The US argued in its First Submission that:

"When read in conjunction with Article 12.3, Article 8.1 requires a Member to engage in consultations in advance of applying a safeguard measure. It does not impose an obligation to offer or provide trade concessions as a condition for applying such a measure." *[At paragraph 261.]*

and

"Thus, the only obligation that Article 8.1 imposes on a Member considering a safeguard measure is to provide an opportunity for prior consultations. The United States satisfied that obligation." *[At paragraph 262.]*

168. SG Article 12.3 requires prior consultations by itself. The US is arguing that the reference to SG Article 8.1 in SG Article 12.3 is otiose when the right of the affected Member to take immediate retaliatory action under SG Article 8.2 is suspended under SG Article 8.3. That is not a permissible approach to treaty interpretation.

169. Similarly, the US is arguing that the reference to "shall endeavour ..." in SG Article 8.1 is also superfluous when the affected Member cannot take immediate retaliatory action under SG Article 8.2 because of the suspension under SG Article 8.3. Again that is not a permissible approach to treaty interpretation.

170. If "shall endeavour ..." in SG Article 8.1 only applied when SG Article 8.3 did not apply, it would have said so. Similarly, if the reference to SG Article 8.1 in SG Article 12.3 only applied when SG Article 8.3 did not apply, the text would have said so.

171. Both SG Articles 8.1 and 12.3 apply when a Member is "proposing to apply ... or seeking an extension ...". They do not apply immediately after the three year suspension under SG Article 8.3 expires. Thus the US's argument is that the obligation to endeavour to maintain a substantially equivalent level of concessions and other obligations does not apply for the first four years of a safeguard measure.

172. The US also asserts in paragraph 265 of its First Submission that:

"To ensure this objective, they permitted Members to impose safeguards for a limited period without fear of "having to pay" for such action."

173. The US points to no provision in the Safeguards Agreement where this is specified. If that was the intent of the drafters, it could have been expected to have been spelled out in the text. The actual text of the Safeguards Agreement simply removes the right to take retaliatory action within the first three years of a measure in conformity with the Safeguards Agreement.

174. At paragraph 266 of its First Submission, the US goes on to say:

"For Australia to now argue that a Member must offer substantially equivalent concessions for the application of safeguard measures during the three-year period referred to in Article 8.3 jeopardizes the objective to re-establish multilateral control because it would encourage Members to find methods outside of the Safeguards Agreement to protect their injured domestic industries. Such an outcome would defeat a key purpose of the Agreement."

175. The US's argument appears to boil down to an assertion that to endeavour to reach some mutually satisfactory arrangement with affected exporters would place too heavy a burden on the Member proposing to apply a measure. However, this is an extraordinary measure and there is nothing in the Safeguards Agreement that suggests that it should be easy and costless to take safeguard action. If a Member can deal with the situation outside the Safeguards Agreement in a manner consistent with the WTO such as through structural adjustment measures, this would be generally welcomed. If, however, the US is saying that if it has to comply with SG Article 8.1, it will act in breach of SG Article 11.1(b) through imposing, for example, so-called voluntary export restraints, then it is saying that it will not comply with its WTO obligations. The refusal of a Member to comply with its WTO obligations is not a legal justification for removing an obligation under the Safeguards Agreement.

176. At paragraphs 279-281 of its First Submission, the US mischaracterizes Australia's arguments with regard to SG Article 12.3. Australia argues that SG Article 12.3 requires a Member proposing to apply a safeguard measure to enter into consultations:

"with a view to, *inter alia*, ... reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8".

177. This requires more than simply having a meeting. It required the US to try to reach and understanding with respect to the obligation under SG Article 8.1, i.e. "shall endeavour ...". The US admitted¹⁹ that it did not seek to achieve that objective because it considered that it had no such obligation. Thus the US did not enter into such negotiations with good faith to comply with SG Article 12.3.

178. In its answer to Question 9 asked by Australia, the US shows that it has not understood either Australia's position or an answer that Australia made to Canada in 1999 (set out in paragraph 19 of the US's answers).

179. At paragraph 20 of its answer to Australia, the US said:

"Australia's response to Canada indicates that, in Australia's view, a Member may choose to accommodate the interests of other Members through adjustments in the size and administration of quotas and TRQs, and that compensation under Article 8.1

¹⁹ See in particular paragraph 234 of Australia's First Submission.

will rarely be appropriate. Australia also appears to view this question as one for the importing Member to decide."

180. The reference by Australia to new legislation was not intended to mean that compensation through tariff concessions would be "*not appropriate*" or that the importing Member should not engage in genuine consultations on a satisfactory resolution of the matter.. The answer was in response to Canada's question. The only legal mechanism for Australia to change tariffs is through legislation, i.e. by in the first place tabling a tariff bill in the Commonwealth Parliament, or giving notice thereof if Parliament is not sitting. It cannot be done by regulation or proclamation. Indeed to apply a safeguard measure in the form of a tariff increase, including a TRQ, would require a tariff bill itself and, if there were agreement on compensation, it would presumably be part of that same bill.

181. The reference to past practice of course reflected the history of Article XIX safeguards, given the leverage of potential retaliation. Australia agrees that a similar outcome could apply for measures under the Safeguards Agreement, i.e. that a negotiated outcome could be that instead of a tariff concession in another product there could, for example, be an increase in the tariff quota or a reduced out of quota tariff. This is entirely consistent with the last sentence of SG Article 8.1. Australia has not argued that the only way of maintaining a substantially equivalent level of concessions and other obligations could only be done through tariff concessions.

182. In this case there was no offer by the US and indeed no consultations on how to achieve the objective of SG Article 8.1. The US says that it complied with SG Articles 8.1 and 12.3 by virtue of the SG Article 12.3 consultations on 4 May²⁰ and 14 July 1999. However, the US maintains that the USITC recommendation on the measure has no significance in the context of the WTO. Moreover, the actual measure to be applied was not known until 7 July 1999. There could not have been consultations on the measure on 4 May 1999. There was no change in the tariff quota following the announcement on 7 July 1999 and no SG Article 12.3 consultations except for that on 14 July 1999.²¹ Indeed, the US notified the Safeguards Committee that it had "introduced" the measure on 7 July 2000²², i.e. before the consultations on 14 July 2000, to be effective from 22 July 1999. Legally the measure was applied by proclamation of the President on 7 July 1999 before the consultations on 14 July 1999.²³ Thus the consultations were pro forma with no attempt to comply with SG Articles 12.3 and 8.1. The arrangements for handling product in transit and for licensing were subject to separate discussions, but were never regarded as being consultations under SG Article 12.3, which the US notified the Council for Trade in Goods and the Safeguards Committee as being limited to the meetings on 4 May 1999 and 14 July 1999.²⁴ In the same document the US notified the Committee that "[n]o mutually satisfactory resolution was reached." On that basis Australia maintained its rights through an exchange of letters notified to the Council for Trade in Goods and the Safeguards Committee.²⁵

183. On the other hand, if the consultations on 4 May 1999 were regarded by the US as being in respect of SG Article 8.1, as claimed in its answer at paragraph 17 to Question from Australia, then the outcome of the consultations was a more restrictive measure. The actual measure applied ran completely contrary to SG Article 8.1 and the consultations under SG Article 12.3.

²⁰ The 28 April 1999 date referred to in paragraph 17 of the US's answer to Question 9 from Australia was with New Zealand, not Australia.

²¹ See G/L/313-G/SG/19 – Exhibit AUS-13.

²² See G/SG/N/10/USA/3 at Exhibit AUS-11. The document was dated 12 July 1999 on the basis of a communication by the US dated 9 July 2000.

²³ Exhibit AUS-5.

²⁴ G/L/313-G/SG/19 at Exhibit AUS-13.

²⁵ G/L/339-G/SG/N/12/AUS/1-G/SG/N/12/USA/1 at Exhibit AUS-14.

3.6 NON-DISCRIMINATION - SG ARTICLE 2.2

184. This issue has also been addressed in Australia's answer to Question 19 from the Panel.

185. The US at paragraphs 253-257 of its First Submission appears to be at variance with the facts under its legislation and the USITC Report. The US is saying, or at least implying, that the USITC did not base its injury determination on imports from all sources, including, *inter alia*, Canada.

186. The USITC Report on page I-26 made a determination on injury and then subsequently on pages I-26 and 27 made a finding on NAFTA imports. This is an additional step required under NAFTA and its implementing legislation.

187. As is clear from pages 21 and 22 of G/SG/N/1/USA/1²⁶, the USITC finding on imports from NAFTA partners is subject to a separate determination by the President. This was confirmed by the US in answers at the time of its legislative review in the Safeguards Committee. For example, in its answers to Australia the US said:²⁷

"2. *If NAFTA imports have been excluded from safeguard action, for example, under § 312 (page 22), then are such imports also excluded from consideration under paragraph 202(c)(1) (pages 4 and 5) and considered as other factors under subparagraph 202(c)(2)(B)? If not, how could that be justified under the Safeguards Agreement?*

The factors listed in Section 202(c)(1) that are considered by the ITC relate to the issue of whether the domestic industry is seriously injured or threatened with serious injury and to causation. With respect to causation, the ITC at this point is considering imports from all sources, including NAFTA countries. Only after the ITC has made an affirmative injury determination with respect to imports from all sources does the ITC make any findings with respect to NAFTA imports alone. The decision to exclude NAFTA imports is made by the President, not the ITC, and only after receiving an ITC report containing an affirmative injury determination.

Moreover, the provisions of US law providing that imports from a NAFTA Party may be excluded from application of a safeguards measure under certain circumstances do not conflict with GATT Article XIX or the WTO Agreement on Safeguards, because these provisions are in the context of a free-trade agreement under GATT Article XXIV. These provisions of US law implement provisions of an agreement between Canada, Mexico, and the United States to eliminate duties and other trade restrictions on substantially all trade with each other."

188. Thus the US said in a document dated 23 April 1996 that: "*With respect to causation, the ITC at this point is considering imports from all sources, including NAFTA countries. Only after the ITC has made an affirmative injury determination with respect to imports from all sources does the ITC make any findings with respect to NAFTA imports alone. The decision to exclude NAFTA imports is made by the President, not the ITC, and only after receiving an ITC report containing an affirmative injury determination.*"

189. Thus the USITC's determination is "with respect to imports from all sources". The US has not attempted to justify this approach, which it followed in this case. The US appears to be limiting itself to arguing that the level of imports from sources excluded, in particular from NAFTA partners was so small as not to cause serious injury. This does not justify a breach of SG Article 2.2.

²⁶ §§311 and 312 of the NAFTA Implementation Act, in particular §312(b).

²⁷ Question 2 in G/SG/W/160 at Exhibit AUS-38.

190. Therefore, Australia asks the Panel to find that the US is in breach of SG Article 2.2.

3.7 THE MEASURE IS IN VIOLATION OF THE US'S OBLIGATIONS UNDER GATT 1994 ARTICLE II

191. Finally, since the measure is not in conformity with Safeguards Agreement and GATT 1994 Article XIX, the measure is in breach of the US's tariff bindings on lamb meat as demonstrated in Australia's First Submission. Therefore, the measure is in violation of the US's obligations under GATT Article II.

4. CONCLUSION

192. In the light of the above and of all the claims and arguments made before the Panel in its first written submission, during the first substantive meeting on 26 and 26 May 2000 and when answering the questions from the Panel, Australia requests the Panel to find that, the US has breached Articles II and XIX of GATT 1994 and Articles 2.1, 2.2, 3.1, 4.1(b) and (c), 4.2(a) and (b), 5.1, 8.1, 11.1(a), 12.2 and 12.3 of the Agreement on Safeguards by applying its safeguard measure on lamb meat.

5. ATTACHMENT A

PAGE 2-5 OF THE USITC REPORT: COMPETITIVE CONDITIONS AFFECTING
 THE US AND FOREIGN LAMB INDUSTRIES [*Emphasis added.*]

Most growers have small flocks of sheep (50 or fewer animals referred to as farm-flocks) and raise sheep as a secondary enterprise.¹ However, about one-third of the growers in the rangelands of the Western States have relatively large flocks (50 or more animals referred to as range-flocks) and specialize in sheep.² **Officials of the National Lamb Feeders Association report that there are probably only about 100 large-volume lamb feedlots in the United States, although there are many small-volume feedlots.** Sheep and lamb feeding tends to be concentrated in a few States as shown in the following tabulation³ (1,000 animals):

<u>State</u>	<u>1990</u>	<u>1991</u>	<u>1992</u>	<u>1993</u>	<u>1994</u>
California	225	280	285	305	320
Texas	200	180	210	180	210
Colorado	385	250	310	315	325
Wyoming	100	110	150	190	190
South Dakota	55	85	85	91	103
Iowa	90	85	95	85	85
Oregon	110	106	81	95	90
Kansas	102	63	48	82	60
All other	<u>495</u>	<u>571</u>	<u>566</u>	<u>534</u>	<u>456</u>
Total	1,762	1,730	1,830	1,877	1,839

Growers

US sheep and lamb growers may be divided into categories including:⁴ (1) purebred breeders (that is, those who keep purebred sheep and sell rams for breeding purposes;⁵ (2) commercial market lamb producers (those who maintain flocks of sheep for the production of lambs that are sent directly

¹ Robert E. Taylor, *Scientific Farm Animal Production: An Introduction to Animal Science*, 4th ed., (New York: Macmillan Publishing Co., 1992), p. 47.

² Ibid

³ Animals in feedlots as of 1 January. USDA, National Agricultural Statistics Service (NASS), *Sheep and Goats*, various issues, 1991-95.

⁴ The following description of grower categories was adapted from Taylor's *Scientific Farm Animal Production*, pp. 48-49.

⁵ Growers often expand the number of animals in their flocks or replace ewes no longer suitable for breeding purposes by retaining the best ewe lambs from each year's crop. Since the productive life of a ewe is typically 4 to 5 years, about 20 to 25 per cent of the ewe lambs from each year's crop must be retained to maintain breeding herd numbers.

to slaughter; or to (3) commercial feedlot operators (those who maintain feedlots where lambs are fed concentrates until they reach slaughter weight). Some growers engage in more than one sheep-raising activity. Some market lamb producers retain title to their lambs that are placed in feed lots by having

ANNEX 1-9

OPENING STATEMENT BY AUSTRALIA AT THE SECOND SUBSTANTIVE MEETING

(26 July 2000)

INTRODUCTION

1. Mr. Chairman, Members of the Panel. We have reached an advanced stage in the proceedings. The issues of fact and law have been identified and argued about at length. Although the presentations in this dispute have been detailed and the arguments interrelated, the issues before the Panel are clear. Australia will concentrate on those key issues of fact and law that have been the subject of the most glaring misinterpretations of the USA in this case. These include the failure of the USA to comply with:

- the obligation to demonstrate the circumstance of "unforeseen developments";
- the obligation to define properly the domestic industry in this case, in light of the specific facts being considered;
- the obligation to demonstrate that the threatened serious injury is clearly imminent;
- the obligation to demonstrate that the serious injury will be caused by increased imports; and
- the obligation to apply a measure only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

2. These obligations have to be met in the investigation under SG Article 3.1 and subsequent reporting and consultations. Failure to fully observe any one of these obligations results in the application of measures in a manner inconsistent with the Safeguards Agreement and GATT 1994 Article XIX. In applying the safeguard measure on imports of lamb meat, the USA has failed to observe not just one, but all, of these obligations. The USA has also failed to comply with the other key obligations: to maintain a substantially equivalent level of concessions and other obligations with Australia; and not to discriminate against Australia in favour of other WTO Members in the application of the measure.

3. The other points of law, procedure and fact already advanced by Australia should also be considered to be confirmed here.

THE OBLIGATION TO DEMONSTRATE "UNFORESEEN DEVELOPMENTS"

4. In its submissions to the Panel and responses to Panel questions, Australia pointed out that the USITC Report failed to demonstrate as a matter of fact the existence of "unforeseen developments", within the meaning of GATT 1994 Article XIX. Australia further established that the actual developments to which the USA reacted in imposing its safeguard measure were not unexpected, but were in fact well known and foreseen.

5. The USA has sought to remove the matter of "unforeseen developments" as a pertinent issue of fact and law, and to reduce it to a matter so trivial that its competent authority need not address it at

all. Indeed, in its Second Submission the USA effectively declares the "unforeseen developments" clause in GATT 1994 Article XIX:1(a) to be meaningless verbiage.¹

6. The USA is simply arguing that the Appellate Body was in legal error in its findings in *Korea - Dairy Safeguard* and *Argentina - Footwear Safeguard*. In its Second Submission, the USA turns to Article 31.3(b) of the *Vienna Convention on the Law of Treaties* to argue that "unforeseen developments" was a trivial consideration under Article XIX of GATT 1947 because of "subsequent practice" by GATT contracting parties. The USA does not demonstrate, however, that such "subsequent practice" established "the agreement of the parties regarding its interpretation."

7. Mr. Chairman, the most conclusive evidence regarding the interpretation and application of Article XIX under the WTO emanates *not* from allegations about safeguard practices and views of individual GATT contracting parties such as the USA in the distant past. Neither does it come from an old factual note by the GATT secretariat. Nor does it come from the wrangling of negotiators in the Uruguay Round over the merits of the word "unexpected" versus the merits of the word "unforeseen". Instead it comes from the actual text of the Safeguards Agreement and the outcome of disputes under the WTO DSU, i.e. the Appellate Body reports on *Korea - Dairy Safeguard* and *Argentina - Footwear Safeguard*, which have been adopted by Members.

8. The second preambular paragraph of the Safeguards Agreement recognized "the need to clarify ... the disciplines of ... Article XIX". If there had been agreement among GATT contracting parties that "unforeseen developments" was meaningless, then it would have been explicitly excised in any exercise of clarification. However, it was not excised and the Appellate Body found that it was an issue that had to be demonstrated as a matter of fact.

9. The demonstration of the circumstance of "unforeseen developments" is a legal requirement for a Member to comply with in applying a measure since it *must* be demonstrated as a matter of fact. SG Article 11.1(a) incorporates the obligations under GATT 1994 Article XIX. Thus, the requirement under SG Article 3.1 that the competent authority publish a report setting forth its findings and reasoned conclusions reached on all pertinent issues of fact and law applies equally to the issue of "unforeseen developments."

10. As a fall back, the USA has also sought to remedy this defect in the USITC Report by attempting to demonstrate *ex post facto* the existence of "unforeseen developments". This does not provide the demonstration required by GATT 1994 Article XIX nor does it represent the published findings and reasoned conclusions reached on all pertinent issues of fact and law required under SG Article 3.1. This is not a permissible option. The USA must stand on what was demonstrated as a matter of fact in the USITC Report and fall on what was not demonstrated.

11. Even if the USA was allowed to demonstrate *ex post facto* the existence of "unforeseen developments", it has failed to do so. The USA erroneously believes it can point to isolated statements within the USITC Report, offered under disparate contexts unrelated to "unforeseen developments", to demonstrate their existence. The USA has gone so far as to suggest that any increase in imports provides a presumption of "unforeseen developments".² To arrive at such a conclusion would be to read any requirement of demonstrating the existence of "unforeseen developments" out of the Safeguards Agreement.

¹ The USA, in particular, relies on the negotiating history of its own negotiators to suggest that the "unforeseen developments" clause in Article XIX:1(a) was either "meaningless" or a form of "semantic window dressing." See paragraph 10 and Footnote 10 of the USA's Second Submission.

² At paragraph 8 of the USA's answer to Question 1 from the Panel.

12. In its Second Submission, the USA also continues to press the change in the mix of chilled and frozen lamb as a source of the "unforeseen developments",³ a conclusion never reached by the USITC Report and one which is not supported by the facts. As Australia has pointed out, USA consumers did not suddenly prefer chilled product. To the extent that there were increased imports of chilled product, it was part of the overall increase in imports of the product subject to the measure. This is yet another thinly disguised attempt by the USA to use an increase in imports, by itself, to demonstrate "unforeseen developments".

13. Australia's argument is simple. The Appellate Body has said that the circumstance of "unforeseen developments" had to be demonstrated by the Member applying a measure. The USITC Report did not *demonstrate* it and the USA did not provide any other report or explanation before applying the measure. The USA's combination of the change in the mix of chilled product and of the assertion that a safeguard investigation on an item where there is a tariff binding is an "unforeseen development" in itself, are *ex post facto* rationalizations that do not rebut Australia's argument and the Appellate Body's findings.

“DOMESTIC INDUSTRY”

14. Even more damaging for the continued and proper operation of the Safeguards Agreement than its failure to demonstrate the existence of the circumstance of “unforeseen developments”, was the USITC's improper decision to include in the “domestic industry” not only the producers of lamb meat (breakers and packers), but also all growers and all feeders. The decision of the competent authority on the "domestic industry" is critical to everything that follows in a safeguard investigation. However, the USITC's decision on "domestic industry" was inconsistent with SG Article 4.1(c).

15. The USA's position is that upstream firms can be included on the basis of "a continuous line of production" and "a substantial coincidence of economic interest". There is nothing in the Safeguards Agreement that permits an authority to broaden the "domestic industry" on the basis of these criteria. The USA has not made any attempt to show, in the absence of any textual support for its approach, what limitations would be imposed by the Safeguards Agreement on a Member wanting to include upstream firms in the "domestic industry". While the USA might in practice limit this approach to imports of certain agricultural products, there is again no textual basis for that in the Safeguards Agreement. In addition, the USA has made no attempt to set out how this approach to determining the "domestic industry" should be dealt with in the context of the determination on injury and in ensuring that the measure is "not more restrictive than necessary".

16. The Panel is faced with a clear choice on the "domestic industry" issue in this case. The USA has sought to blur the issue with claims of some limited vertical integration between some layers of the industry segments. However, the Panel should not be deflected by such claims. There is no such pervasive vertical integration between growers and feeders and packers and breakers. Indeed there is no integration at all between growers and packers and breakers.

17. Moreover, while the USA has asserted that the choice of "domestic industry" is an issue related to the ability of the USITC to analyse some issues⁴, this was not reflected in the USITC Report, either through the selection of firms surveyed or the description of the data obtained. Similarly, the USA says that some growers slaughter lambs. Australia has questioned⁵ the extent of this. However, even if it was widespread amongst many of the more than 70,000 growers, none of such growers appears to be part of the trivial number of growers actually selected by the USITC. The USITC Report makes no assertion that it chose this definition of "domestic industry" for analytical reasons. The USITC Report simply asserts that this was on the basis of USITC practice without even

³ At paragraph 17 of the USA's Second Submission.

⁴ For example, at paragraph 73 of the USA's First Submission.

⁵ For example at paragraph 75 of Australia's Second Submission.

a requirement in the relevant US statute for safeguard investigations. There were no special circumstances for this case that led the USITC to do this. The selection of growers for which information was used in the injury determination was not on the basis of any ownership or contractual arrangements. It was simply on the level of subsidies received under the National Wool Act,⁶ thus even excluding not only smaller growers but also any new entrants, and possibly consolidated farms. There is no suggestion in the USITC Report that there was some problem in dissociating the data on grower operations from those of packer operations.

18. All the Panel has to do is decide whether a grower that produces feeder lambs, wool, skins, lambs for breeding, and cull ewes for mutton produces product that is "like product" to the imported lamb meat subject to the measure. If such a grower does not, then it cannot be part of the "domestic industry". Consequently, the USITC's definition of "domestic industry" would be inconsistent with SG Article 4.1(c).

19. The decision on "domestic industry" is critical to the proper findings on issues of fact and law required under the Safeguards Agreement. The USITC Report's error in defining the "domestic industry" infects every step of its analysis. The USA cannot now ask the Panel to review the USITC Report on the basis of excluding growers from the "domestic industry", or excluding growers and feeders. The USITC Report did not perform separate analyses of injury and causation for each segment. Moreover, the definition of the "domestic industry" can critically affect the causation analysis. Finally, the definition of the "domestic industry" must also affect compliance with the decision that a measure is "not more restrictive than necessary" under SG Article 5.1.

20. Accordingly, the USA cannot now change the definition of the "domestic industry" for the review by the Panel. It must stand by the USITC Report. Therefore, if the Panel agrees with our position on the "domestic industry", the measure must be revoked.

21. The USA raises the issue of Australian practice on safeguards in a number of areas, including "domestic industry" and "unforeseen developments". Australia has not introduced a new safeguard measure since 1983. Australia was subject to considerable criticism under GATT 1947 about Article XIX action and exactly what Australia did in the distant past is hardly determinant of either the rules under GATT 1947 or the rules under GATT 1994 as part of the Agreement Establishing the WTO. Australia has conducted one inquiry under the Safeguards Agreement, into imports of pig meat, and the Government decided not to apply a safeguard measure. Thus there has been no safeguard action by the Australian Government under the WTO, and so there has been no action and no practice by the Australian Government from which the USA can draw comfort for its stance in this case.

INADEQUACY OF DATA

22. Australia has proven that the data set used by the USITC is seriously flawed. The USITC Report reached its determinations on "threat of serious injury" and on causation on the basis of a data set that was insufficient to comply with the standards of the Safeguards Agreement, in particular under SG Article 4.1(b) and 4.2(a) and (b).

23. Before turning to this or any other issue that addresses the evidence in this case, we feel the need to remind the Panel again of the grossly unrepresentative nature of the evidence that formed the basis for the USITC's determination. Any analysis performed by the USITC was necessarily infected with these evidentiary deficiencies. The four segments of the "domestic industry" as improperly defined by the USITC were made up of more than 70,000 firms and cannot be adequately represented by less than 70 firms in all.

⁶ At paragraph 101 of the USA's answer to Question 15 from the Panel.

24. The USITC sent out only 110 questionnaires to growers. Among those polled, only 70 bothered to respond, only 57 provided useable replies, and only 27 provided replies with financial information to September 1998. Mr. Chairman, 27 out of more than 70,000 is less than 0.04 per cent, representing less than 3 per cent of the flock. Not only is this dreadfully low coverage unacceptable; the USITC undertook no effort to ensure that the sample it had was statistically valid or representative. A similar story applies to feeders. The data collected on these firms was totally inadequate to form the basis for any determination, whether "threat of serious injury" or causation or that the measure was "not more restrictive than necessary".⁷

25. Data on packers and breakers -- the actual producers of lamb meat -- were also flawed. Only five of seventeen packers polled provided data on their packing operations. As for breakers, of the sixteen firms polled, only five provided useable data. For financial data, information was available only from 2 packers, 2 packer/breakers, and 1 breaker.⁸

26. We are not questioning the coverage and responses of exporters or importers, which was 100%, i.e. the coverage was complete. We are referring to the "domestic industry" that was allegedly being, or going to be, seriously injured by increased imports. It was in the interest not only of the petitioners, but also of all other firms in the "domestic industry", to ensure greater participation in the USITC's investigation. The very low level of participation can only be interpreted as indicating that either (a) many firms in the "domestic industry" did not agree with the petitioners, and/or (b) their responses would have been damaging to the petitioners' case. Whatever the reason, the lack of participation by the very firms that stood to gain from the investigation must be interpreted to suggest that their responses would have damaged the petitioners' case. That the USITC did not use its subpoena power or even its powers of persuasion to obtain more representative data is not the fault of Australian and New Zealand exporters of lamb meat. It was up to the USITC to obtain adequate, objective evidence to support its determinations. Its failure to do so means that it could not, and did not, comply with the requirements of SG Article 4 and the USA could not and did not comply with the requirements also of SG Article 5.1.

27. By the same token, it should be noted that the USITC chose to use its questionnaire data only when it supported its conclusions. If its questionnaire data showed inconvenient trends, the USITC referred to USDA data to support its position. The Panel should not countenance such evidentiary cherry picking.⁹

28. That said, even the paltry evidence on which the USITC relied failed to support its findings, no matter what definition of "domestic industry" is used. In addition, the time frame of the data, i.e. only to September 1998 and in some cases only to 1997 meant that the USITC had no basis for reaching a justifiable decision on the issues of fact and law before it in a case of "threat of serious injury".

29. The Panel has the responsibility to decide whether the data were adequate. If the Panel agrees with Australia, then virtually all aspects of the USITC, and subsequent US Government, findings would be irremediably flawed for that reason alone.

PROVING THAT SERIOUS INJURY WAS CLEARLY IMMINENT

30. There is an absolute obligation on the USITC to have proven that serious injury was "clearly imminent". Even apart from the inadequate data, there was nothing in the USITC Report's finding that showed that it was clear that serious injury would occur. Moreover, there was nothing to show

⁷ At pages II-11-13, 24, and 29 (including footnote 89) of the USITC Report.

⁸ At pages II-14, 15, and 24 of the USITC Report.

⁹ At pages I-18-19 of the USITC Report.

that serious injury was imminent within any normal meaning of the word. Indeed, given the data used, in particular the questionnaire data, up to September 1998 and in some cases only 1997, with no attempt at any prospective analysis, the USITC Report could never have adequately made a finding that serious injury was "clearly imminent".

31. Whether or not the Panel agrees with our position on the USITC's definition of the "domestic industry" for lamb meat, Australia has shown that the facts of this case do not support either a determination that serious injury to the "domestic industry" was imminent or that any such serious injury -- if it occurred -- would be caused by increased imports. We shall briefly address these issues again today.

NOT ALL THE FACTORS LISTED IN SG ARTICLE 4.2(A) WERE EXAMINED

32. Australia showed in its First Submission that not all the factors listed in SG Article 4.2(a) were examined for all the industry segments, and no reason was given why this was not done. The USITC's analysis of these factors was woefully inadequate. Even where the USITC Report went through the motions of examining some of the factors listed, this did not meet any reasonable standard of compliance with SG Article 4.2(a) because of the inadequacy of the data set. As a result, the USITC failed to carry out its most obvious obligations in performing the causation analysis under SG Article 4.2.

FAILURE TO EXAMINE OTHER FACTORS PROPERLY IN THE CAUSATION ANALYSIS

33. It is clear from a plain reading of the Safeguards Agreement that in this case what has to be proved is that increased imports *by themselves* must be going to cause serious injury to the "domestic industry". There may be other causes of injury or even serious injury to the "domestic industry"; however, increased imports must be proved to be going to cause serious injury separately from the *individual and collective* effect of such other factors. The idea, therefore, that the USA was *not* required to prove this is, quite frankly, ludicrous. In effect, it would rewrite the Safeguards Agreement to allow the application of a safeguard measure where increased imports are only, and no more than, a contributing cause of the alleged imminent serious injury and not actually about to cause serious injury by themselves.

34. As to the facts of this case, the paucity of data on firms in the "domestic industry" would in any case have made it impossible for the USITC to *prove* a cause and effect relationship -- if any -- between imports and the health of the "domestic industry", no matter which industry segments were included as being the "domestic industry". The USITC Report acknowledges that there were other factors causing injury and that these "other factors" were causes of the alleged "threat of serious injury". The factors examined by the USITC Report were: the removal of the National Wool Act subsidies; competition from other meat products; increased input costs; overfeeding of lambs; concentration in the packer segment; and the failure to develop and implement an effective marketing programme for lamb meat. However, the USITC Report only examined these cursorily and only found that individually each was a less important cause of the "threat of serious injury" than imports of lamb meat.

35. The USITC Report did not assess the collective impact of these factors on the "domestic industry" as a whole or on each of the industry segments. The one-by-one analysis of other factors renders even a "substantial cause" standard meaningless. Finally, SG Article 4.2(b) requires that the serious injury be attributed to "increased imports" not just to "imports". The USITC Report only analyses the impact of the other factors in respect of "imports of lamb meat", not "*increased* imports of lamb meat". It makes no attempt to prove even against its own standards that "increased imports of lamb meat" were going to cause serious injury. Moreover, the USITC Report's analysis did not

establish that "increased imports" were going to cause serious injury imminently. The USA in its submissions to the Panel has not shown how the USITC Report proved that "increased imports" were going to be the cause of imminent serious injury.

36. Moreover, the USITC Report's failure to undertake a prospective analysis of other factors in a case of threat alone, results in its affirmative finding being no more than *speculation* that increased imports would cause serious injury. The finding of threat of serious injury was taken without regard to prospective events. The finding on causation was based on a small increase in projected imports of around 4.5 per cent, when domestic production was in decline. The finding lacked any prospective analysis of the state of the firms in the "domestic industry" beyond the most anecdotal of testimony. The consideration of the other factors was cursory, with no analysis of their impact on the firms in the "domestic industry". This made the analysis meaningless. If such an approach was accepted, this would make the requirements of SG Article 4.1(b) and SG Article 4.2 superfluous.

USA'S COMMENTS ON THE NEGOTIATING HISTORY OF CAUSATION IN THE SAFEGUARDS AGREEMENT

37. In its Second Submission the USA made lengthy comments on the supposed negotiating history of causation in the Safeguards Agreement. The best that can be said about the negotiating history of SG Article 4.2(b) is that there is little that can be said beyond that there were differences in view among the participants in the negotiations on what the outcome should be in the text.

38. What the Panel has to address is not the differences in national positions during the Uruguay Round negotiations, but what is in the actual text of the Safeguards Agreement.

39. As shown in Australia's Second Submission¹⁰ the wording of SG Article 4.2(b) is clear and straightforward. The mandatory nature of the wording and the strength of the requirement obliged the USITC to have *proved* that increased imports by themselves were going to cause serious injury imminently to the "domestic industry".

"NOT MORE RESTRICTIVE THAN NECESSARY"

40. Even assuming *arguendo* that the USA had appropriately made the necessary findings with respect to "unforeseen developments", the domestic industry definition, imminent threat of serious injury, or causation, Australia has shown further that the remedy the USA chose was inconsistent with the Safeguards Agreement. In particular, the USA's interpretation of SG Article 5.1 in trying to reduce its remedy obligations reflects yet another example of its preference to read critical requirements out of the WTO Agreement.

41. In reality the USA is seeking to say no more than that in its view the Appellate Body erred in *Korea - Dairy Safeguard* when it found that there was an obligation to ensure that the measure was "not more restrictive than necessary".¹¹ Indeed, if the separate test in SG Article 5.1 is redundant, why is it there. In interpreting the Safeguards Agreement, it is not permitted to assume that the drafters made a mistake and gratuitously inserted the word "necessary", which plays such a fundamental role in the WTO Agreement. When interpreting the text it is not permissible to assume that such a key word was inserted simply for appearance sake without intending it to have any meaning.

42. There is an obligation that this be ensured before the measure is applied. However, Australia has demonstrated that the USA did not ensure that its measure was "not more restrictive than necessary". Indeed, no attempt to ensure that the measure was "not more restrictive than necessary"

¹⁰ See paragraph 160 of Australia's Second Submission.

¹¹ At paragraph 103 of the Appellate Body's report on *Korea - Dairy Safeguard*.

was ever made by the USA before applying the measure. Not only was this a violation of SG Article 5.1, but also SG Articles 3.1 and 12.2 given that the extent of the measure was a pertinent issue of fact and law. The USA did not publish its findings and reasoned conclusions on the matter, nor did it properly notify the Committee on Safeguards on this pertinent information related to the action. We are left only with the USA's *ex post facto* explanation about modelling that the USA claimed to have subsequently undertaken to show that the measure was sufficient rather than necessary - an explanation offered without a scintilla of documentation to back it up.

43. Consistent with its approach to other aspects of this case, such as the issue of demonstrating the circumstance of "unforeseen developments" under GATT 1994 Article XIX, the USA seeks to write its obligations under SG Article 5.1 out of the Safeguards Agreement.

44. In the end, the only documentation and assessment of remedy on the record is the recommendation provided in the USITC Report, which at least was the product of a public examination of the "domestic industry", albeit itself flawed. The USA rejected the recommendation, however, electing to impose a more severe measure. In the first year, a 20 per cent out-of-quota tariff rate recommended by the USITC became a 40% out-of-quota tariff rate and an in-quota tariff of about 0.2 per cent became 9 per cent. Similarly, in subsequent years, the out-of-quota and in-quota tariffs under the measure remain much higher and more restrictive than those recommended by the USITC.

45. The shorter duration of the measure versus the USITC recommendation is irrelevant to the question of whether the measure is more restrictive. The necessity in respect of the duration of a measure, up to eight years, falls under the provisions of SG Article 7.1 and 7.2. In applying this more restrictive measure, the USA has yet to rebut the recommendation of the USITC as to what would be a sufficient response to the increased imports that it alleged were going to cause "serious injury" imminently.

46. To close on this issue, we can only reiterate that Australia has shown that even the USITC recommendation would have fallen short of meeting the obligations of SG Article 5.1. As Australia has pointed out, the USITC recommended limiting lamb meat imports to 1998 levels even though the industry was not experiencing serious injury from imports at those levels.

BALANCE OF CONCESSIONS AND OTHER OBLIGATIONS

47. Article XIX is about maintaining the balance of concessions and other obligations in the event that a safeguard measure is applied. The Safeguards Agreement did not change this, but only limited the right to unilaterally suspend equivalent concessions and other obligations. The removal of that right for the first three years does not remove the requirement on the Member applying a measure to maintain a substantially equivalent level of concessions and other obligations. It only modifies the negotiating leverage, by requiring an affected Member to have recourse to a panel if it considers that its rights have been abridged.

48. The USA has not rebutted Australia's argument that SG Article 8.1 applies, beyond pointing out that Members imposing measures would not want to maintain a substantially equivalent level of concessions and other obligations and that the obligations of SG Article 8.1 would act as a disincentive to pursuing measures consistent with the WTO Agreement. That does not constitute an argument.

NON-DISCRIMINATION

49. At paragraph 124 of its Second Submission, the USA refers to Article XXIV:5(b) of GATT 1994 and mischaracterizes both Article XXIV:5(b) and its relationship to the Safeguards Agreement. Article XXIV:5(b) talks about "duties and other regulations of commerce" not being

higher or more restrictive under a FTA than "prior to the formation of the FTA", not "in the absence of the FTA" as stated by the USA. The USA provides no basis for saying that "it is the relevant provisions of Article XXIV, rather than any provision of the Safeguards Agreement, that govern issues related to the application by participants in free-trade areas of safeguard measures."¹². Footnote 1 in the Safeguards Agreement refers only to Article XXIV:8 and to no other provision of Article XXIV. If the intention was to have paragraph 5 or any provision of Article XXIV other than paragraph 8 apply, then the text would say so. Given the explicit reference to paragraph 8 and 8 alone, it is not permissible to widen the ambit of Footnote 1 to include other provisions.

50. The USA's argument in paragraph 125 of its Second Submission, is that: "Article XXIV:5(b) would prevent a Member from applying a safeguard measure exclusively against third countries in a situation in which the serious injury or threat of serious injury the domestic industry was experiencing was attributable to increased imports from its free-trade partners." The USA does not explain how this is based on Article XXIV:5(b). Under Article XXIV:5(b) the restrictiveness of, for example, a tariff on imports from third country Members is not dependent on whether the tariff is applied to a FTA partner. Thus the USA has provided no foundation that Article XXIV:5(b) imposes any discipline on its actions. In any case this argument is irrelevant. Even if it did impose a discipline, the USA has not explained why it would override the obligation on non-discrimination under SG Article 2.2.

CONCLUSION

51. In the course of this Panel's proceedings, Australia has proved that the USA has breached a range of its obligations under the Safeguards Agreement and GATT 1994 Article XIX in applying the measure. The USA has failed to rebut any of the claims made about the measure and the failure of the USA to comply with its obligations.

52. Therefore, Australia submits that the Panel should find that the USA has not complied with Articles 2.1, 2.2, 3.1, 4.1(b), 4.1(c), 4.2(a), 4.2(b), 5.1, 8.1, 11.1(a), 12.2 and 12.3 of the WTO Safeguards Agreement as well as Articles II and XIX of GATT 1994. Australia requests that the Panel recommend that the USA bring itself into conformity with the Safeguards Agreement and GATT 1994 by revoking the measure forthwith.

¹² At paragraph 124 of the USA's Second Submission. [*Emphasis added.*]

ANNEX 2-1

FIRST SUBMISSION OF NEW ZEALAND

(19 April 2000)

TABLE OF CONTENTS

	<u>Page</u>
I. EXECUTIVE SUMMARY.....	153
II. INTRODUCTION.....	154
III. CHRONOLOGY OF RELEVANT EVENTS.....	154
IV. FACTUAL BACKGROUND.....	156
A. THE LIVE LAMB AND LAMB MEAT INDUSTRIES IN THE UNITED STATES.....	156
1. The Participants in the Live Lamb and Lamb Meat Industries.....	156
2. The State of the Live Lamb and Lamb Meat Industries.....	157
(a) The Sources of Information.....	157
(b) The Live Lamb Industry.....	158
(c) The Lamb Meat Industry.....	161
B. THE UNITED STATES LAMB MEAT MARKET.....	162
1. Lamb Meat Consumption in the United States.....	162
2. Lamb Meat Imports into the United States.....	163
3. Lamb Meat Product and Marketing.....	164
C. CONCLUSION.....	165
V. THE UNITED STATES DETERMINATION.....	165
VI. NEW ZEALAND'S CLAIM.....	166
VII. LEGAL ARGUMENT.....	167
A. INTRODUCTION.....	167
B. THE UNITED STATES OBLIGATIONS UNDER THE SAFEGUARDS AGREEMENT.....	167
C. APPROACH TO INTERPRETATION.....	169
D. BURDEN OF PROOF.....	170
E. USE OF CONFIDENTIAL INFORMATION.....	170
F. STANDARD OF REVIEW.....	171
G. THE UNITED STATES VIOLATION OF ITS OBLIGATIONS UNDER THE SAFEGUARDS AGREEMENT.....	171
1. The United States Safeguard Measure is Not a Response to "Unforeseen Developments" as Required by GATT Article XIX.....	171

2.	The United States has Failed to Demonstrate that its “Domestic Industry that Produces Like or Directly Competitive Products” has Been Threatened by “Serious Injury” as it is Required to do under Article 2.1 of the Safeguards Agreement.....	173
	(a) The United States has failed to define correctly its “domestic industry that produces like or directly competitive products”.....	173
	(b) The United States has failed to demonstrate that there is any “serious injury” to its domestic industry that is “clearly imminent”.....	177
3.	The United States has Failed to Demonstrate that any Threat of Serious Injury to its Domestic Industry has been Caused by Increased Imports as Required by Article 2.1 of the Safeguards Agreement.....	181
	(a) The United States wrongfully applies a “substantial cause” test.....	182
	(b) The United States fails to demonstrate the causal link between increased imports and the threat of serious Injury	183
	(c) The United States wrongfully attributes to imports injury caused by other factors.....	188
4.	The United States has Applied a Safeguard Measure that is Neither “Necessary to Prevent Serious Injury” Nor “Necessary to Facilitate Adjustment”, Contrary to Article 5.1 of the Safeguards Agreement. Moreover, it has Failed to Publish its Findings and Reasoned Conclusions on the Necessity of its Measure as Required by Article 3.1 of the Safeguards Agreement.....	188
	(a) The United States measure is not “necessary” to prevent serious injury within the meaning of Article 5.1 of the Safeguards Agreement.....	189
	(b) The United States measure is not “necessary” to facilitate adjustment within the meaning of Article 5.1 of the Safeguards Agreement	191
	(c) The United States has failed to publish its findings and reasoned conclusions on the necessity of its measure as required by Article 3.1 of the Safeguards Agreement	191
5.	The United States has Failed to Apply a Safeguard Measure to All Imports Irrespective of Source, Contrary to Article 2.2 of the Safeguards Agreement and Article I of GATT 1994.....	192
6.	The United States has Applied a Safeguard Measure that Places it in Violation of its Obligations under Article II of GATT 1994.....	192
VIII.	CONCLUSION	193

ANNEXES

- NZ1. USITC Report "Lamb Meat", Investigation No. TA-201-68, Publication 3176, April 1999.
- NZ2. United States Notification Under Article 12.1(b) of the Agreement on Safeguards on Finding a Serious Injury or Threat Thereof Caused by Imports, 15 April 1999 (G/SG/N/8/USA/3/Rev.1).
- NZ3. United States Notification Pursuant to Article 12.1(c) and Article 9, Footnote 2, of the Agreement on Safeguards on Taking a Decision to Apply a Safeguard Measure, 12 July 1999 (G/SG/N/10/USA/3).
- NZ4. Request for Consultations by New Zealand Under the DSU, 16 July 1999 (WT/DS177/1).
- NZ5. Request for the Establishment of a Panel by New Zealand, 14 October 1999 (WT/DS177/4).
- NZ6. Meat New Zealand Pre-Hearing Submission, Exhibit 7, "Number of US Lamb Growers and Size of Operations 1994-1997".
- NZ7. Meat and Livestock Australia Pre-Hearing Submission, Vol 1, Exhibit 15, "All US Sheep and Lambs - January 1 Inventory".
- NZ8. Meat and Livestock Australia's Pre-Hearing Submission, Vol 1, Exhibit 6 "Government Wool Subsidy Payments, Value of Wool Production and Total US Income from Wool".
- NZ9. Table of Lamb Import Quantities received from the United States in response to questions during consultations under the DSU on 26 August 1999.
- NZ10. Meat New Zealand Pre-Hearing Submission, Exhibit 1, "USITC, Lamb Meat: *Competitive Conditions Affecting the US and Foreign Lamb Industries*, Inv. No. 332-357, August 1995", pp 2-46 and 2-47, Tables 2-12 and 2-13.

I. EXECUTIVE SUMMARY

1.1 This dispute is about an attempt by the United States to protect its domestic live lamb and lamb meat industries from the consequences of a long-term decline caused by factors within the United States domestic market, and to place the burden of that protection on imports of lamb meat. Such action is contrary to the United States' obligations under GATT 1994 and under the WTO Agreement on Safeguards.

1.2 On 7 July 1999 the United States imposed a three-year safeguard measure against lamb meat imports in the form of a tariff rate quota. Under this measure, imports of lamb meat up to the quota level, which is set at 1998 import levels in the first year, are subject to a tariff substantially in excess of that bound by the United States in respect of imports of lamb meat in its schedule of commitments under the WTO. Additionally, imports of lamb meat above the quota level are subject to tariffs of 40 per cent, 32 per cent and 24 per cent in the successive years of the measure.

1.3 The United States safeguard measure was imposed in response to a long-term and well-known decline in the live lamb and lamb meat industries in the United States, and not as a response to circumstances resulting from "unforeseen developments." Hence, the measure does not comply with Article XIX of GATT 1994.

1.4 In its investigation to determine whether serious injury or threat of serious injury had been caused to a domestic industry, the United States included in that domestic industry, an industry that does not produce a "like or directly competitive" product. Hence, the United States determination does not conform with Article 2.1 of the Safeguards Agreement.

1.5 In determining that an industry had been threatened with serious injury, the United States failed to demonstrate that serious injury was "clearly imminent" within the meaning of Article 4.1(b) of the Safeguards Agreement. In this respect as well, the United States has failed to comply with its obligations under Article 2.1 of the Safeguards Agreement.

1.6 In determining that the threat of serious injury, that it had wrongfully found, was "caused" by increased imports, the United States failed to demonstrate the existence of the causal link between increased imports and the threat of serious injury as required by Article 4.2(b) of the Safeguards Agreement. Again, the United States failed to comply with its obligations under Article 2.1 of the Safeguards Agreement.

1.7 In addition, the safeguard measure adopted by the United States has not been applied "only to the extent necessary to remedy serious injury and to facilitate adjustment," nor has the United States published findings or reasoned conclusions on how its measure is capable of doing so as required by Article 3.1 of the Safeguards Agreement. Accordingly, the United States safeguard measure is inconsistent with the United States obligations under Article 5.1 of the Safeguards Agreement.

1.8 Furthermore, by applying its safeguard measure to the imports of some countries and not to the imports of others, the United States has failed to comply with its obligation under Article 2.2 of the Safeguards Agreement to impose any safeguard measure on all imports irrespective of source. Such action places the United States equally in violation of its basic "most favoured nation" obligation in Article I of GATT 1994.

1.9 Finally, by imposing tariffs on imports of lamb meat that are inconsistent with its bound obligations under the WTO and not otherwise justified under the WTO agreements, the United States is in violation of its obligations under Article II of GATT 1994.

II. INTRODUCTION

2.1 On 7 July 1999, the President of the United States imposed a definitive safeguard measure on imports of lamb meat from New Zealand. This measure, in the form of a tariff-rate quota over a three-year period, followed a determination by the United States International Trade Commission (ITC) that imports of lamb meat were a substantial cause of the threat of serious injury to the domestic industry in the United States producing a product like or directly competitive with lamb meat.

2.2 The imposition of this safeguard measure is not in conformity with the provisions of the WTO Agreement on Safeguards or of GATT 1994. Hence, as New Zealand will show in this Submission, the United States is in violation of its obligations under the Safeguards Agreement and of its obligations under GATT 1994.

2.3 Contrary to its obligations under the Safeguards Agreement, the United States has sought to ascribe to imports effects on a domestic industry that are caused by internal domestic factors. The production of live lambs has been in a long-term decline in the United States for a period going well beyond the period of review selected by the USITC in making its injury determination. Rather than causing the decline in domestic production, increases in imports of lamb meat have been a response to that decline. Imports have filled a domestic demand for lamb meat that could not be met with declining domestic production. Imports have also stimulated increased domestic demand including in new markets.

2.4 A long-term, systemically-caused decline in the domestic production of live lambs has been characterized by the United States as an imminent threat of serious injury to the producers of live lambs and the producers of lamb meat. The United States has then sought to apply a safeguard measure on the basis that a substantial cause of this “threat” is imports of lamb meat. In doing so, the United States has ignored its obligations under the Safeguards Agreement and under GATT 1994.

2.5 The Safeguards Agreement provides Members with the opportunity to derogate from their obligations under the WTO Agreements in carefully defined circumstances. It permits such derogation where a serious injury to a domestic industry or a threat of such serious injury has been caused by increased imports. To allow Members to place on imports the burden of adjustment that a domestic industry must make in response to domestic circumstances, as the United States seeks to do in this case, would undermine the Safeguards Agreement and defeat its objective of circumscribing the derogations by Members from their obligations under the WTO Agreements.

III. CHRONOLOGY OF RELEVANT EVENTS

3.1 On 1 January 1995, on the entry into force of the Agreement establishing the WTO, the United States bound its tariff for imports of lamb meat at 1.1c per kg.¹ to decline to 0.7c per kg. by 2001. On 1 January 1999, the rate was 0.8c per kg.

3.2 On 7 October 1998, a petition was filed with the USITC, under section 202 of the Trade Act of 1974,¹ on behalf of the American Sheep Industry Association, Inc (ASI), National Lamb Feeders Association, Harper Livestock Co, Winters Ranch Partnership, Godby Sheep Co, Talbott Sheep Co, Iowa Lamb Corp, Ranchers’ Lamb of Texas Inc, and Chicago Lamb and Veal Co.

3.3 On 19 October 1998, the USITC issued a notice of initiation of an investigation to determine whether lamb meat was being imported into the United States “in such increased quantities as to be a substantial cause of serious injury, or threat thereof, to the domestic industry producing an article like or directly competitive with the imported article.” The period of investigation chosen by the USITC

¹ 19 USC sec 2252.

was 1993 to September 1998. The initiation of this investigation was notified to the WTO Committee on Safeguards on 30 October 1998.²

3.4 On 9 February 1999, the USITC determined that “lamb meat is being imported into the United States in such increased quantities as to be a substantial cause of the threat of serious injury to the domestic industry producing an article like or directly competitive with the imported article.” The report of the USITC setting out its determination and its recommendations on remedy was published in April 1999,³ and forwarded, on 5 April 1999, to the President of the United States for final decision.

3.5 On 13 April 1999, the United States notified the USITC determination to the WTO Committee on Safeguards.⁴ Consultations between New Zealand and the United States, pursuant to Article 12.3 of the Agreement on Safeguards, were held on 28 April 1999.

3.6 On 7 July 1999, the United States imposed a definitive safeguard measure on imports of lamb meat, effective 22 July 1999.⁵ This measure, which differed from the measure recommended by the USITC, was notified by the United States to the WTO Committee on Safeguards on 9 July 1999.⁶ Consultations between New Zealand and the United States, pursuant to Article 12.3 of the Agreement on Safeguards, continued on 14 July 1999.

3.7 On 16 July 1999, New Zealand requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and pursuant to Article XXII:1 of the GATT and Article 14 of the Agreement on Safeguards.⁷ Such consultations were held in Geneva on 26 August 1999.

3.8 On 14 October 1999, New Zealand requested the establishment of a panel.⁸ On the same date, Australia also requested the establishment of a panel in respect of the same United States measure.⁹ A single panel to hear the complaints of both New Zealand and Australia was established on 19 November 1999. New Zealand reserved its third party rights in respect of the Australian complaint. Australia, Canada, Iceland, Japan and the European Communities reserved their third party rights in respect of New Zealand’s complaint.

3.9 The panel was constituted on 21 March 2000.¹⁰

² G/SG/N/6/USA/5.

³ USITC Report “Lamb Meat”, Investigation No. TA-201-68, Publication 3176, April 1999 (attached as Annex 1). Referred to in this submission as “USITC Report”.

⁴ G/SG/N/8/USA/3/Rev.1 (attached as Annex 2). The USITC determination on injury had previously been notified to the WTO Committee on Safeguards in February 1999 (G/SG/N/8/USA/3 and G/SG/N/8/USA/3/Corr.1).

⁵ The measure was amended on 30 July 1999, but not in any respect material to the legal arguments set out in this submission: “Proclamation 7214 of 30 July 1999 - To provide for the Efficient and Fair Administration of Action Taken With regard to Imports of Lamb Meat and for Other Purposes” by the President of the United States of America published in the Federal Register Vol 64, No 149, pp 42265-42267 on 4 August 1999.

⁶ G/SG/N/10/USA/3 and G/SG/N/11/USA/3 (attached as Annex 3). This notification was later supplemented on 13 August 1999 by G/SG/N/10/USA/3/Suppl.1 and G/SG/N/11/USA/3/Suppl.1.

⁷ Circulated to WTO Members on 22 July 1999 as WT/DS177/1 (attached as Annex 4).

⁸ Circulated to WTO Members on 15 October 1999 as WT/DS177/4 (attached as Annex 5).

⁹ Circulated to WTO Members on 15 October 1999 as WT/DS178/5.

¹⁰ Notified to WTO Members on 23 March 2000 as WT/DS177/5 and WT/DS178/6.

IV. FACTUAL BACKGROUND

4.1 In this section, New Zealand will describe the two industries which the United States claims are threatened with serious injury, that is the live lamb and the lamb meat industries. New Zealand will also provide relevant information on the lamb meat market in the United States, consumption of lamb meat, lamb meat imports, and product marketing. The information in this section is derived either from information in the USITC Report or uncontested information placed before the USITC.

A. THE LIVE LAMB AND LAMB MEAT INDUSTRIES IN THE UNITED STATES

1. The Participants in the Live Lamb and Lamb Meat Industries

4.2 The “domestic industry” in the United States, which the USITC found threatened with serious injury by increased imports, is composed of two distinct categories: those who produce live lambs (growers and feeders) and those who slaughter lambs and prepare carcasses for sale as lamb meat (packers and breakers).

4.3 The live lamb industry is involved in the breeding, growing, and feeding of lambs. Growers have sheep-breeding flocks which produce lambs. They produce two products: live lambs and shorn wool. The annual live lamb crop is retained for breeding purposes and wool production, sold to feeders, or sold directly to packing operations. Feeders fatten lambs on grain in feedlots until they reach the desired weight.¹¹ The feeders then sell the live lambs which are slaughtered for lamb meat. Feeders also receive income from the lamb’s wool pelt.

4.4 The live lamb industry consists of a large number of growers, numbering some 74,710 establishments in 1997.¹² Many of these operations consist of only a few animals that are raised by part-time or hobby farmers.¹³ While there was a decline in the number of growing establishments from 1993 to 1997, 94 per cent of the exits were of growers with fewer than 100 sheep.¹⁴ The live lamb industry also consists of a small number of feeders and a number of feeders who are also growers.¹⁵

4.5 The lamb meat industry is comprised of packers, who slaughter lambs, and breakers, who process carcasses for wholesale or retail sale.¹⁶ The United States packing and breaking industry is highly concentrated with relatively few companies accounting for most of the production. In the lamb meat packer industry 5 firms accounted for 76 per cent of the total lamb slaughter in 1997.¹⁷ The breaker industry is similarly concentrated with less than 10 firms engaged in processing lamb.¹⁸ An estimated 75 per cent of lamb carcasses are processed by breakers, with the remaining 25 per cent

¹¹ An estimated 70 to 80 per cent of live lambs slaughtered are fed in feed lots: USITC Report: II-24.

¹² USITC Report: II-11.

¹³ USITC Report: II-12.

¹⁴ Meat New Zealand Pre-Hearing Submission, Exhibit 7, “Number of US Lamb Growers and Size of Operations 1994-1997” (attached as Annex 6).

¹⁵ It is difficult to quantify this figure. In 1995 officials of the National Lamb Feeder Association reported that there were probably 100 large-volume lamb feedlots in the US (Meat New Zealand Pre-Hearing Submission, Exhibit 1, “USITC, Lamb Meat: *Competitive Conditions Affecting the US and Foreign Lamb Industries*, Inv. No. 332-357, August 1995”, pp 2-4). Nine feeders were identified in the petition. Eleven feeders provided responses to the USITC’s questionnaires. Some growers may be feeders and grain feed their own lambs.

¹⁶ The main output from packers is lamb meat in carcass form, although some operations, including two of the five firms providing responses to the USITC’s questionnaires, both slaughter and divide carcasses.

¹⁷ USITC Report, II-14.

¹⁸ USITC Report, II-15.

processed by packers at the slaughter plants.¹⁹ As with packers, many of the breakers devote only a portion of their overall operations to the processing of lamb.²⁰

2. The State of the Live Lamb and Lamb Meat Industries

(a) The Sources of Information

4.6 The USITC used responses to questionnaires to assist in determining the production levels and financial condition of the live lamb growers and feeders and the lamb meat packers and breakers.²¹ However, in most cases the questionnaire responses failed to provide a valid representative sample. In other cases the statistical significance of the sample cannot be determined from the USITC Report.

4.7 With regard to the live lamb industry, usable data on domestic production and shipments from 1993 to 1997 was received from 57 growers and 18 feeder operations in response to questionnaires, including several growers which also maintained feeder operations.²² However, only 49 growers, three grower/feeders, and nine feeders provided data on the financial condition of the live lamb industry.²³ These reporting growers represented merely 5 per cent of the US lamb crop in 1997. Furthermore, information on the size of the operations of these growers was not provided in the USITC report. The feeders reporting financial data represented approximately one-third of the slaughtered lambs fed in feedlots in 1997.²⁴

4.8 In the case of the lamb meat industry, data on domestic shipments and inventories was provided in response to questionnaires from five packers. The USITC estimated that these five packers responding accounted for 76 per cent of the sheep and lambs slaughtered in the US in 1997.²⁵ However, information on the *financial condition* of the packers was provided by only four packers, two of whom were also packer/breakers.²⁶ It is not made clear in the USITC report which of these firms were included in the five packing firms estimated to account for 76 per cent of the sheep and lambs slaughtered in the United States in 1997.

4.9 There is a similar pattern with regard to responses from breakers. Responses to the USITC questionnaires were received from five firms involved in breaking lamb, four of whom provided usable data on their operations,²⁷ yet only three firms, (including two who were also packers) provided data on their financial condition.²⁸ Only one responding firm undertook solely breaking operations. While it is estimated that breakers process 75 per cent of lamb carcasses (with the remaining 25 per cent being processed by packers at slaughter plants),²⁹ no information is provided by the USITC on the proportion of that total breaker output represented by the one breaker response.

4.10 As a result, the USITC made findings on the financial condition of lamb meat packers and breakers on the basis of financial data provided by five firms - two were packers, two were

¹⁹ USITC Report, II-15, n 63.

²⁰ USITC Report, II-15.

²¹ USDA national data on the numbers of lamb-growing establishments and annual domestic lamb slaughter was also relied on by the USITC: USITC Report, I-16.

²² USITC Report, II-11 and II-13. Of the 18 feeder responses, seven claimed to be feeders, but in fact were growers who fed their own live lambs and were reclassified as growers: II-29, n 89.

²³ USITC Report, II-24.

²⁴ USITC Report, II-24.

²⁵ USITC Report, II-14.

²⁶ USITC Report, II-14.

²⁷ USITC Report, II-15.

²⁸ USITC Report, II-24.

²⁹ USITC Report, II-15, n 63.

packer/breakers, and only one was a breaker.³⁰ It is impossible to determine from the information in the USITC report whether these firms represent a valid sample of packers, and what proportion of the total lamb meat processed by firms solely undertaking breaking operations was represented by the only responding breaker.

4.11 Accordingly, the information provided by the USITC on the financial condition of the live lamb and lamb meat industries was not shown to be a valid representative sample. In addition, the statistical significance of the sample cannot be determined in some cases because the United States has not disclosed the information on which the USITC based its determination. As New Zealand will point out later in the submission, the failure of the United States to disclose this information disallows the United States from invoking it in support of its measure.

(b) The Live Lamb Industry

4.12 Both the USITC and the participants in the live lamb and lamb meat industries recognise that the lamb industry in the United States has been in a long state of decline.³¹ For some 50 years there has been a long-term downward trend in both the annual lamb crop and the sheep-breeding inventory. The number of breeding ewes has fallen from 22.4 million head in 1960 to 4.5 million head in 1998.³² Live lamb production (or lamb crop) in 1960 was 21 million.³³ By 1993, the start of the USITC's period of investigation, live lamb production had fallen to 6.37 million. This downward trend continued and by 1998 live lamb production was at 4.87 million.³⁴

4.13 Aside from live lamb production, the profitability of the live lamb industry is also affected by the other main output - wool.³⁵ The National Wool Act was introduced in 1954 to provide support payments for shorn wool, mohair, and pulled wool.³⁶ Government support payments for wool increased substantially from the late 1980's as market prices for wool fell.³⁷ The support price continued to increase until 1993, when payments under the Wool Act totalled \$125 million, with an average payment per wool producer of US\$2,320.³⁸ During the period of investigation revenues to the live lamb industry were adversely affected by the decision of the United States Government in 1993 progressively to eliminate subsidies under the Wool Act to growers of lambs. Subsidies were cut to 75 per cent of previous levels in 1994, to 50 per cent in 1995 and eliminated completely in 1996.

4.14 Government wool subsidies in 1994 accounted for 19.3 per cent of the total net sales revenue that growers responding to the USITC questionnaire received from live lambs, wool, and cull ewes.³⁹ The impact of the wool subsidy can be illustrated by making adjustment to incomes to account for the

³⁰ USITC Report, II-29 to II-34.

³¹ USITC Report, I-17.

³² USITC Report, II-53; Meat and Livestock Australia Pre-Hearing Submission, Vol 1, Exhibit 15, "US Live Lamb Statistics 1960 to 1998" (attached as Annex 7).

³³ Meat and Livestock Australia Pre-Hearing Submission, Vol 1, Exhibit 15, "US Live Lamb Statistics 1960 to 1998" (attached as Annex 7).

³⁴ USITC Report, II-53, Table 33. The figure for 1998 of 4.87 million is a January-October figure. The year-end figure is likely to be somewhat higher.

³⁵ Responses to questionnaires from growers and feeders also indicate that a share of their income is derived from operations other than sheep and lambs: USITC Report, II-51.

³⁶ USITC Report, II-77.

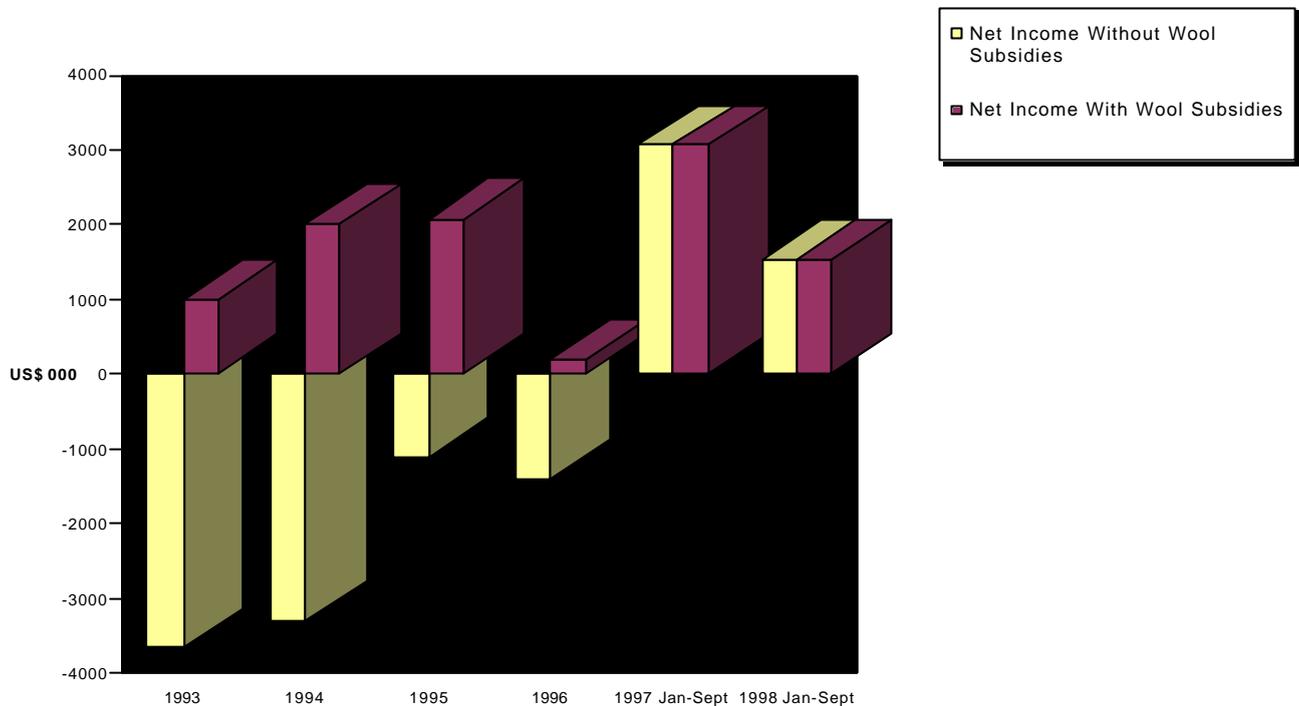
³⁷ Meat and Livestock Australia Pre-Hearing Submission, Vol 1, Exhibit 6, "Government Wool Subsidy Payments, Value of Wool Production and Total US Income from Wool" (attached as Annex 8).

³⁸ USITC Report, II-78, Table 45.

³⁹ USITC Report, II-25 to II-28, Table 12.

removal of wool subsidies. When such an adjustment is made, net incomes of responding lamb growers actually increased over the period of investigation (Figure 1).⁴⁰

Figure 1 : United States lamb grower income survey



Source: USITC Report, II-25, Table 12

Curiously, this is the one occasion on which the USITC admits that it may not be faced with a representative sample.⁴¹ However, it was the only financial information on lamb growers in front of the USITC.

4.15 Information obtained from grower and feeder responses to the USITC questionnaires indicates that supply and profitability in the live lamb industry is also affected by other factors. These include input costs, including wages and depreciation, predator losses, and more restricted access to public land for grazing.⁴²

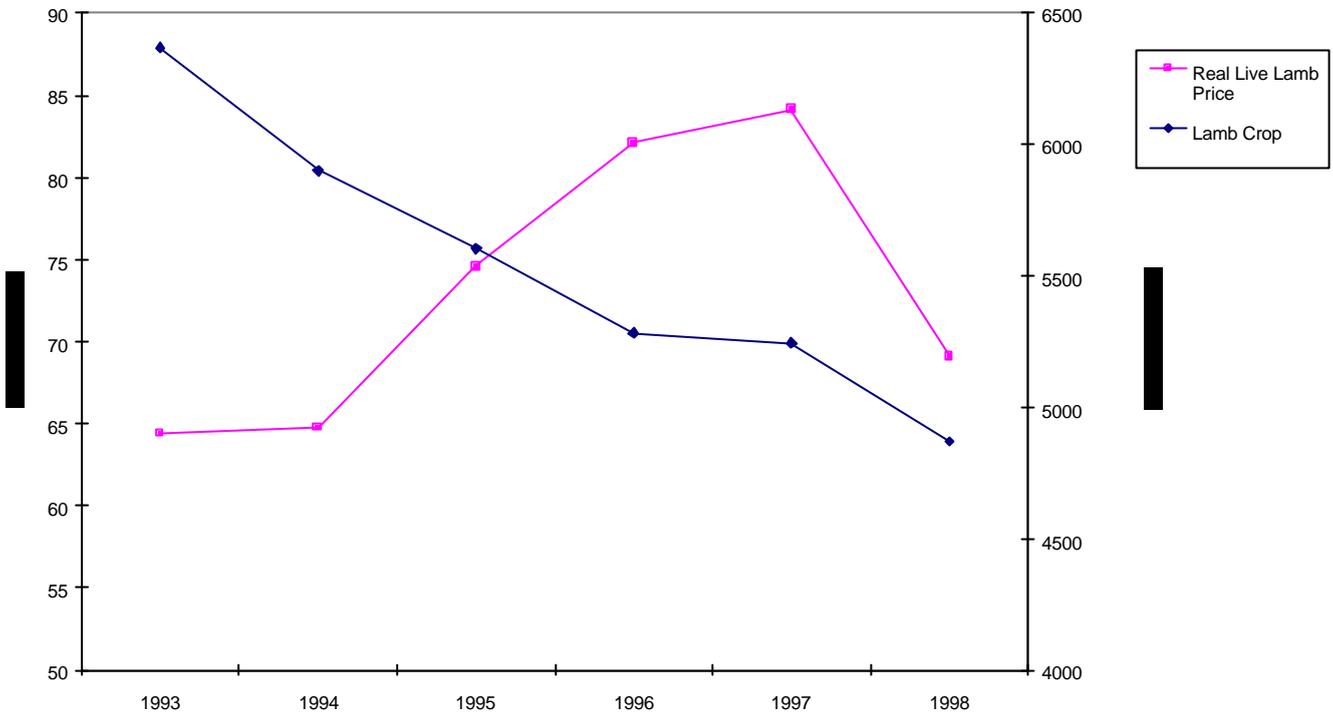
4.16 The decline in the number of breeding ewes and the lamb crop from 1993 to 1998 occurred at the same time as an upward trend in the price of live lambs for slaughter (Figure 2).

⁴⁰ The 1997 and 1998 columns - by showing no differential between net income without and with wool subsidies - reflect that in 1997 and 1998 no wool subsidies were paid.

⁴¹ USITC Report, II-51, n 150.

⁴² USITC Report, II-25 to II-28, Table 12, and II-30 to II-32, Table 15, and II-52 to II-54.

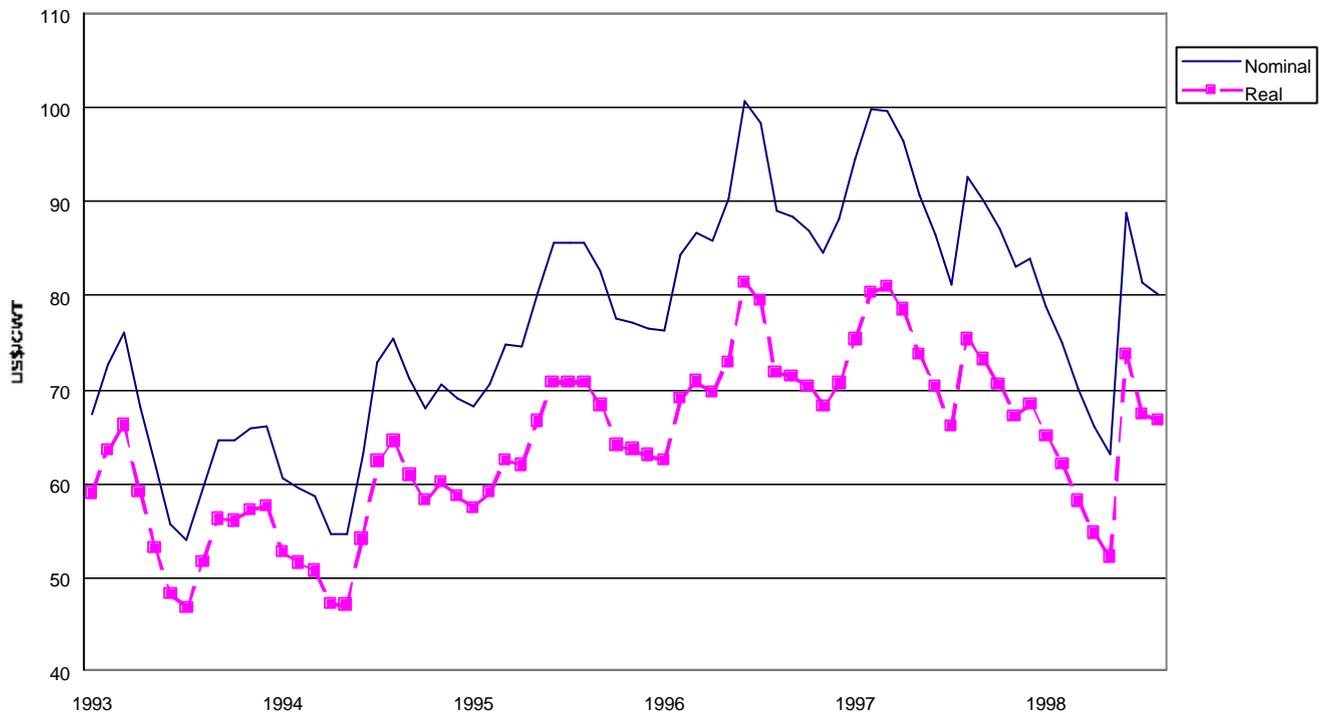
Figure 2 : United States live lamb market



Source: USDA/NASS Annual Price Summary; Bureau of Labour Statistics (PPI Index); & USITC Report, II-53, Table 33

The monthly price of live lambs for slaughter fluctuated considerably over the period of investigation but trended upwards over the period as a whole in both nominal and real terms (Figure 3).

Figure 3: Real and nominal live lamb prices at time of slaughter



Source: USITC Report, II-55, Figure 3

Prices at the end of the period though lower than in 1996 and 1997 were significantly higher than through much of 1993 and 1994 in both nominal and real terms. Furthermore, although prices declined from mid-1997, they improved over the last three months of the period of investigation.

4.17 Decisions taken by the live lamb industry on retention of live lambs for breeding or on the culling of ewes are made on the basis of expected future prices.⁴³ Accordingly, based on the returns from live lambs alone, producers would have had no reason to reduce their breeding ewes. The decline in lamb flocks must, therefore, have been in response to other factors affecting supply. The loss of revenue resulting from the removal of the Wool Act subsidies is the most likely factor leading to the continued decline in the US lamb crop.

(c) The Lamb Meat Industry

4.18 The main source of supply for lamb packers is the domestic supply of live lambs. As the domestic supply of live lambs contracted over the period of investigation, the throughput of packers, and correspondingly of breakers, has fallen. The decline in lamb meat production is a direct result of the decline in the production of live lambs. Lamb meat production declined from 327 million pounds in 1993 to 251 million pounds in 1997 -- a decline of some 76 million pounds.⁴⁴ This constituted an average annual decline of 6.3 per cent between 1993 and 1997. Production is estimated to have declined by 3.4 per cent between January-September 1997 and January-September 1998.⁴⁵

⁴³ USITC Report, II-51.

⁴⁴ USITC Report, II-21, Table 7.

⁴⁵ USITC Report, II-21, Table 7.

4.19 The wholesale price of lamb carcasses tended to fluctuate between January 1993 and September 1998 with clear cyclical trends.⁴⁶ Wholesale prices exhibited a decline from mid-1997 to mid-1998, but thereafter showed a sharp improvement. However, over the period 1993 to September 1998 as a whole, real wholesale prices of domestic lamb carcasses increased by 12 per cent.⁴⁷

4.20 Information was provided by the USITC for only part of the period on packers' production, capacity, and capacity utilisation. Information on inventories was withheld by the USITC as confidential.⁴⁸ No information on any of these factors was provided in relation to breakers. The relevance of this information cannot, therefore, be assessed.

4.21 Available information on the input costs of packers and breakers indicate that labour costs increased over the period of investigation and processing costs in general were relatively flat to slightly increasing from 1993 to 1997.⁴⁹ Other data relating to the financial condition of packers and breakers over the period 1993 to interim 1998 and relied upon by the USITC was said by the USITC to be confidential. Once again, the relevance of this information cannot, therefore, be assessed.

4.22 From the little information available, it seems apparent that there has been a decline in the lamb meat industry which has paralleled the long-term decline in the production of live lambs. However, the financial condition of the lamb meat industry cannot be assessed on the basis of the information provided by the United States.

B. THE UNITED STATES LAMB MEAT MARKET

1. Lamb Meat Consumption in the United States

4.23 Lamb meat consumption in the United States has fallen steadily since World War II.⁵⁰ In 1950 consumption per capita was 4 pounds. By the mid-1970's it had fallen to just over half that level.⁵¹ It has further declined in recent years to around 1 pound per capita.⁵² From 1993 to 1997, total consumption decreased from 365 million pounds to 307 million pounds, although consumption appeared to increase in 1998.⁵³

4.24 A shift in consumer preferences away from red meat and loss of price competitiveness with other meats have been important factors in the decline in lamb meat consumption. In general, United States consumer preferences since the mid-1970's have shifted away from red meat consumption, towards poultry and other protein sources. Even in comparison with other red meat sources, however, lamb meat has been relatively uncompetitive.

4.25 Lamb meat has consistently been priced higher than competing meats. Furthermore, there has been an increasing loss of price competitiveness (Figure 4).⁵⁴ For example, between 1992 and 1998 the real consumer price for beef decreased by 12.3 per cent and the price for pork decreased by 1.8 per cent. By contrast, the real consumer price for lamb meat rose by 6.1 per cent.⁵⁵

⁴⁶ USITC Report, II-58, Figure 5.

⁴⁷ USITC Report, II-57.

⁴⁸ USITC Report, II-21 and II-22.

⁴⁹ USITC Report, II-56.

⁵⁰ USITC Report, I-22.

⁵¹ USITC Report, I-30 and II-66.

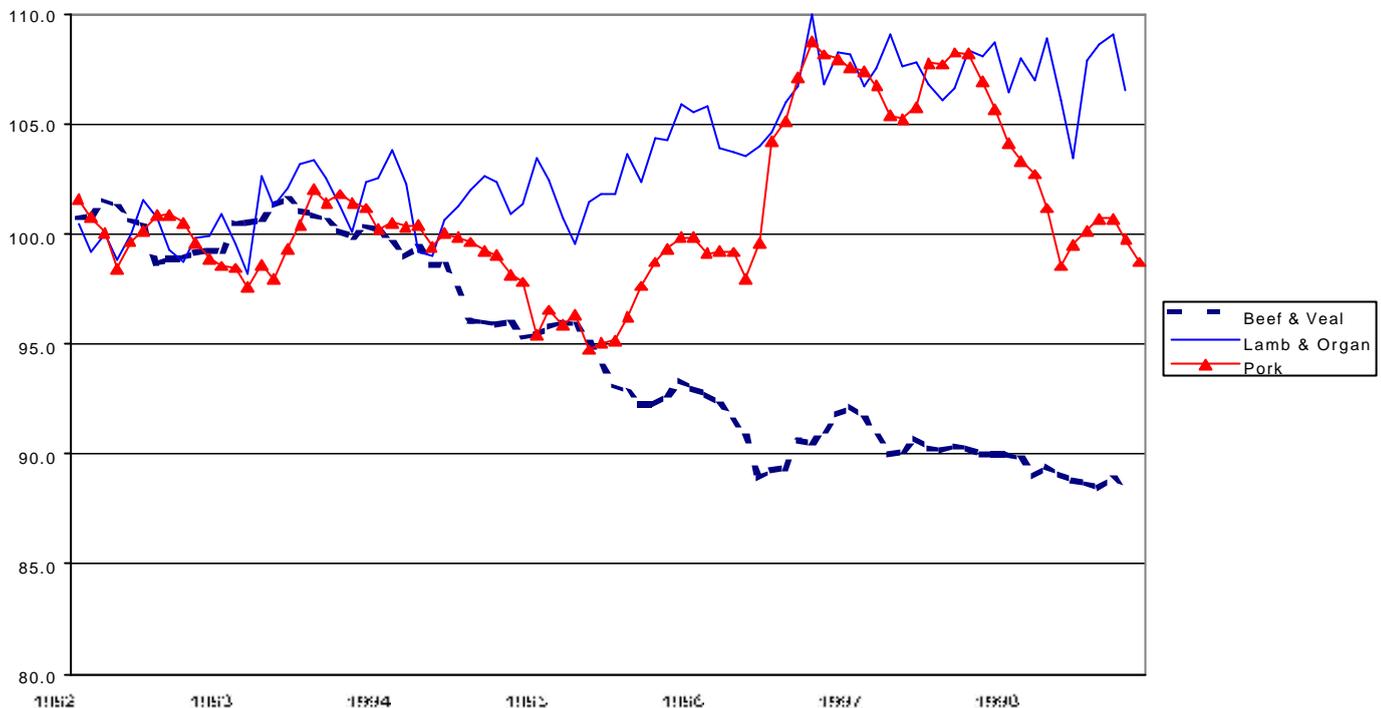
⁵² USITC Report, II-69.

⁵³ Based on interim data: USITC Report, II-17, Table 5.

⁵⁴ USITC Report, I-31. Figure 4 is adapted from II-70, Figure 17.

⁵⁵ Poultry also rose, but by only 2.5 per cent: USITC Report, II-69.

Figure 4: Real consumer price indexes of beef,pork,lamb and organ meats(1992=100)



Source: USITC Report, II-70, Figure 17

4.26 Figure 4 shows that the price of the main red meat substitutes for lamb meat has decreased while lamb meat prices have increased. This can be expected to have contributed to the decline in lamb meat consumption in the United States.

2. Lamb Meat Imports into the United States

4.27 During the period of investigation imports of lamb meat rose from 41 million pounds (carcass weight equivalent) in 1993⁵⁶ to 77.8 million pounds for the full 1998 calendar year.⁵⁷ During 1993 to 1997 the quantity of lamb meat imports increased by 47 per cent while the value of the imports increased by 131 per cent. The quantity and value of imports from January-September 1997 to January-September 1998 increased by 19 and 8 per cent respectively.⁵⁸ Imports for the period January to September 1998 totalled 55 million pounds, and \$114 million.⁵⁹

4.28 The average unit CIF import price of lamb meat increased from US\$1.45 per pound in 1993 to US\$2.06 in 1998 after having peaked at US\$2.28 in 1997.⁶⁰ The rise in imports of the period since 1993 has in this way been associated with an increase in the average import price. The average

⁵⁶ USITC Report, II-19, Table 6.

⁵⁷ Table of Lamb Import Quantities received from the United States in response to questions during consultations under the DSU on 26 August 1999 (attached as Annex 9).

⁵⁸ USITC Report, II-18.

⁵⁹ USITC Report, II-19, Table 6.

⁶⁰ USITC Report, II-19, Table 6.

import price in 1993 was higher than that prevailing during the period 1990 to 1992.⁶¹ In the January-September 1998 period, the average import price was significantly higher than in 1993 and 1994.⁶²

4.29 It can be concluded, therefore, that while imports of lamb meat increased over the period of investigation, so too did their average unit price.

3. Lamb Meat Product and Marketing

4.30 Domestic United States lamb meat carcasses and cuts are usually large compared to imported lamb meat. The average carcass weight for lambs slaughtered under Federal Inspection in the United States in 1997 was 67 pounds, whereas the average carcass weight in Australia is about 42 pounds and in New Zealand about 35 pounds.⁶³ Domestic meat is generally sold fresh or chilled and is mostly (70 to 80 per cent) derived from lambs that have been grain fed.⁶⁴ The bulk of imported product comes from grass-fed lambs and is often sold in frozen form.⁶⁵

4.31 The highest priced cuts from domestic lambs are racks, and the largest production cut is double legs.⁶⁶ There is some specialisation of specific cuts of imported lamb meat and a number of imported products which the domestic industry does not produce.⁶⁷ For example, New Zealand produces small racks, and consumer-ready cuts which the domestic industry does not.

4.32 Both New Zealand and Australia have promoted increased consumption of lamb meat in the United States.⁶⁸ Factors influencing the purchase of imported lamb meat include its smaller size, leanness, better packaging and greater price stability than domestic lamb meat.⁶⁹ As a result of the promotional efforts and product marketing, many imports have gone to create new demand supplied through, for example, large retail chains.⁷⁰

4.33 Domestic and imported lamb meat is generally sold through the same channel of distribution. Lamb meat in the United States is distributed to the food services sector (hotels, restaurants and institutions) and retailers (mostly grocery stores).⁷¹ The majority of New Zealand lamb meat is supplied to the food services sector.⁷² More detailed information on the distribution of domestic lamb meat has not been made public by the USITC.⁷³

4.34 While domestic and imported lamb meat have similar (but not identical) physical characteristics and comparable distribution channels, they are by no means equivalent in their product differentiation and marketing. The consistency of supply, greater price stability and vigorous promotional efforts have all impacted positively on the demand for imported product.

⁶¹ Meat New Zealand Pre-Hearing Submission, Exhibit 1, "USITC, Lamb Meat: *Competitive Conditions Affecting the US and Foreign Lamb Industries*, Inv. No. 332-357, August 1995", pp 2-46 and 2-47, Tables 2-12 and 2-13 (attached as Annex 10). The 1990 average import price was \$1.26.

⁶² USITC Report, II-19, Table 6.

⁶³ USITC Report, II-8.

⁶⁴ USITC Report, II-8 and II-24.

⁶⁵ USITC Report, II-8.

⁶⁶ USITC Report, II-58.

⁶⁷ USITC Report, II-74 to II-76.

⁶⁸ USITC Report, II-63.

⁶⁹ USITC Report, II-65.

⁷⁰ USITC Report, I-32. These were also referred to by the USITC as "food warehouses".

⁷¹ USITC Report, II-16.

⁷² USITC Report, II-18.

⁷³ USITC Report, II-18.

C. CONCLUSION

4.35 The factual evidence clearly shows that both the United States live lamb industry and the United States lamb meat industry have been in a long term decline. The most severe adjustment occurred in the early part of the period of investigation with the progressive elimination of the Wool Act subsidies, which accounted for a significant portion of lamb growers' income. The inevitable effect was a decline in the domestic production of live lambs.

4.36 In response to the reduced domestic supply, imports were drawn into the United States market to meet the unfilled consumer demand for lamb meat. As a result of promotional efforts and differentiated marketing, importers have also created new demand for lamb in markets which the domestic industry had previously not supplied or had under-supplied.

4.37 The factual evidence also shows that while domestic prices trended upwards during the period of investigation, the increase was greater over the 1993 to mid-1997 period. Prices improved again over the last three months of the period of investigation. Although faced with a downward trend in the prices of competing meats, lamb meat prices held up relatively well over the period of investigation.

4.38 There was nevertheless an inevitable lamb meat price correction in 1997 as lamb meat lost its price competitiveness. Despite this, the live lamb and lamb meat industries that claim to be suffering injury were better off in 1998 than they were in the early years of the period of investigation.

V. THE UNITED STATES DETERMINATION

5.1 In its determination of April 1999, the USITC recommended that a tariff-rate quota be imposed on imports of lamb meat for a four year period as follows:

Year One:	20 per cent <i>ad valorem</i> on imports over 78 million pounds. ⁷⁴
Year Two:	17.5 per cent <i>ad valorem</i> on imports over 81.5 million pounds.
Year Three:	15 per cent <i>ad valorem</i> on imports over 81.5 million pounds.
Year Four:	10 per cent <i>ad valorem</i> on imports over 81.5 million pounds.

Under the USITC's recommendation the in-quota tariff would remain at the current bound value of 0.8c per kg.⁷⁵

5.2 This recommendation was not adopted by the United States Administration. Instead, on 7 July 1999, the United States imposed a definitive safeguard measure in the form of a tariff-rate quota on imports of lamb meat for a period of three years and one day on the following basis:

Year One: 9 per cent *ad valorem* in-quota tariff; 40 per cent *ad valorem* out-of-quota tariff on imports over 31,851,151 kg.⁷⁶

⁷⁴ The weights recommended by the USITC are in terms of carcass-weight equivalents: USITC Report, I-29.

⁷⁵ The bound value is scheduled to drop to 0.7c per kg in 2001. The average *ad valorem* tariff rate equivalent of 0.8c per kg is approximately 0.2%.

⁷⁶ In contrast to those used by the USITC, the weights used in the measure adopted by the United States Administration are in product weight equivalent. The weight specified for Year One of the measure is approximately 78 million pounds in carcass weight equivalent. The country allocations (in product weight equivalent) are: Australia 17,139,582 kg; New Zealand 14,481,603 kg; other countries 229,966 kg: US notification to the WTO Committee on Safeguards of its safeguard measure under Article 12.1(c) of the Safeguards Agreement (attached as Annex 3.)

Year Two: 6 per cent *ad valorem* in-quota tariff; 32 per cent *ad valorem* out-of-quota tariff on imports over 32,708,493 kg.⁷⁷

Year Three: 3 per cent *ad valorem* in-quota tariff; 24 per cent *ad valorem* out-of-quota tariff on imports over 33,565,835 kg.⁷⁸

The import level for the year one over-quota rate under both the USITC recommendation and the actual United States safeguard measure was set at the import level for lamb meat for 1998.

5.3 The measure does not apply to imports from Canada, Mexico, Israel, beneficiary countries under the Caribbean Basin Economic Recovery Act or the Andean Trade Preference Act, or developing countries exempted in accordance with Article 9.1 of the Agreement on Safeguards.

VI. NEW ZEALAND'S CLAIM

6.1 The United States safeguard measure imposed on imports of lamb meat from New Zealand is not in conformity with the United States obligations under the Safeguards Agreement and under GATT 1994 in the following respects:

- (i) The United States measure is not a response to “unforeseen developments” within the meaning of GATT Article XIX and thus does not comply with Article 2.1 and Article 11 of the Safeguards Agreement.
- (ii) The United States has failed to demonstrate that its “domestic industry that produces like or directly competitive products” has been threatened with “serious injury” as required by Article 2.1 of the Safeguards Agreement.
- (iii) The United States has failed to demonstrate that any threat of serious injury to its domestic industry has been caused by increased imports as required by Article 2.1 of the Safeguards Agreement.
- (iv) The United States has applied a safeguard measure that is neither necessary to prevent serious injury nor necessary to facilitate adjustment, contrary to Article 5.1 of the Safeguards Agreement, and has failed to publish its findings and reasoned conclusions on the necessity of its measure as required by Article 3.1 of the Safeguards Agreement.
- (v) The United States has failed to apply a safeguard measure to all imports irrespective of source as required by Article 2.2 of the Safeguards Agreement and Article I of GATT 1994.
- (vi) The United States has applied a safeguard measure that places it in violation of its obligations under Article II of GATT 1994.

⁷⁷ ie approximately 80 million pounds in carcass weight equivalent. The country allocations (in product weight equivalent) are: Australia 17,600,931 kg; New Zealand 14,871,407 kg; other countries 236,155 kg: Annex 3.

⁷⁸ ie approximately 82 million pounds in carcass weight equivalent. The country allocations (in product weight equivalent) are: Australia 18,062,279 kg; New Zealand 15,261,210 kg; other countries 242,346 kg: Annex 3.

VII. LEGAL ARGUMENT

A. INTRODUCTION

7.1 The Safeguards Agreement and GATT 1994 set out certain obligations that must be met by Members seeking to derogate from their WTO obligations through the use of a safeguard measure. Those obligations are clear and precise and, in order to uphold the integrity of the WTO system, Members must adhere to those obligations strictly. New Zealand will establish that the United States has failed to meet those obligations and that as a result its safeguard measure in this case places the United States in violation of both the Safeguards Agreement and GATT 1994.

B. THE UNITED STATES OBLIGATIONS UNDER THE SAFEGUARDS AGREEMENT

7.2 The Agreement on Safeguards, which clarifies and reinforces Article XIX of GATT 1994,⁷⁹ sets out the conditions under which Members may take safeguard measures. The basic conditions are set out in Article 2 which provides:

“A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.”

7.3 A “safeguard measure” is stated in Article 1 to “be understood to mean those measures provided for in Article XIX of GATT 1994.” Accordingly, to be justified as a safeguard measure under the Safeguards Agreement, a measure must meet the requirements of GATT Article XIX. This is reinforced by Article 11 of the Safeguards Agreement which provides that emergency action can be taken only if it conforms with both GATT Article XIX and the provisions of the Safeguards Agreement. In particular, under GATT Article XIX a safeguard measure can respond only to “unforeseen developments”. As the Appellate Body pointed out in *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*,⁸⁰ and in *Argentina - Safeguard Measures on Imports of Footwear*,⁸¹ emergency action within the meaning of Article XIX can be invoked only when an importing Member “finds itself confronted with developments it had not ‘foreseen’ or ‘expected’...”.⁸²

7.4 Article 2 provides that a determination of serious injury or of threat of serious injury can only be made in respect of an industry that “produces like or directly competitive products.”

7.5 In the present case, the United States has not made a determination of serious injury; it has determined that there is a “threat of serious injury.” Article 4.1(b) of the Safeguards Agreement defines “threat of serious injury” as “serious injury that is clearly imminent”. “Serious” injury is defined in Article 4.1(a) as “a significant overall impairment in the position of a domestic industry.” Thus, any determination by the United States that there is a threat of serious injury must establish that a “significant overall impairment in the domestic industry” is “clearly imminent”.

7.6 Article 4.2(a) requires that in an investigation to determine whether increased imports are causing or threatening to cause serious injury to a domestic industry, the competent authorities of a Member shall:

⁷⁹ Safeguards Agreement, Preamble.

⁸⁰ WT/DS98/AB/R, 14 December 1999.

⁸¹ WT/DS121/AB/R, 14 December 1999.

⁸² *Argentina - Footwear*, para 93 and *Korea - Dairy*, para 86.

“evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses and employment.”

7.7 Article 4.2(b) requires that a determination that increased imports are causing or threatening to cause serious injury to a domestic industry shall not be made unless the investigation demonstrates “on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof.” Article 4.2(b) goes on to provide that “when factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.” Thus, any threat of serious injury on which a safeguard measure is based must be caused by increased imports. It is not sufficient to show that increased imports in part cause a threat of serious injury. Serious injury caused by other factors does not constitute serious injury on which a safeguards measure can be based.

7.8 Having made the relevant determinations on injury and causation, a Member has specific obligations under Article 5 of the Safeguards Agreement in respect of the remedy imposed. Article 5.1 provides that a safeguard measure can be applied “only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.” Moreover, in accordance with Article 5.1, Members are to “choose measures most suitable” for the achievement of this objective.

7.9 In making the determinations on injury and causation required in Article 2 and Article 4, and on the necessity of the remedy under Article 5, a Member is required by Article 3 to publish a report setting out the findings of its competent authorities and its “reasoned conclusions on all pertinent issues of law and fact.” In short, in order to justify the imposition of a safeguard measure, a Member must base its determinations both on injury and remedy on reasoned conclusions.

7.10 Article 2.2 requires a Member applying a safeguard measure to ensure that the measure is applied to all imports irrespective of source. Thus a measure must be applied on a “Most Favoured Nation” basis, in accordance with Article I of GATT 1994.

7.11 As a result of these provisions, the United States has specific obligations under the Safeguards Agreement and GATT 1994 in respect of its imposition of a definitive safeguard measure on imports of lamb meat.

- (i) It must demonstrate that “unforeseen developments” have resulted in the situation to which the safeguard measure responds.
- (ii) It must determine, on the basis of reasoned conclusions, that there is a clearly imminent threat of serious injury to a domestic industry that produces a like or directly competitive product.
- (iii) It must determine on the basis of reasoned conclusions that the threat of serious injury has been caused by increased imports, and must not attribute injury from other factors to imports.
- (iv) It must demonstrate, on the basis of reasoned conclusions, that the remedy it has adopted is necessary to prevent the serious injury that is threatened and is necessary to facilitate adjustment.
- (v) It must also apply its safeguard measure to all imports irrespective of source and in such a way that it does not violate its other obligations under GATT 1994.

7.12 In this Submission, New Zealand will show that the United States has failed to meet each of the above obligations and as a consequence the United States is not in conformity with its obligations under the Agreement on Safeguards or its obligations under GATT 1994.

C. APPROACH TO INTERPRETATION

7.13 The correct approach to the interpretation of WTO Agreements, including the Safeguards Agreement, is well-established in the jurisprudence of the WTO. Agreements are to be interpreted in accordance with the rules of interpretation set out in the Vienna Convention on the Law of Treaties. Article 31 of the Vienna Convention provides that a treaty is to be interpreted in accordance with “the ordinary meaning to be given to the terms of a treaty in their context and in the light of its object and purpose.” Article 32 of the Vienna Convention provides that the preparatory work and the circumstances of the conclusion of a treaty can be referred to as a supplementary means of interpretation “to confirm a meaning derived from the application of Article 31, or where the application of the approach set out in Article 31 produces a result that is ambiguous or obscure or is manifestly absurd or unreasonable.”

7.14 Thus, the approach to interpretation in this case involves looking at the meaning of the words used in the Safeguards Agreement and in GATT 1994 in their context and in the light of the object and purpose of the agreement in question. The *travaux préparatoires* play a supplementary role.

7.15 In looking at the meaning of the words, it must be recalled, as the Appellate Body pointed out in *Korea - Dairy*, that “Article XIX is clearly an extraordinary remedy.”⁸³ In *Argentina - Footwear* the Appellate Body added further emphasis: “Article XIX is clearly, *and in every way*, an extraordinary remedy.”⁸⁴ The reason for this extraordinary nature of the safeguard remedy is made clear in both cases. It is because it allows Members temporarily to suspend obligations undertaken under the WTO Agreements in whole or in part or to withdraw or modify a concession made under those Agreements.⁸⁵ It allows Members to derogate from obligations undertaken under the WTO Agreements.

7.16 This derogation from obligations is explicitly exceptional. GATT Article XIX is entitled “Emergency Action on Imports of Particular Products.” The reference to “emergency action” is repeated in Article 11.1(a) of the Safeguards Agreement. It follows that a safeguard measure is to be taken in “emergencies”, not routinely. It is action that can be taken in respect of trade that has occurred in full compliance with WTO obligations, and as such, is action that can be taken only in exceptional circumstances. As the Appellate Body said in *Argentina - Footwear*:⁸⁶

“it is essential to keep in mind that a safeguard action is a ‘fair’ trade remedy. The application of a safeguard measure does not depend upon ‘unfair’ trade actions, as is the case with anti-dumping or countervailing measures.”

7.17 Such an interference with the legitimate trading activities of WTO Members can be permitted only in limited and defined circumstances. Members can impose safeguard measures only to the extent that they comply strictly with the provisions of GATT Article XIX and the Safeguards Agreement. As the Appellate Body said in *Korea - Dairy* and *Argentina - Footwear*:

“it must always be remembered that safeguard measures result in the temporary suspension of treaty concessions or the temporary withdrawal of treaty obligations,

⁸³ Para 86.

⁸⁴ Para 93 (emphasis added).

⁸⁵ *Korea - Dairy*, para 86 and *Argentina - Footwear*, para 93.

⁸⁶ Para 94.

which are fundamental to the *WTO Agreement*, such as those in Article II and Article XI of the GATT 1994.”⁸⁷

7.18 That the extraordinary nature of the safeguard remedy must be taken into account in the interpretation of the Safeguards Agreement, was mandated specifically by the Appellate Body in *Argentina - Footwear*. It said:

“Thus, the import restrictions that are imposed on products of exporting Members when a safeguard action is taken must be seen, as we have said, as extraordinary. *And, when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account.*”⁸⁸

7.19 Accordingly, in the present context the provisions of the Safeguards Agreement and of GATT 1994 are to be interpreted in accordance with the fundamental rule of interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties, taking account of the extraordinary nature of the safeguard remedy which requires that safeguard provisions be interpreted strictly.

D. BURDEN OF PROOF

7.20 The basic rule regarding burden of proof was set out by the Appellate Body in *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*: “the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof.”⁸⁹ Such a rule applies equally to cases brought under the Safeguards Agreement. As the Panel pointed out in *Korea - Dairy*, it is for the claimant to establish a *prima facie* case of violation of the Safeguards Agreement and then it is for the respondent to refute that case.⁹⁰

7.21 Accordingly, New Zealand will demonstrate in this submission that, in adopting the safeguard measure against imports of lamb meat, the United States has failed to discharge its obligations under the Safeguards Agreement and under GATT 1994.

E. USE OF CONFIDENTIAL INFORMATION

7.22 In seeking to demonstrate that it has met its obligations under the Safeguards Agreement and under GATT 1994, the United States must show that the determination of the USITC, as well as any determination made by the United States Administration, in respect of the safeguard measure imposed on New Zealand, was based on reasoned conclusions.⁹¹ In order to accept that conclusions were reasoned, a Panel must have access to the information on which those conclusions were based.

7.23 In its report, the USITC relied on information that it regarded as confidential and which has never been disclosed to New Zealand. Article 3.2 of the Safeguards Agreement recognises that in the course of its investigation a Member’s competent authorities will have access to confidential information and that that confidentiality must be respected. But Article 3.2 does not absolve a Member from disclosing information in the course of proceedings under the DSU when a safeguard measure that it has imposed is challenged by another Member. Article 13.1 of the DSU expressly contemplates that the Panel and the parties in any dispute settlement proceedings will be provided with any confidential information on which the Member seeks to rely to justify a measure, and sets out specific procedures to protect the confidentiality of that information.

⁸⁷ *Korea - Dairy*, para 88, *Argentina - Footwear*, para 95.

⁸⁸ Para 94 (emphasis added).

⁸⁹ WT/DS33/AB/R, 25 April 1997, p 14.

⁹⁰ WT/DS98/R, 21 June 1999, para 7.24.

⁹¹ Safeguards Agreement, Article 3.1 and *Argentina - Footwear* (Appellate Body Report), para 121.

7.24 It follows from this that a Member cannot rely on undisclosed information to show that it is complying with its obligations under the Safeguards Agreement or under GATT 1994. For a Member to argue that it had complied with its obligations under the Safeguards Agreement and GATT 1994 simply by affirming, without proof, that it has done so would undermine the rules-based system on which the WTO and the DSU rest.

7.25 Accordingly, in the absence of disclosure of the information on which its competent authorities relied, the United States cannot rely on that information to support the conclusions reached by the USITC or the US Administration to demonstrate its compliance with its obligations under the Safeguards Agreement or GATT 1994.

F. STANDARD OF REVIEW

7.26 In *Argentina - Footwear* the Appellate Body noted that the Agreement on Safeguards “is silent as to the appropriate standard of review.”⁹² Accordingly, the Appellate Body pointed out, it is the requirements of DSU Article 11 that apply here. That is, “a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements”.⁹³

7.27 Under Article 4 of the Safeguards Agreement, before making their determinations, the competent authorities of a Member are required, in the course of their investigation, to evaluate certain factors. In this context, the responsibility of the Panel is to examine whether the competent authorities “had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination.”⁹⁴ This does not constitute conducting a *de novo* investigation or substituting the Panel’s judgment for that of the national authorities.

7.28 As required by Article 11 of the DSU, a panel is also to make an assessment of the applicability of the covered agreement and the conformity of a measure with it. In order to be consistent with Article 3.1 of the Safeguards Agreement, reasoned conclusions must be reached on all pertinent issues. A Panel has therefore to determine whether the Member has based its decision on reasoned conclusions. Also, under Article 5.1 of the Safeguards Agreement a Member is entitled to apply a safeguard measure only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. A Panel must therefore decide both whether, in accordance with Article 3.1, reasoned conclusions have been provided for the application of a measure, and whether, in accordance with Article 5.1, the measure is, in fact, “necessary.”

G. THE UNITED STATES VIOLATION OF ITS OBLIGATIONS UNDER THE SAFEGUARDS AGREEMENT

1. The United States Safeguard Measure is Not a Response to “Unforeseen Developments” as Required by GATT Article XIX

7.29 Article 1 of the Safeguards Agreement provides that safeguard measures “shall be understood to mean measures provided for in Article XIX of GATT 1994.” Article 11 of the Safeguards Agreement provides that a Member shall not take or seek emergency action on imports of products unless its action conforms with both the provisions of Article XIX of GATT 1994 and the provisions of the Safeguards Agreement. GATT Article XIX provides that the circumstances that give rise to a need for emergency action must be “a result of unforeseen developments.” In both *Korea - Dairy* and *Argentina - Footwear* the Appellate Body affirmed that the requirement of “unforeseen

⁹² Para 120.

⁹³ Para 120.

⁹⁴ *Argentina - Footwear* (Appellate Body Report), para 121.

developments” was a circumstance that “must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994.”⁹⁵ Accordingly, the United States cannot take the measures it has imposed on imports of lamb meat unless those measures are a response to “unforeseen developments.”

7.30 The meaning of the term “unforeseen developments” was examined by the Appellate Body in both *Korea - Dairy* and *Argentina - Footwear*. It refers, the Appellate Body said, to circumstances that were “unexpected” when the obligation sought to be suspended temporarily was undertaken.⁹⁶ Safeguard measures may be imposed in respect of matters that are “out of the ordinary,” or matters of urgency.⁹⁷ The language of GATT Article XIX:1(a), the Appellate Body said, was “not the language of ordinary events in routine commerce”.⁹⁸ Where at the time an obligation was undertaken or a concession was made the developments that subsequently occurred could have been expected or foreseen, then there would be no basis for the imposition of a safeguard measure, as there would be nothing “out of the ordinary” in such circumstances. This means that, in order to meet the requirements of GATT Article XIX for the imposition of a safeguard measure against imports, the developments that result in an increase in those imports must have been unforeseen.

7.31 In the present case, the United States has made no determination that the circumstances that led to the imposition of a safeguard measure on imports of lamb meat were the result of “unforeseen developments”. The matter was simply not addressed in the USITC’s report. And nor is it surprising that it was not. The circumstances affecting the domestic industry in the United States in the present case did not result in fact from “unforeseen developments”. As the facts set out above show, the decline in domestic lamb production was long-term, foreseen and known. Moreover, it was in part the consequence of acts deliberately taken by the United States affecting its own domestic market and of factors within that market itself. This could not have met any standard of “unexpected” or “unforeseen”.

7.32 As the Appellate Body pointed out in *Korea - Dairy* and *Argentina - Footwear*, the words “unforeseen developments” are part of a broader clause and must take their meaning from this context. Article XIX states, “if, as a result of unforeseen developments *and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions...*”. The Appellate Body pointed out in *Argentina - Footwear* that this phrase means that “it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions.”⁹⁹ The Appellate Body also made clear that it is at the time of incurring those obligations including concessions that the developments leading to the increase in imports causing injury must have been unforeseen. The question to be determined in this case, therefore, is whether the alleged threat to the United States domestic industry from increased lamb meat imports results from developments since the binding of the United States tariff on imports of lamb meat on the coming into force of the WTO which were unforeseen at the time of that binding. That is, at 1 January 1995.

⁹⁵ *Korea - Dairy*, para 85, *Argentina - Footwear*, para 92.

⁹⁶ *Argentina - Footwear*, paras 91 and 93 and *Korea - Dairy*, paras 84 and 86.

⁹⁷ *Argentina - Footwear*, para 93 and *Korea - Dairy*, para 86. This formulation, the Appellate Body noted at para 96 of *Argentina - Footwear* and 89 of *Korea - Dairy*, is consistent with the formulation of the GATT Working Party in the *Hatters Fur* case (GATT/CP/106, adopted 22 October 1951), where it was stated at para 9:

“‘unforeseen developments’ should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated.”

⁹⁸ *Argentina - Footwear*, para 93.

⁹⁹ *Argentina - Footwear*, para 91 and *Korea - Dairy*, para 84.

7.33 On the basis of the period of investigation (1993-September 1998) and the definition of domestic industry adopted by the USITC,¹⁰⁰ it was clear by the beginning of 1995 that live lamb production in the United States was declining. In 1993 the lamb crop in the United States was 6,370,000 lambs; in 1994 it was 5,897,000. There was a parallel decline in lamb meat production from 327 million pounds in 1993, to 299 million pounds in 1994. The decline in production simply continued from 1995 on a trend that was well-established. There was nothing unexpected, or unforeseen about production declines from 1995 on. Indeed, the USITC itself noted that it had been “generally agreed” by all of the parties before it that the US lamb industry has been in a long state of decline.”¹⁰¹

7.34 One of the reasons for the continuation of this decline during the period of investigation was well-known to the United States and acknowledged by the USITC. That is, from 1993, subsidies under the Wool Act to growers and feeders of lambs were progressively reduced, and were eliminated by 1996. In an industry -- that of growers and feeders -- whose source of income came from both the sale of wool and the sale of lambs for the production of lamb meat, the removal of the Wool Act subsidy would have had a predictable effect. Incomes of the recipients of that subsidy - growers and feeders - would fall and production would decline. And that is precisely what occurred. There was nothing unexpected or unforeseen about that. It also would not have been unexpected that if domestic production of live lambs fell, there would be a flow-through effect on packers and breakers. That is, there would be a decline in their source of supply. That, too, is what occurred. Nor would it have been unexpected that a decline in domestic supply would lead to an increase in imports as those imports would be drawn into the United States market to meet the demand for lamb meat that the domestic industry was unable to fulfil. It was not unexpected, and, in fact, that also is what occurred.

7.35 This is a classic situation of supply and demand, where a contraction of supply leads to unfulfilled demand which is met by increased imports. Therefore, not only were the circumstances that allegedly have caused a threat to the domestic industry foreseen, but the circumstances that led to the increase in imports were also foreseen. As pointed out earlier, the decline in the production of live lambs, resulting from the elimination of the wool subsidy led to a loss of production by packers and breakers. This in turn led to the drawing of imports of lamb meat into the United States market to meet the demand that the domestic industry was unable to fulfil. None of this could be regarded as unforeseen or unexpected.

7.36 Accordingly, the safeguard measure applied by the United States in the present case does not comply with the requirement of Article XIX of GATT 1994 that it be a response to “unforeseen developments”.

2. The United States has Failed to Demonstrate that its “Domestic Industry that Produces Like or Directly Competitive Products” has been Threatened by “Serious Injury” as it is Required to do Under Article 2.1 of the Safeguards Agreement

(a) The United States has failed to define correctly its “domestic industry that produces like or directly competitive products”

7.37 Under Article 2.1 of the Safeguards Agreement, a condition to be fulfilled before the application of a safeguard measure is that serious injury must be caused or threatened to be caused to “the domestic industry that produces like or directly competitive products.” An examination of

¹⁰⁰ However, as New Zealand will point out later in this Submission, the United States’ determination of its “domestic industry” for the purposes of the investigation is not in conformity with the provisions of the Safeguards Agreement.

¹⁰¹ USITC Report, I-17.

whether the requirements of this provision have been met necessitates a determination of what constitutes “the domestic industry that produces a like or directly competitive product”.

7.38 Article 4.1(c) defines “domestic industry” as “the producers as a whole of the like or directly competitive product operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.” This definition has both a quantitative and a qualitative aspect. The quantitative aspect refers to the numbers of producers who must be included; either “producers as a whole” or “those whose collective output ...constitutes a major proportion of domestic production.”

7.39 The qualitative aspect of Article 4.1(c) relates to who constitutes a producer for the purposes of defining the domestic industry. Both Article 2.1 and Article 4.1(c) make clear that membership in the category of “producers” is determined by production of “like or directly competitive products.” Accordingly, the determination of what constitutes the domestic industry for the purposes of a safeguards investigation has to be based on a determination of whether the industry produces a “product” that is “like or directly competitive” with imported lamb meat.

7.40 The United States has made no such determinations. In its report, the USITC bifurcates its analysis into a determination of whether imported lamb meat is “like or directly competitive” with domestically produced lamb meat and then makes a separate determination of what constitutes the “domestic industry.” The USITC acknowledges that most safeguard investigations “involve firms and workers producing a product at the same stage of production as the imported article.”¹⁰² However, it asserts that it is appropriate to include the producers of a raw product in the industry producing a processed product if “there is a continuous line of production from the raw to the processed product” and there is a “substantial coincidence of economic interest between the growers and the processors.”¹⁰³ On this basis, the USITC concludes that “the domestic lamb meat industry includes the growers and feeders of live lambs as well as packers and breakers of lamb meat.”¹⁰⁴

7.41 The approach of the USITC finds no justification in the Safeguards Agreement or in GATT Article XIX. Under Articles 2.1 and 4.1(c) of the Safeguards Agreement, the domestic industry for the purposes of a safeguards investigation is the industry that “produces like or directly competitive products.” The only basis on which the USITC could, consistently with the Safeguards Agreement, have included growers and feeders of live lambs in its investigation would have been if the live lambs produced by growers and feeders were a product that is “like or directly competitive” with lamb meat. The USITC made no such determination. It found only that imported lamb meat was “like” domestically produced lamb meat and that there was a continuous line of production from the raw product of growers and feeders (live lambs) to the processed product of packers and breakers (lamb meat), along with a substantial coincidence of economic interest between the two types of producers. Furthermore, the USITC could not have made a determination that live lambs were a product “like or directly competitive” with lamb meat consistently with the well-established law in GATT and the WTO on the meaning of “like or directly competitive” products.

7.42 In *Japan - Taxes on Alcoholic Beverages*¹⁰⁵ the Appellate Body endorsed the “Report of the Working Party on *Border Tax Adjustments*”¹⁰⁶ under the GATT on the criteria to be taken into

¹⁰² USITC Report, I-12.

¹⁰³ USITC Report, I-12.

¹⁰⁴ USITC Report, I-13.

¹⁰⁵ WT/DS8/AB/R, 4 October 1996.

¹⁰⁶ BISD 18S/97.

account in determining whether products are “like”.¹⁰⁷ The Appellate Body also accepted that a determination of what constitutes a “like” product must be made on a case-by-case basis.

7.43 In the present case, no claim has been made by the United States that live lambs and lamb meat are “like” products. Those Commissioners of the USITC who addressed the question whether the producers of live lambs were producing a product that was a “like or directly competitive” product, concluded only that live lambs were “directly competitive” with lamb meat.¹⁰⁸ Accordingly, the only claim made by the United States, albeit indirectly, is that live lambs are “directly competitive” with lamb meat.

7.44 In *Japan - Alcohol* the Appellate Body considered the term “directly competitive or substitutable” in the context of Article III:2 of GATT. The Appellate Body endorsed the Panel’s view that, in interpreting that term, it was appropriate to look at “the market place” as well as at physical characteristics, common end uses and tariff classifications.¹⁰⁹ It agreed that the “decisive criterion” is whether the products “have common end-uses, *inter alia* as shown by elasticity of substitution.”¹¹⁰ In the subsequent case of *Korea - Taxes on Alcoholic Beverages*¹¹¹ the Appellate Body and the Panel emphasised that for products to be directly competitive or substitutable there has to be evidence of a “direct” competitive relationship.¹¹² The Appellate Body also stated that products are directly competitive or substitutable if they are “interchangeable”, and accepted the Panel’s formulation that directly competitive or substitutable products must provide “alternative ways of satisfying a particular need or taste.”¹¹³

7.45 Live lambs and lamb meat are not “interchangeable”. A live lamb can be sold for breeding purposes, kept for wool production, or it can be sold for slaughter. The product of a slaughtered lamb is both its wool pelt and lamb meat.¹¹⁴ A buyer of breeding stock would not purchase lamb meat as a substitute for live lambs. Equally, the typical consumer of lamb meat would not satisfy a “need or taste” for lamb meat by the purchase of a live lamb. In *Japan - Alcohol*, in *Korea - Alcohol* and in *Canada - Certain Measures Concerning Periodicals*,¹¹⁵ the products in question could be purchased by consumers and used in fundamentally the same way, although they might appeal to different tastes. The same cannot be said for live lambs and lamb meat.

7.46 The approach of the USITC Commissioners to the identification of the relevant domestic industry in this case was based on a legislative test set out in the United States Trade Act.¹¹⁶ Under this test a domestic article can be regarded as directly competitive with an imported article at an earlier or later stage of processing if the importation can have an economic effect on the domestic producer “comparable to” the importation of an article in the same stage of processing. Such a test, however, has been rejected in GATT law, both in respect of “like product” determinations and in respect of whether products are “directly competitive”.

¹⁰⁷ Those criteria were said to include the product’s end-uses in a given market, consumers’ tastes and habits, and the product’s properties, nature and quality: *Border Tax Adjustments*, para 18 and *Japan - Alcohol*, p 20.

¹⁰⁸ Commissioner Askey, USITC Report, I-8, fn 7 and Commissioner Crawford, USITC Report, I-9, fn 8.

¹⁰⁹ *Japan - Alcohol*, p 25. See also *Canada - Certain Measures Concerning Periodicals*, WT/DS31/AB/R, 30 June 1997, p 25.

¹¹⁰ *Japan - Alcohol*, p 25, quoting from the Panel Report (WT/DS8/R, 11 July 1996), para 6.22.

¹¹¹ WT/DS75/AB/R, 18 January 1999 (Appellate Body Report) and WT/DS75/R, 17 September 1998 (Panel Report).

¹¹² Panel Report, para 10.43 and Appellate Body Report, paras 109, 113, and 124.

¹¹³ Appellate Body Report, para 115.

¹¹⁴ The product of a lamb pelt is both the hide and the wool.

¹¹⁵ WT/DS31/AB/R, 30 June 1997.

¹¹⁶ 19 USC sec 601(5).

7.47 GATT panels have never accepted that products that were not “like” could have that defect cured by reference to some idea of a continuous line of production. In *Panel on United States Definition of Industry Concerning Wine and Grape Products*¹¹⁷ the Panel took the view that the “economic interdependence between industries producing raw material or components and industries producing the final product” was not relevant for a “like product” determination under the Anti-Dumping Code.¹¹⁸ Similarly, in *Canada - Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC*¹¹⁹ the Panel rejected Canada’s argument that because of the economic linkages between the producers of live cattle and the producers of manufacturing beef, the former could also be considered “producers” of manufacturing beef within the meaning of Article 6.5 of the Subsidies Code.¹²⁰ These cases clearly show that the inclusion of products within earlier stages of processing as “directly competitive” with those at a later stage of processing purely on the basis of linked economic interests is not consistent with GATT law.

7.48 Equally, that argument has not been accepted where the issue is one of direct competition. In *Canada - Import Restrictions on Ice Cream and Yoghurt*¹²¹ the Panel did not accept Canada’s argument that ice cream and yoghurt “competed directly” with raw milk. The Panel took the view that “The essence of direct competition was that a buyer was basically indifferent if faced with the choice between one product or the other and viewed them as substitutable in terms of their use.”¹²² Canada’s arguments that because imported ice cream and yoghurt competed directly with domestically produced ice cream and yoghurt, it “displaced” raw milk that would otherwise be processed into ice cream and yoghurt was rejected by the panel as indirect competition.¹²³

7.49 In the present case, a proper application of the test for determining whether products are directly competitive indicates clearly that live lambs and lamb meat are not “directly competitive.” There are separate market places for live lambs and lamb meat. The former is purchased by sheep breeders, by feeders, and by packers for slaughtering. The latter is purchased by consumers of lamb meat. The marketing of live lambs and of lamb meat is different. They are advertised differently. Typical consumers are not indifferent if faced with a choice between live lambs and lamb meat. They do not find live lambs and lamb meat substitutable or interchangeable. The fact that live lambs can be processed to lamb meat does not mean that they have common end-uses. To argue that live lambs and lamb meat are directly competitive on the basis of economic interdependence is something that has been rejected consistently in GATT jurisprudence. Indeed, in seeking to treat live lambs and lamb meat as “directly competitive”, the United States is seeking to resurrect Canada’s “displacement” or “indirect competition” theory which the United States itself opposed and which was rejected by the Panel in *Canada - Ice Cream and Yoghurt*.

7.50 The United States incorrect determination of its “domestic industry” is of itself a violation of the United States obligations under the Safeguards Agreement. However, the erroneous identification of the “domestic industry” also has a direct impact on the determination of whether serious injury has been caused or threatened to that domestic industry. The incorrect determination by the United States of the relevant domestic industry in this case has resulted in errors in the determination of whether a threat of serious injury had occurred. This is because in making that determination, the United States

¹¹⁷ Report of the Panel adopted by the Committee on Subsidies and Countervailing Measures on 28 April 1992, SCM/71, BISD 39/436.

¹¹⁸ Para 4.5. Both parties, including the United States, had agreed that grapes and wine could not be considered “like” products.

¹¹⁹ SCM/85, 13 October 1987.

¹²⁰ Paras 5.8, 5.12 and 5.13. In that case the parties and the Panel all agreed that live cattle was not a “like product” with fresh and frozen manufacturing beef: para 5.1.

¹²¹ Report of the Panel adopted 5 December 1989, BISD 36S/68.

¹²² Para 73. The Panel also rejected the view that raw milk and yoghurt and ice cream could be regarded as “like products” for the purposes of GATT Article XI:2(c).

¹²³ Para 73.

has taken into account the situation of growers and feeders - segments of an industry which produces live lambs and which is different from the industry that produces products that are like or directly competitive with imported lamb meat.

7.51 The arguments set out above clearly establish that in order to meet the requirements of Article 2.1 of the Safeguards Agreement, the correct domestic industry must be identified in a safeguard investigation, as the industry which produces a like or directly competitive product to the imported product. In its investigation on safeguards against lamb meat imports, the United States was required by Article 2.1 to determine the industry that produces a product that is like or directly competitive with imported lamb meat. The United States has failed to do this. Instead, it made a determination for the purposes of its safeguard investigation that the domestic industry was made up of producers of products that were not “like or directly competitive”. It did this on the basis of a coincidence of economic interests between the producers of live lambs, a product that is not like or directly competitive with imported lamb meat, and the producers of lamb meat, a product that is directly competitive with imported lamb meat. This approach has no foundation in the Safeguards Agreement. The economic effects of lamb meat imports on each of these producers is irrelevant to the issue of which industry produces a like or directly competitive product to those imports. The question is simply whether growers and feeders, as producers of live lambs, are part of the domestic industry producing a product like or directly competitive with lamb meat imports.

7.52 As no claim was made by the United States that live lambs produced by growers and feeders of lamb are “like” imported lamb meat, the relevant question in this case is whether those live lambs are “directly competitive” with lamb meat. The arguments set out above clearly establish that they are not. It follows that the United States has failed to define its domestic industry correctly for the purposes of the lamb safeguard investigation as required by Article 2.1 of the Safeguards Agreement. In addition, the erroneous identification by the United States of the relevant domestic industry has resulted in an erroneous determination by the United States of a threat of serious injury based on the economic situation of growers and feeders.

- (b) The United States has failed to demonstrate that there is any “serious injury” to its domestic industry that is “clearly imminent”

7.53 The United States determination in the present case is that its domestic industry is faced with a “threat of serious injury”. Article 4.1(b) of the Safeguards Agreement provides that a “‘threat of serious injury’ shall be understood to mean serious injury that is clearly imminent...”. Moreover, a determination of a threat of serious injury is to be “based on facts and not merely on allegation, conjecture or remote possibility”.¹²⁴ Paragraph (a) of Article 4.1 requires that “serious injury” shall be understood to mean a significant overall impairment in the position of a domestic industry. Thus, in order to comply with its obligations under the Safeguards Agreement, the United States must demonstrate that its domestic industry is threatened with a significant overall impairment that is clearly imminent.

7.54 In an investigation to determine whether a threat of serious injury has occurred, Article 4.2(a) requires that the competent authorities “evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry.” This obligation to evaluate relevant factors entails an obligation to consider those factors and to demonstrate their relevance or otherwise. Such a standard was recognised by the Panel in *United States - Wool Shirts*,¹²⁵ in respect of safeguard measures under the Agreement on Textiles and Clothing and has been applied by panels to measures under the Safeguards Agreement as well.¹²⁶ In addition, in *Korea - Dairy* the Panel indicated that a Member must examine “all relevant facts in its possession or which it should have obtained in

¹²⁴ Safeguards Agreement, Article 4.1(b).

¹²⁵ Paras 7.25-7.27.

¹²⁶ *Korea - Dairy*, para 7.55 and *Argentina - Footwear*, para 8.167.

accordance with Article 4.2 of the Agreement on Safeguards at the time of the investigation” and it must “provide an adequate explanation of how those facts as a whole supported the determination made.”¹²⁷ Article 4.2(c) requires that a detailed analysis of the case investigated be published, along with a demonstration of the relevance of the factors examined.¹²⁸

7.55 A determination that an industry has suffered or is threatened with serious injury is a comparative determination. That is, the position that the industry is in or is expected to be in at the time of the determination must be significantly impaired overall in comparison with the position it was in at some other point in time. Thus, there must be some indication over the period of a safeguard investigation that the position of the industry is or will be significantly impaired overall compared with the position it was in at the beginning of the period.

7.56 The report prepared by the USITC, on which the United States safeguard measure is based, does not make any such determination. Nor does it demonstrate a “clearly imminent significant overall impairment” within the meaning of Article 4.1(a) and Article 4.1(b). Instead, the report simply lists a variety of factors purporting to show that the domestic industry, as defined by the USITC, was threatened with serious injury. These factors include declines in domestic lamb meat market share in terms of both volume and value; declines in domestic lamb meat production volume and value; declining lamb meat prices; a decrease in lamb-growing establishments; declines in sales by packers and breakers; revenue declines for packers, breakers and feeders; revenue fluctuations affecting growers; declining capacity utilisation of breakers; and constant productivity across all segments throughout the period.¹²⁹ The USITC makes no attempt to “evaluate” these factors as Article 4.2(a) requires nor to show *how* these factors show a threat to the condition of the industry. It simply says that these factors “show” that the domestic industry is threatened with serious injury.¹³⁰ No attempt is made to show how those factors support the determination made. Thus, there is no “demonstration of the relevance of the factors examined” as required by Article 4.2(c) of the Safeguards Agreement.

7.57 The failure of the USITC to evaluate the relevant factors as required by Article 4.2(a) is demonstrated by its reference to the decline in the number of lamb growing establishments from 1993 to 1997. From this decline the USITC postulates that employment indicators fell over the period. However, the USITC does not explain how employment and profitability levels are affected when there was evidence before it that 94 per cent of those exiting the market were operations of less than 100 sheep.¹³¹ Those who exited were probably part-time or hobby farmers or those with other income sources. These facts are simply ignored by the USITC which fails to assess the relevance of the indicator it cites. Furthermore, the USITC does not even attempt to explain how establishments that have already left the market can be considered as being threatened with significant overall impairment that is clearly imminent.

7.58 The USITC is selective in its use of data. It notes that because USDA data provides a more comprehensive industry coverage than the USITC’s questionnaire data, it would rely on USDA data

¹²⁷ Para 7.55.

¹²⁸ Article 3.1 also requires the publication of a report setting forth the findings and reasoned conclusions of the competent authorities on all pertinent issues of fact and law.

¹²⁹ USITC Report, I-18 to I-20.

¹³⁰ USITC Report, I-21. In addition, factors such as the decrease in lamb-growing establishments, revenue declines for feeders, revenue fluctuations affecting growers, and productivity of growers and feeders, should not have been considered by the USITC in determining serious injury or threat thereof at all. This is because those factors relate to the position of the live lamb industry, which is not a part of the domestic industry producing a like or directly competitive product with lamb meat imports within the meaning of Article 4.1(c) of the Safeguards Agreement.

¹³¹ Meat New Zealand Pre-Hearing Submission, Exhibit 7, “Number of US Lamb Growers and Size of Operations 1994-1997” (attached as Annex 6).

“where possible”.¹³² This turns out to be a licence for the USITC to use either data depending on which supports its view of threat of serious injury. Questionnaire data on indicators such as production, shipments, profitability and employment show more positive trends than those of USDA data. As a result, the USITC rejects the questionnaire data, even though all it can find by way of substitution is conjecture about employment based on USDA figures of declines in establishments of only growers.

7.59 The USITC is also selective in the way it draws conclusions from the data on which it relies. This is apparent in the USITC’s discussion of profitability, where it states, on the basis of the questionnaire data, that “a significant portion of individual growers reported that they had operated at a loss.”¹³³ This statement is misleading. It could equally be said that on the basis of the questionnaire data “a significant portion of individual growers reported that they had operated at a profit.” What the data in fact shows is that while 51 per cent of the reporting growers operated at a profit in 1993, 67 per cent of the reporting growers operated at a profit in January-September 1998. Even if the growers responding to the USITC questionnaires were those who were more profitable, the data they provided indicated that their profitability was higher in the latter part of the period of investigation than in the earlier. The data also shows that the proportion of growers reporting operating at a profit remained relatively constant between 1994 and 1998.¹³⁴ This is not consistent with the USITC’s image of growers operating at a loss.

7.60 Similarly, when dealing with the profitability of feeders, the USITC again seeks to draw conclusions that the data will not support. For example, on the basis of the questionnaire data, the USITC identifies the first nine months of 1998 as the period when feeders experienced their greatest loss during the period of investigation.¹³⁵ It supports this finding by comparing the responses of 9 feeders who provided responses to the questionnaires for the period 1993-1997, 7 feeders who provided responses for the period January-September 1997 and 6 feeders who provided responses for the period January-September 1998.¹³⁶ In short, the USITC seeks to draw conclusions by comparing what is simply not comparable.

7.61 In contrast, questionnaire data on matters such as capacity, capacity utilisation, inventories and productivity that would have presented a picture of the financial condition of the industry different to the way it was perceived by the USITC was dismissed as “mixed”.¹³⁷ The USITC also discounted the relevance of inventories,¹³⁸ thereby failing to take into account the fact that inventories of packers actually decreased in January-September 1998 by comparison with the previous year.¹³⁹ Similarly, on the basis of anecdotal evidence the USITC concluded that financing of capital and repaying of loans showed “difficulties consistent with the worsening financial condition of the domestic lamb meat industry.”¹⁴⁰ However, if anecdotal evidence has probity, there was also anecdotal evidence that some packers and breakers had undertaken financial commitments for new equipment and modernisation of plant.¹⁴¹ Such commitments are normally undertaken on the basis of an expectation of increasing financial returns. The existence of such expectations is not the hallmark of an industry that is threatened with significant overall impairment.

¹³² USITC Report, I-16.

¹³³ USITC Report, I-20.

¹³⁴ USITC Report, II-28, Table 12.

¹³⁵ USITC Report, I-19.

¹³⁶ USITC Report, II-32, Table 15.

¹³⁷ USITC Report, I-20.

¹³⁸ USITC Report, I-20.

¹³⁹ USITC Report, II-22.

¹⁴⁰ USITC Report, I-21.

¹⁴¹ USITC Report, II-15, n 61 and n 64.

7.62 In another example, the decline in lamb prices that occurred towards the end of the period of investigation is relied on by the USITC as a key indicator of the poor health of the domestic industry. Falling prices allegedly affected financial performance across all industry segments.¹⁴² However in reaching this conclusion the USITC fails to take account of the fact that live lamb slaughter prices through 1997 and 1998 were higher than during most of the 1993 and 1994 period. Similarly, real wholesale lamb meat prices in September 1998 were 12 per cent higher than in January 1993. The USITC also fails to take into account that when Wool Act subsidies that were in place at the beginning of the period of investigation are deducted, grower income is shown actually to be higher at the end of the period of investigation than it was at the beginning.¹⁴³

7.63 In terms of the USITC's finding of threat of serious injury, notwithstanding what it perceived to be "declines during the period of investigation in the domestic industry's market share, production, shipments, profitability and prices" the USITC did not conclude that these factors resulted in "a significant overall impairment" in the position of the domestic industry. If it had done so, it would have concluded that there was actual serious injury. Instead, it concluded that "a significant overall impairment" was clearly imminent. What the USITC failed to do was identify any basis for that conclusion. In short, the USITC asserts, as if it were a truism, that factors that did not constitute serious injury must constitute a threat of serious injury.

7.64 The conclusion that a threat exists requires more than affirmation. The Panel in *Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*¹⁴⁴ stated that determining whether a threat exists necessitates "a prospective analysis of a present situation with a view to determining whether a 'change in circumstances' was 'clearly foreseen and imminent'." In the Panel's view, it required an analysis of relevant future developments with regard to the volume and price effects of imports and their consequent impact on the domestic industry.¹⁴⁵

7.65 Similarly, in *United States - Measures Affecting Imports of Softwood Lumber from Canada*¹⁴⁶ the Panel said that in the practice of GATT signatories the concept of threat of material injury "had been interpreted as requiring factual evidence of a clearly foreseen and imminent change in circumstances".¹⁴⁷ In *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*,¹⁴⁸ the Panel stated that a finding on "threat" requires a party "to demonstrate that, unless action is taken, damage will most likely occur in the near future."¹⁴⁹

7.66 Such requirements are implicit in Article 4.1(b) of the Safeguards Agreement according to which in order to establish a threat of serious injury it must be shown that serious injury is "clearly imminent". The dictionary definition of "imminent" is "impending, soon to happen".¹⁵⁰ To determine whether something is "soon to happen" requires a prospective analysis; it requires an assessment of what is likely to happen in the future. The USITC did not make such an assessment. Rather, it looked at the past - a past that it found did not constitute a "significant overall impairment" in the position of the domestic industry. The USITC rejected information that might give some idea about the future. It rejected questionnaire data that showed an increase in net shipments, employment

¹⁴² USITC Report, I-20.

¹⁴³ See Figure 1 at para 4.14 of this Submission.

¹⁴⁴ Report of the Panel adopted by the Committee on Anti-Dumping Practices on 27 April 1993 (ADP/92 and Corr.1), BISD 40S/205.

¹⁴⁵ Para 271.

¹⁴⁶ Report of the Panel adopted by the Committee on Subsidies and Countervailing Measures on 27-28 October 1993 (SCM/162), BISD 40S/358.

¹⁴⁷ Para 402. See also *New Zealand - Imports of Electrical Transformers from Finland*, Report of the Panel adopted on 18 July 1985 (L/5814), BISD 32S/55, para 4.8.

¹⁴⁸ WT/DS24/R, 8 November 1996.

¹⁴⁹ Para 7.55.

¹⁵⁰ *The New Shorter Oxford English Dictionary* (1993).

and net sales over the period of investigation, on the ground that such data had a “survivorship bias.” However, surely information about the competitiveness of “survivors” is a better prediction of the future than information about those who have exited the industry?

7.67 The factors examined by the USITC show exactly what the USITC and the parties before it all accepted. That is, the live lamb and lamb meat industries in the United States continued throughout the period of investigation a decline that they had been experiencing since the early 1940's. The continuation of that decline in 1993, at the beginning of the period of investigation, clearly did not constitute an imminent significant overall impairment in the position of the industry. If it had, the USITC would have been obliged to find that serious injury had occurred during the period of investigation, that is, that the clearly imminent threat of 1993 had become actual serious injury in 1998. But it did not do so. On what basis, then, does a continuation of a decline that existed in 1993 without being a threat of serious injury suddenly constitute in 1998 a clearly imminent significant overall impairment of the industry? That is what the USITC was obliged to explain, and that is what it has not done.

7.68 Instead, what the USITC does is rely on a decline that has occurred in the past to explain a threat of significant overall impairment in the future. In support of its conclusion, it cites USDA figures to show a 23.2 per cent decline in production between 1993 and 1997. However, most of this decline occurred in the period between 1993 and 1996, when production fell by 21.7 per cent.¹⁵¹ In other words, most of the decline in production occurred prior to 1997. The fact that production in January-September 1998 was 3.4 per cent below the comparable figure for 1997 is within the bounds of normal production fluctuation, especially in an industry that has been in a general state of decline for many years. Accordingly, the figures relating to past production declines relied on by the USITC to support its finding of threat of serious injury do not in fact constitute any indication that future significant overall impairment to the position of the domestic industry is clearly imminent.

7.69 Thus, the United States has not met its obligations under Article 4.1(b) of the Safeguards Agreement to base its determination that serious injury is clearly imminent on facts and not on allegation, conjecture or remote possibility. Instead, what the USITC has done is to base its determination on threat of serious injury on the presentation of facts showing that actual serious injury has not occurred. It has not undertaken any prospective analysis of the clear imminence of a significant overall impairment in the position of the domestic industry in future. It has made its findings through selective use of data available to it, and has drawn conclusions inconsistently from that data on which it has chosen to rely.

In fact, what the available data shows is that there has been a continuation of a long-term decline in the domestic industry. That decline was not considered by the USITC to constitute clearly imminent significant overall impairment of the domestic industry at the beginning of the period of investigation. No reason has been given as to why the continuation of that same long-term decline should be considered now to amount to a threat of serious injury. Accordingly, the United States has not met the requirements of Article 4.1(b) of the Safeguards Agreement to determine on the basis of reasoned conclusions that there is a significant overall impairment to the position of its domestic industry that is clearly imminent.

3. The United States has Failed to Demonstrate that any Threat of Serious Injury to its Domestic Industry has been Caused by Increased Imports as Required by Article 2.1 of the Safeguards Agreement

7.70 Article 2.1 provides that a Member may apply a safeguard measure where a threat of serious injury is caused by products being imported into its territory in increased quantities. Article 4.2 requires that in investigating this matter the competent authorities are to evaluate all relevant factors

¹⁵¹ USITC Report, II-21, Table 7.

having a bearing on the industry (paragraph (a)) and that the existence of the causal link between increased imports and the threat of serious injury must be demonstrated on the basis of “objective evidence”(paragraph (b)). In addition, injury caused by factors other than increased imports is not to be attributed to increased imports.¹⁵²

7.71 These obligations were summed up by the Panel in *Korea - Dairy* as follows:

“In its causation assessment, the national authority is obliged to evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry. In addition, if the national authority has identified factors other than increased imports which have caused injury to the domestic industry, it shall ensure that any injury caused by such factors is not considered to have been caused by the increased imports.”¹⁵³

7.72 In the present case, the USITC’s finding of causation is fundamentally flawed in three important respects:

First, the USITC applies a test for causation that has no basis in the Safeguards Agreement;

Second, the USITC fails to show “the causal link” between increased imports and threat of serious injury as required by Article 4.2(b); and

Third, the USITC fails to comply with the requirement in Article 4.2(b) that injury from factors other than increased imports not be attributed to increased imports.

(a) The United States wrongfully applies a “substantial cause” test

7.73 The USITC found that increased imports of lamb meat are “both an important cause of the threat of serious injury and a cause that is not less than any other cause.”¹⁵⁴ It concludes, therefore, that increased imports of lamb meat are a “substantial cause” of the threat of serious injury to the domestic lamb meat industry. The USITC bases its “substantial cause” test on S.202(b)(1)B of the Trade Act of the United States. However, such a finding does not comply with the standards set out in the Safeguards Agreement. Article 2.1 of the Agreement requires that serious injury or a threat thereof must be “caused” by increased imports. It does not say that it is sufficient if the injury is “substantially” caused by increased imports. In short, the United States has applied a less stringent test, that of “substantial cause”, in place of the test set out in Article 2.1 of the Safeguards Agreement which requires that serious injury be “caused” by increased imports.

7.74 That the United States “substantial cause” test is inconsistent with the Safeguards Agreement is readily apparent from the USITC’s own explanation of how that test is to be applied. The test is met if increased imports are a cause that is “no less than any other cause” or “a cause that is equal to or greater than any other cause.”¹⁵⁵ Thus, the United States “substantial cause” test is met even though increased imports are only one of many causes of serious injury as long as *no single cause* is more important than increased imports.

7.75 Article 4.2(b) of the Safeguards Agreement makes clear that such a weighing of the causes of serious injury is incompatible with the requirements of that Agreement. It provides that injury caused by factors other than increased imports cannot be attributed to those imports. It is not possible under

¹⁵² Safeguards Agreement, Article 4.2(b).

¹⁵³ Para 7.89.

¹⁵⁴ USITC Report, I-21.

¹⁵⁵ USITC Report, I-21.

Article 4.2 to aggregate injury caused by a variety of factors and then determine whether the impact of increased imports is greater than that of any single other cause. Rather, there can be no serious injury attributable to imports at all if that serious injury is in fact attributable to other causes.

7.76 The consequence of the United States applying a causation test that has no basis in the Safeguards Agreement is that it has attributed to imports of lamb meat injury to its domestic industry that is caused by factors that are domestic in nature and that result from government action or from domestic market forces. In doing so, the United States has not complied with Article 2.1 of the Safeguards Agreement which limits the application of safeguard measures to circumstances where *increased imports* threaten to cause serious injury.

- (b) The United States fails to demonstrate the causal link between increased imports and the threat of serious injury

7.77 In analysing causation under the Safeguards Agreement, a Member must examine the conditions of competition between imports and domestic product in the market to determine whether, on the basis of objective evidence, the causal link between imports and any threat of serious injury has been demonstrated.¹⁵⁶ In this case, therefore, the USITC was required to examine whether conditions of competition between imported and domestic lamb meat in the United States market were such as to objectively demonstrate the causal link between the imports and the threat of injury found to exist. Furthermore, the Appellate Body has said that the relationship between the movements in imports and the movements in the injury factors must be central to the causation analysis in safeguard investigations.¹⁵⁷ Accordingly, in the present case the USITC's causation analysis should have focussed on the relationship between the increase in imports and the factors found to indicate a threat of injury to the domestic industry.

7.78 In its analysis of causation the USITC speculates that, given the nature of the domestic lamb industry, increases in imports "would likely cause domestic producers to lose some sales, to lower prices to attempt to maintain sales, or both."¹⁵⁸ It refers to conflicting evidence on the likelihood of imports from Australia and New Zealand increasing in future years and suggests that "increases in import volume are likely to have further negative effects on the domestic industry's prices, shipment volumes, and financial conditions in the imminent future." However, the only evidence it cites in support of its assertion that "the increase in imports has caused prices to fall in the short run" is a lowering of the unit value in domestic and imported products in the 1997-1998 period and an increase in the market share of imported lamb meat over the period of investigation, particularly in 1997-98.¹⁵⁹ It asserts, without proof, that the worsening financial condition of the domestic industry was a result of increases in imports and states that increased imports "captured" market share from domestic producers.¹⁶⁰

7.79 In fact, the factors cited by the USITC cannot reasonably and objectively support such a conclusion. For example, while it is true that the market share held by United States lamb meat declined from 88.8 per cent in 1993 to 80.3 per cent in 1997 and 76.7 per cent in January-September 1998, this was largely due to the decline in United States production over that period. Increasing imports did not match this dramatic decline in domestic supply of lamb meat. Over the period of investigation as a whole domestic production fell by 82 million pounds while imports rose by only 28 million pounds. Accordingly, the increase in imports over the period of investigation did not match the fall in domestic production. Yet the USITC assumes, without any analysis, that domestic

¹⁵⁶ *Argentina - Footwear*, Panel Report, para 8.229.

¹⁵⁷ *Argentina - Footwear*, Appellate Body Report, para 144, quoting from the Panel Report, para 8.237.

¹⁵⁸ USITC Report, I-22.

¹⁵⁹ USITC Report, I-24.

¹⁶⁰ USITC Report, I-24.

market share was *taken* by imported product. This assumption also ignores the USITC's own finding that imported product partly went to meet new demand.¹⁶¹

7.80 The USITC's analysis of causation consists of conjecture and speculation. It takes the fact that the domestic industry has been in decline over the period of investigation and the fact that imports have increased over that period and then supposes that the decline in the domestic industry is caused by the increased imports. It assumes that the decline in domestic prices occurring in mid-1997 was caused by increased imports¹⁶² without producing any evidence to support this. The USITC fails completely to distinguish between circumstances where imports increase because they come into a market at reduced prices and displace domestic production, and circumstances where imports increase because domestic production has declined due to domestic supply side factors. However, this distinction is fundamental. The latter circumstance would clearly not constitute causation.

7.81 The factors referred to by the USITC as indicative of causation do not distinguish between circumstances where domestic production declines due to domestic supply side factors and circumstances where domestic production declines because of increased imports. In either instance imports would grow, domestic production would decline and domestic producers would suffer hardship. In either instance, profits and revenues in the domestic industry would deteriorate. Thus, the fact that a domestic production decline and an increase in imports occur does not provide a basis for showing whether the decline in production is caused by domestic factors or by increased imports. The USITC cites hardship for domestic producers and revenue and profit declines, but it provides no basis on which to determine the cause of that hardship and decline, or for distinguishing domestic causes from the effects of increased imports.

7.82 Methods which could have been used to draw such distinctions were simply ignored by the USITC. For example, a key way of determining whether injury results from domestic factors or from increased imports is to analyse information about price. Such an approach is contemplated by the Safeguards Agreement and by the Panel in *Argentina - Footwear*.¹⁶³ However, this was not done by the USITC. There is no serious analysis by the USITC of the impact of price on the conditions of competition. There is no real analysis of price trends of imports and of domestic products. Nor is there any theoretical or empirical economic reasoning cited in support of the many assertions and suppositions about causation on which the USITC's conclusions are based.

7.83 In order to comply with the United States obligations under the Safeguards Agreement, the USITC had to demonstrate the link between one variable, increased imports, and other variables, the factors constituting threat of injury to the domestic industry. Econometric analysis would have provided objective, statistical analysis concerning this link. In previous investigations of the domestic lamb meat industry the USITC has used econometric analysis to this end. For example, in 1995,¹⁶⁴ the USITC used a "vector autoregression model" in concluding that imports of lamb meat had only a marginal impact on domestic production. In this case, the USITC had before it updated analysis based on the methodology used in their previous investigation. The USITC even cites the 1995 study as suggesting "that imports do little to displace US produced lamb or to suppress its prices and that imports are imperfect substitutes".¹⁶⁵ However, the USITC did not undertake a further econometric analysis such as it had utilised in 1995.

¹⁶¹ USITC Report, I-32.

¹⁶² USITC Report, I-24.

¹⁶³ Para 8.252.

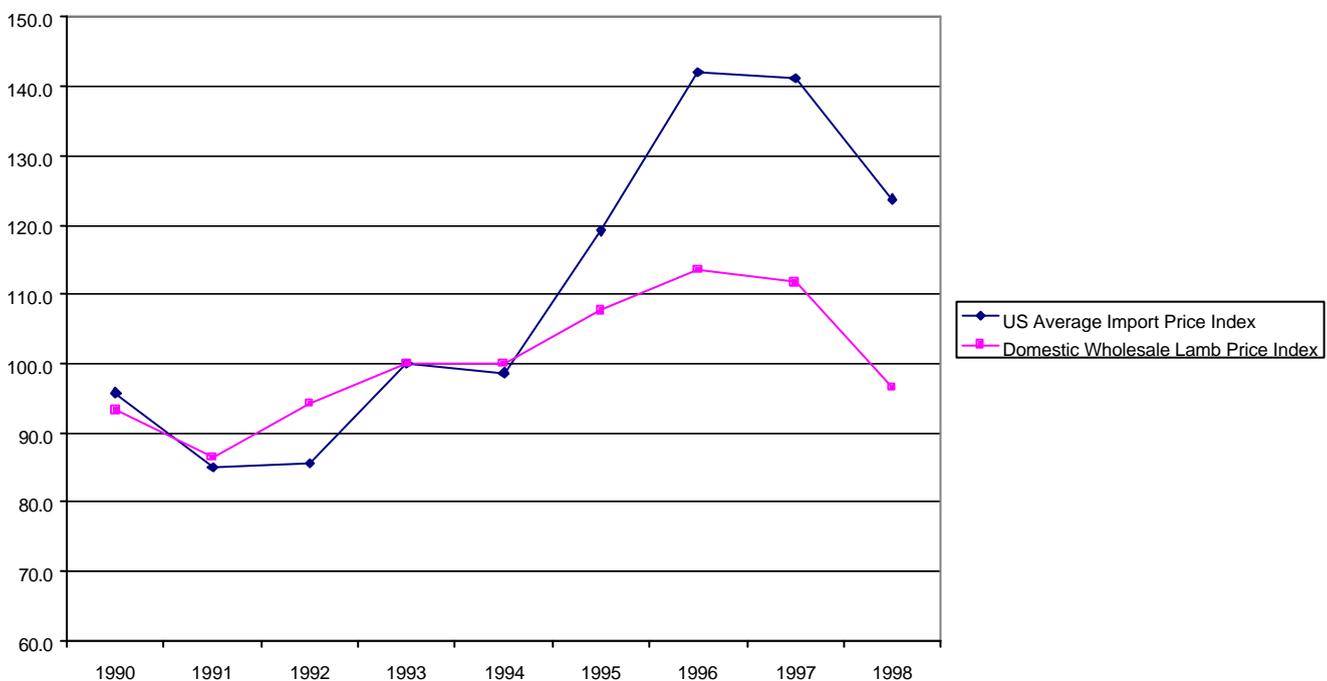
¹⁶⁴ USITC, *Lamb Meat: Competitive Conditions Affecting the US and Foreign Lamb Industries*, Inv. No. 332-357, August 1995, USITC Publication No 2915.

¹⁶⁵ USITC Report, II-72.

7.84 In addition, in making a determination of *threat* of serious injury, the United States is obliged to demonstrate that increased imports will be the cause of serious injury in the future. It must *demonstrate* causation; it is not sufficient just to say that causation exists. Again, however, the USITC's analysis rests on assertion and not on demonstration. Thus, not only is there a failure by the United States to demonstrate that the decline in domestic production has been caused by increased imports, there is also no substantiation of the USITC's supposition that imports would in the future cause a serious threat of injury.

7.85 A proper analysis by the USITC of the information available about prices would have led to the conclusion that increased imports could not have been the cause of the decline in domestic production over the USITC's period of investigation. Based on indices of real prices for lamb meat on the United States market, the real price for domestic lamb meat steadily increased over much of the period of investigation (Figure 5).

Figure 5: Indexes of real import & domestic wholesale US lamb prices

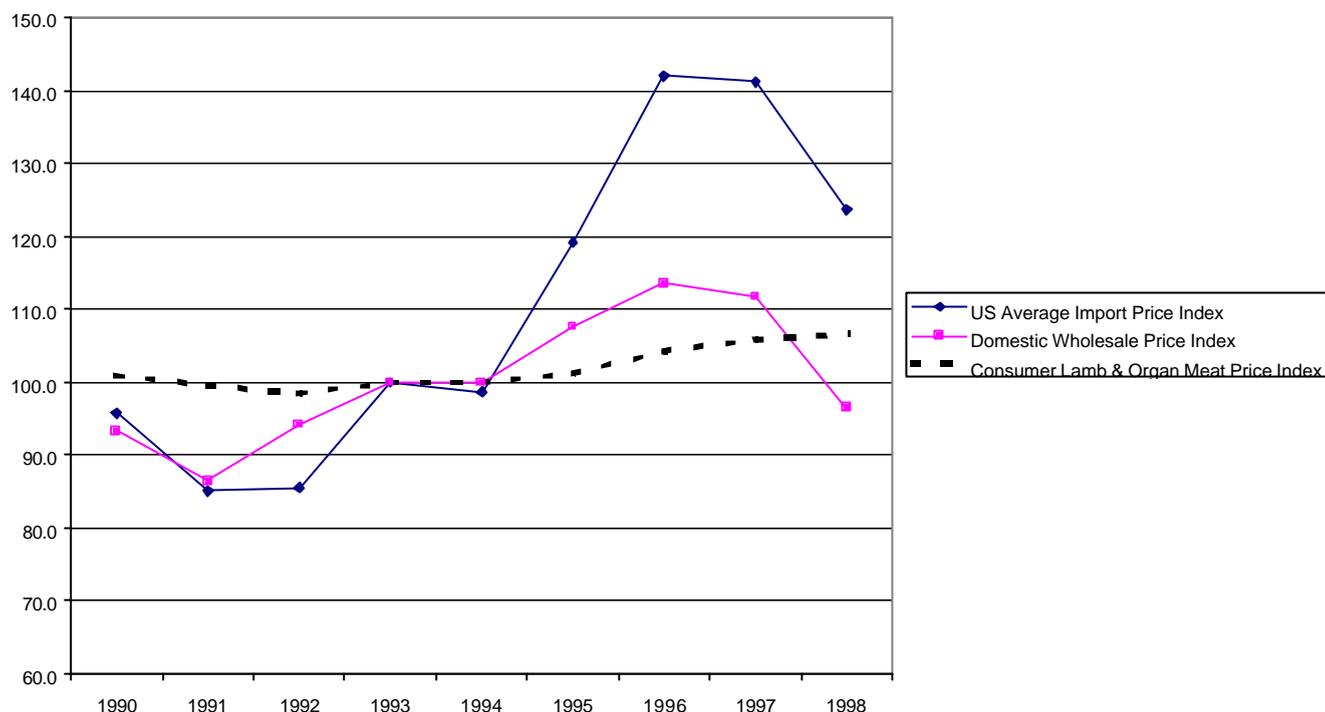


Sources: US Department of Commerce and USITC Publication No 2915, August 1995, pp 2-46 and 2-47 (Unit CIF Import Price); US Bureau of Labour Statistics (CPI); USDA/AMS Red Meat Yearbook 1996 and "Livestock, Dairy and Poultry 1997-1999" (Domestic Wholesale Price)

Figure 5 illustrates that over this period the imported lamb meat price rose more steeply than domestic lamb meat price. In such circumstances the decline in domestic production could not have been attributable to increased imports. In fact, the strong rise in import price would have helped drive up lamb meat prices on the United States domestic market.

7.87 The rise in prices on the supply side between 1993 and 1997 clearly show that there was a shortage of lamb meat on the United States market during that period. This also drove up real consumer prices (Figure 6).

Figure 6 : Indexes of real (CPI deflated) prices for lamb on US market



Sources: Department of Commerce; ITC Publication No 2915, August 1995, pp 2-46 and 2-47; US Bureau of Labour Statistics; USDA/AMS Red Meat Yearbook; "Livestock, Dairy and Poultry" 1997-1999

As Figure 6 shows, the consumer price continued to increase in 1998 although at a smaller rate than in previous years.

7.88 In 1998 both domestic wholesale and import lamb meat prices declined. However, even after a decline from 1997 to 1998 of 12 per cent, the import price in 1998 was still 24 per cent higher than its 1993 level. A price decline in one year, 1997 to 1998, following several years of price increases in a row does not demonstrate that imports have caused a decline in domestic prices. To focus on that particular portion of the period of investigation would be to ignore the reality that agricultural prices fluctuate. For example, real pork prices have exhibited wide fluctuations in recent years and fell by 9 per cent between August 1997 and April 1998.¹⁶⁶ The choice of a period of investigation is designed to look at trends and impacts over a period of time, and not to focus on isolated, single events.

7.89 The conclusion that can be drawn from the relevant price information is that increased imports could not have been a cause of any serious injury to the United States domestic industry. Instead, domestic factors must have been the cause of the industry's decline. This is reinforced if quantities of domestic production during this period are considered. From 1993-1997, notwithstanding the rising real prices for lamb meat, the quantity of domestically-produced lamb meat declined. In circumstances where real prices rise, it cannot be increases in imports that cause domestic production to decline. It has to be factors external to the market that are responsible for the decline in domestic supply. In this case, increased imports were a *response* to this backward shift in the supply schedule, not the *cause* of it.

¹⁶⁶ See Figure 4 at para 4.25 of this Submission.

7.90 The relevant price information during the period of investigation indicates clearly that domestic factors must have been the cause of the decline in the United States domestic industry during that period. In this regard, the single most important factor in the cause of that decline was the removal of the wool subsidy. The wool subsidy contributed 19.3 per cent of the revenue of live lamb producers (growers and feeders). An industry with a dual revenue stream cannot avoid being affected by a substantial reduction in one of those revenue streams. The decline in production by growers and feeders is at the root of the problem faced by the domestic industry properly considered in this case. That is, any deterioration in the economic condition of packers and breakers -- the producers of lamb meat which is the product that is like or directly competitive with imported lamb meat -- results from a decline in production by growers and feeders. It is not the result of competition from increased imports.

7.91 Another important factor in the decline in the domestic industry during the period of investigation is the price competitiveness of lamb meat with other meats. In this context, although domestic prices at the wholesale and producer level at the end of the period of investigation declined, it is not reasonable to conclude that imports were the cause of these declines. As the comparison of real consumer price indices of lamb and other meats shows,¹⁶⁷ prices for lamb meat at the consumer level remained very high throughout 1997 and 1998 while real prices for other meats, particularly pork, declined. This is in sharp contrast to the period between 1995 and 1997. At that time, there were significant increases in the real prices of pork which would have helped to support demand for lamb at higher prices. In its report, the USITC concluded that demand for lamb meat was responsive to price.¹⁶⁸ However, it then ignored relative price changes in analysing the end of the period decline in domestic prices at the wholesale and producer level. Similarly, the USITC concluded that many imports supplied new demand,¹⁶⁹ but then ignored this conclusion in considering the impact of increased imports on the domestic industry. Instead, the USITC simply assumed that the decline in domestic prices on which it placed such reliance was caused by imports.

7.92 The above analysis of the relevance of other factors to the domestic industry's decline shows that the USITC's entire causation analysis was based on an *assumption* that increased imports led to decreased prices, which led to a decline in the financial condition of the domestic industry. Causal factors such as price competition from other meats were not given serious consideration. Similarly, causal factors such as the elimination of the Wool Act subsidies, and the overfeeding of lambs in 1997 which respondents argued had a negative effect on prices at that time, were summarily dismissed on the basis that such factors did not constitute a more important cause of future threat than increased imports. In this way, the USITC's report gives the impression that the USITC had made up its mind that what it saw as a threat of serious injury to the domestic industry was the result of increased imports, and that it was not to be deflected by a proper analysis of other factors relevant to the industry's decline. However, if the USITC had considered those other factors as it should have, it could not have reached the conclusion that it did.

7.93 The above arguments clearly show that the USITC's assertion that increased imports caused the threat of serious injury to the domestic industry is merely speculation and conjecture. The arguments above also establish that the USITC has failed to distinguish between a situation where domestic production declines due to domestic supply side factors, and where it declines because of increased imports. It could have made such a distinction, using econometric analysis previously used by it in investigating the lamb industry, but chose not to do so. Had the USITC undertaken any serious analysis of prices, it could not have reached the conclusion it did reach on causation. Other

¹⁶⁷ See Figure 4 at para 4.25 of this Submission. Real prices of poultry also increased during that period: USITC Report, II-70, Figure 17.

¹⁶⁸ USITC Report, I-22.

¹⁶⁹ USITC Report, I-32.

factors would instead have been found responsible for the domestic industry's decline, for example, the removal of the Wool Act subsidy and the lack of competitiveness with other meats.

7.94 If a decline in the domestic industry which does not constitute serious injury is caused by domestic considerations, and not by increased imports, then there is no basis for any conclusion that a continuation of that decline constitutes a threat of serious injury that is caused by increased imports. The United States' failure to analyse correctly the causes of the decline in its domestic industry means that its conclusions on the cause of an alleged threat to its domestic industry are flawed and cannot stand.

(c) The United States wrongfully attributes to imports injury caused by other factors

7.95 Article 4.2(b) of the Safeguards Agreement expressly requires that in making a determination that increased imports have caused or are threatening to cause serious injury, when factors other than increased imports are causing injury at the same time, that injury must not be attributed to increased imports. However, in direct contradiction to this requirement, the United States' test of "substantial cause" leads it to attribute to increased imports injury that the United States itself acknowledges has been caused by other factors. For example, the USITC acknowledges that the withdrawal of the subsidy under the National Wool Act was a cause of the decline of the domestic industry during 1993-97.¹⁷⁰ However, while it indicates that this factor will not be a significant cause in the future, and thus does not attribute the threat of serious injury to the removal of the subsidy, nevertheless it treats the injury caused by the removal of the wool subsidy as evidence of a threat of serious injury. It then attributes that threat of serious injury to increased imports.¹⁷¹

7.96 Equally, the USITC concludes that competition from other meat products, concentration in the packer segment, and failure of the industry to develop and implement an effective marketing program were all causes of injury.¹⁷² However, since none of those factors was individually a more important cause of injury, in the USITC's view, than increased imports, the USITC saw no reason to alter its finding. In doing so, however, the USITC did not deny that part of the threat of serious injury on which its finding of causation was based was attributable to factors other than increased imports.

7.97 The failure of the USITC to attribute injury acknowledged by it to be caused by other factors to those other factors, and not to imports, is a violation of Article 4.2(b) of the Safeguards Agreement. In fact, the USITC's determination of causation in this case has done precisely what that Article enjoins a Member imposing a safeguard from doing. That is, not to attribute to increased imports injury that has been caused by other factors.

4. The United States has Applied a Safeguard Measure that is Neither "Necessary to Prevent Serious Injury" Nor "Necessary to Facilitate Adjustment" Contrary to Article 5.1 of the Safeguards Agreement. Moreover, it has Failed to Publish its Findings and Reasoned Conclusions on the Necessity of its Measure as Required by Article 3.1 of the Safeguards Agreement

7.98 Even if the United States had been justified in imposing a safeguard measure, it must still comply with Articles 5.1 and 3.1 of the Safeguards Agreement. Article 5.1 provides: "A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment." It further provides that Members should choose measures "most suitable" for

¹⁷⁰ USITC Report, I-24.

¹⁷¹ USITC Report, I-17.

¹⁷² USITC Report, I-25 and I-26. The USITC also considered arguments that increased input costs and overfeeding of lambs were causes of a threat of serious injury. Although the USITC's Report is unclear on this point, it appears to reject both these factors as causes at all: I-25.

the achievement of the objectives of this Article. In *Korea - Dairy* the Appellate Body affirmed that this provision “imposes an *obligation* on a Member applying a safeguard measure to ensure that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment.”¹⁷³ There is thus a two-fold obligation on the United States in applying its safeguard measure to a threat of serious injury. The United States must ensure that its measure is “necessary” to “prevent” the serious injury that is threatened. Second, the United States must ensure that its measure is “necessary” to “facilitate adjustment.” In fact, as New Zealand will show, the United States has failed to meet either obligation. In addition, Article 3.1 requires a Member imposing a safeguard to publish a report setting out its findings and reasoned conclusions on all pertinent issues of fact and law. New Zealand will also show that the United States has failed to meet this obligation with regard to the necessity of its safeguard measure.

- (a) The United States measure is not “necessary” to prevent serious injury within the meaning of Article 5.1 of the Safeguards Agreement

7.99 The ordinary meaning of the term “necessary” as defined in *The New Shorter Oxford English Dictionary*¹⁷⁴ is “that cannot be dispensed with or done without,” or “requisite, essential, needful.” The term “necessary” is used in other provisions of the WTO Agreements and it has a particular meaning in GATT jurisprudence. In *United States - Section 337 of the Tariff Act of 1930*,¹⁷⁵ the Panel, speaking of GATT Article XX(d), said that a contracting party could not justify a measure that was inconsistent with another GATT provision as “necessary” if “an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it.”¹⁷⁶ It went on to say that if a GATT consistent measure is not available, then a contracting party “is bound to use, among the measures reasonably available to it, that which entails the *least degree of inconsistency* with other GATT provisions.”¹⁷⁷

7.100 This obligation to choose the “least trade restrictive” measure in order to meet the “necessary” test was applied by GATT panels in *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*,¹⁷⁸ and in *United States - Measures Affecting Alcoholic and Malt Beverages*.¹⁷⁹ Equally it has been endorsed by a WTO Panel and the Appellate Body in *United States - Standards for Reformulated and Conventional Gasoline*.¹⁸⁰

7.101 The rationale for the “least trade restrictive” test in the context of GATT Article XX is that it serves to minimise the impact of derogations from substantive GATT obligations. In the context of the Safeguards Agreement, which is designed to ameliorate the impact of fair, rather than unfair, trade, similar considerations apply.¹⁸¹ Article 5.1 is designed to place limits on the ability of Members to take safeguard measures which by definition derogate from their substantive WTO obligations.¹⁸² Members can take such measures “only to the extent necessary” to achieve the

¹⁷³ Para 96 (emphasis in original).

¹⁷⁴ (1993).

¹⁷⁵ Report of the Panel adopted on 7 November 1989 (L/6439), BISD 36S/345.

¹⁷⁶ Para 5.26.

¹⁷⁷ Para 5.26 (emphasis added).

¹⁷⁸ Report of the Panel adopted on 7 November 1990 (DS10/R), BISD 37S/200, paras 73-75.

¹⁷⁹ Report of the Panel adopted on 19 June 1992 (DS23/R), BISD 39S/206, paras 5.40-5.43. See also the unadopted reports of the Panels in *United States - Restrictions on Imports of Tuna*, DS21/R, discussed in the Council on 18 February, 18 March, and 30 April 1992, BISD 39S/155, para 5.28 and *United States - Restrictions on Imports of Tuna*, DS29/R, 16 June 1994, para 200.

¹⁸⁰ Panel Report, WT/DS2/9 (as modified by the Appellate body Report on 20 May 1996), para 6.24 and Appellate Body Report WT/DS2/AB/R, 29 April 1996, page 16.

¹⁸¹ In *United States - Underwear*, safeguard measures under the ATC were treated as exceptions to substantive obligations for the purposes of applying the burden of proof.

¹⁸² To this extent, safeguards provisions are more like the general exceptions provisions of GATT Article XX than some of the provisions of other WTO Agreements where the term “necessary” is used: see Note

objective of preventing serious injury. In the safeguards context, the need to preserve the integrity of Members' substantive obligations under the WTO Agreements is emphasised in the Preamble to the Safeguards Agreement, which refers to the need to "clarify and reinforce the disciplines of GATT 1994". While recognising the need for structural adjustment, the preamble also recognises the need to "enhance rather than limit competition in international markets". A "least trade restrictive" interpretation of the term "necessary" in Article 5.1 therefore gives the term "necessary" its ordinary meaning of "requisite" and "essential" as applied in the particular context of Article 5 and in the light of the object and purpose of the Safeguards Agreement as a whole.

7.102 The "least trade restrictive" test was accepted by the Panel in *Korea - Dairy* as the proper interpretation of the term "necessary" in Article 5.1. It said: "in order to comply with Article 5.1 a Member must apply a measure which in its totality is no more restrictive than is necessary to prevent or remedy the serious injury and facilitate adjustment."¹⁸³

7.103 In the present case, the remedy applied by the United States was not the least trade restrictive measure available. For example, it was more trade restrictive than that proposed by the USITC, in several respects. First, the USITC proposal for a tariff-rate quota would have retained the in-quota rate at the bound MFN level of approximately 0.2 per cent.¹⁸⁴ The measure imposed by the United States raised the in-quota rate to 9 per cent. In addition, the USITC proposed an over-quota rate in the first year of 20 per cent. The United States measure adopts an over-quota rate in the first year of 40 per cent. The same circumstances prevail in subsequent years.¹⁸⁵ Prima facie, then, the United States has failed to apply a measure that meets the least trade restrictive test.

7.104 The United States measure is more trade restrictive than necessary to achieve its objectives in a further respect. That is, the USITC concluded that there was no actual serious injury to the domestic industry. In other words, the level of imports that existed during the period of investigation was not injurious. Rather, the threat the USITC identified came from potential future increases. Yet, in spite of this, the United States has, through its in-quota tariff, imposed a restriction on imports at levels at and below those existing during the period of investigation - that is to say, at or below levels found not to be injurious. By applying both an in-quota tariff and an out-of-quota tariff, it has not limited the measure to future increases even though it identified those future increases as the basis of the threat of serious injury. In short, the United States has applied a measure directed at dealing with a serious injury that it has found not to exist.

7.105 The necessity requirement of Article 5.1 of the Safeguards Agreement means that a safeguard must be no more trade restrictive than necessary to prevent or remedy serious injury. The United States lamb safeguard measure is more trade restrictive than an alternative measure which its competent authorities found to be sufficient to prevent or remedy the serious injury to the domestic industry. In addition, the United States safeguard measure goes beyond what is necessary to prevent the threat of serious injury found to exist by the USITC to exist in this case by addressing levels of trade which were found not to be injurious. The United States measure therefore does not meet the "least trade restrictive" test.

7.106 The failure of the United States to apply a safeguard measure only to the extent necessary to prevent or remedy serious injury also means that the United States has not chosen the "most suitable"

by the Secretariat, Council for Trade in Services, *Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to All Services*, S/C/W/96, 1 March 1999, para 22.

¹⁸³ Para 7.101.

¹⁸⁴ This is the approximate ad valorem tariff rate equivalent of 0.8c per kg, which was the bound tariff on lamb meat imports in 1999.

¹⁸⁵ The only respect in which the USITC proposed remedy is not less trade restrictive than that adopted by the United States is that the USITC would have continued the measure for a fourth year.

measure within the meaning of Article 5.1. Accordingly, the United States has violated its obligations under that Article of the Safeguards Agreement.

- (b) The United States measure is not “necessary” to facilitate adjustment within the meaning of Article 5.1 of the Safeguards Agreement

7.107 The United States has equally failed to meet its obligation to apply a safeguard measure only to the extent necessary to facilitate adjustment. In this context, too, the term “necessary” carries with it the meaning that the least trade restrictive measure must be chosen. Furthermore, as the Panels in *United States - Gasoline* and *Canada - Periodicals*, pointed out, a measure must be capable of achieving its objective before it can be determined to be “necessary”.¹⁸⁶ In this case, the United States has provided no explanation of how the measure chosen is either capable of achieving its required objective of facilitating adjustment or less trade restrictive than other reasonably available measures that would achieve that objective.

7.108 The USITC did address the issue of facilitating adjustment. It indicated that its proposed tariff-rate quota should be applied in conjunction with adjustment assistance. This shows that the USITC considered something more was required than the safeguard measure in order to facilitate adjustment. Clearly therefore, in the USITC’s view, a tariff-rate quota would not in itself facilitate adjustment. Thus, the United States imposition of a safeguard measure consisting of a tariff-rate quota constitutes a *prima facie* case of failure to apply a measure that is “necessary” to facilitate adjustment.

7.109 Furthermore, in the context of the present case, the United States measure is not capable of facilitating adjustment. As the USITC recognised, one of the problems facing the domestic industry is that of consumer demand for lamb meat. Increasing the costs of imports of lamb meat will lower rather than enhance consumer demand and will accordingly not address this problem.

7.110 The necessity requirement in Article 5.1, as applied to the objective of facilitating adjustment, means that a safeguard measure must be capable of meeting this objective, and must be the least trade restrictive means of doing so. The United States lamb safeguard is neither. It has therefore not been applied only to the extent necessary to facilitate adjustment within the meaning of Article 5.1. In addition, the failure by the United States to apply a safeguard measure that is necessary to prevent serious injury or to facilitate adjustment, means that the United States has not chosen the most suitable measures to achieve the objectives of Article 5.1. Hence, the United States has failed to meet its obligations under this Article of the Safeguards Agreement.

- (c) The United States has failed to publish its findings and reasoned conclusions on the necessity of its measure as required by Article 3.1 of the Safeguards Agreement

7.111 Article 3.1 of the Safeguards Agreement requires that the competent authorities of a Member imposing a safeguard measure publish a report setting forth the findings of those authorities and their reasoned conclusions on all pertinent issues of fact and law. Whether a safeguard measure meets the requirements of Article 5 is clearly such a pertinent issue. However, in applying its definitive safeguard measure in the present case, the United States has provided no explanation of how that measure could be regarded as the least trade restrictive measure that would achieve the goal of preventing serious injury. The USITC provided an extensive explanation for its proposed remedy,¹⁸⁷ but that remedy was rejected by the United States Administration, which provided no explanation for the measure it imposed in place of the USITC’s recommendation. In addition, neither the USITC nor the United States Administration provided any explanation at all for how their measure met the

¹⁸⁶ *United States - Gasoline*, para 6.31 and *Canada - Periodicals*, para 5.7.

¹⁸⁷ USITC Report, I-29 to I-38.

requirement of Article 5.1 that a measure be applied “only to the extent necessary to facilitate adjustment”.

7.112 The failure of the United States to explain how its lamb safeguard measure was “necessary” within the meaning of Article 5.1 places the United States in violation of its obligation under Article 3.1 of the Safeguards Agreement not to apply a measure unless it has published a report setting forth its findings and “reasoned conclusions” on all pertinent issues of fact and law.

5. The United States has Failed to Apply a Safeguard Measure to All Imports Irrespective of Source, Contrary to Article 2.2 of the Safeguards Agreement and Article I of GATT 1994

7.113 Article 2.2 of the Safeguards Agreement provides: “Safeguard measures shall be applied to a product being imported irrespective of its source.” In the present case, the United States has not done this. It has excluded imports from Canada, Mexico, Israel and from beneficiary countries under the Caribbean Basin Recovery Act and the Andean Trade Preference Act. However, in making its determination of threat of serious injury, the United States considered the imports of all countries that import lamb meat into the United States market.

7.114 Having made a determination based on all such imports, the United States then sought to exclude some of those imports from the application of its safeguard measure. There is no justification in the Safeguards Agreement for such an exclusion.¹⁸⁸ This has been made explicit in *Argentina - Footwear*, where the Appellate Body rejected a claim by Argentina that it was entitled to exclude from the application of its safeguard measure the imports of MERCOSUR countries that had been included in the making of the injury determination. The Appellate Body said:¹⁸⁹

“we find that Argentina’s investigation, which evaluated whether serious injury or the threat thereof was caused by imports from *all* sources, could only lead to the imposition of safeguard measures on imports from *all* sources.”

7.115 In addition, failure to apply a safeguard measure to all imports irrespective of source constitutes the provision of an advantage to the products of a Member excluded from the application of a safeguard measure that is not granted “immediately and unconditionally” to the products of those Members to which the safeguard measure applies. Accordingly, such a failure contravenes the “Most Favoured Nation” obligation of Article I of GATT 1994 as well as the express requirement in Article 2.2 of the Safeguards Agreement.

6. The United States has Applied a Safeguard Measure that Places it in Violation of its Obligations under Article II of GATT 1994

7.116 The application by the United States of a safeguard measure that is not in conformity with the Safeguards Agreement also constitutes a violation of the United States obligations under GATT Article II. By imposing duties on imports that are not justified under the terms of the Safeguards Agreement in excess of those provided for in its schedule the United States has failed to comply with its obligations under GATT Article II:1(b).

¹⁸⁸ Unless the countries are exempted from the application of the safeguard measure by virtue of Article 9.1, as developing country Members.

¹⁸⁹ Para 113 (emphasis in original).

VIII. CONCLUSION

8.1 By applying its safeguard measure of 7 July 1999 to imports of New Zealand lamb meat, the United States has contravened its obligations under the GATT 1994 and the Agreement on Safeguards.

8.2 For all of the reasons cited above, New Zealand respectfully requests the Panel to find that:

1. The United States measure is not a response to “unforeseen developments” within the meaning of GATT Article XIX and thus does not comply with Article 2.1 and Article 11 of the Safeguards Agreement.
2. The United States has failed to demonstrate that its “domestic industry that produces like or directly competitive products” has been threatened by “serious injury” as required by Article 2.1 of the Safeguards Agreement.
3. The United States has failed to demonstrate that any threat of serious injury to its domestic industry has been caused by increased imports as required by Article 2.1 of the Safeguards Agreement.
4. The United States has applied a safeguards measure that is neither necessary to prevent serious injury nor necessary to facilitate adjustment, contrary to Article 5.1 of the Safeguards Agreement, and has failed to publish its findings and reasoned conclusions on the necessity of its measure as required by Article 3.1 of the Safeguards Agreement.
5. The United States has failed to apply a safeguard measure to all imports irrespective of source as required by Article 2.2 of the Safeguards Agreement and Article I of GATT 1994.
6. The United States has applied a safeguard measure that places it in violation of its obligations under Article II of GATT 1994.

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

ANNEX 2-2

LETTER FROM NEW ZEALAND

(9 May 2000)

I refer to the request of the United States (US) for certain preliminary rulings that was submitted to the Panel on Friday 5 May.

New Zealand has now had an opportunity to review the US request and would like to offer our preliminary views on the procedural issues raised by the US.

In our view the various claims contained in the US request lack legitimacy and, in this regard, New Zealand would be pleased to set out its position in writing on the various claims made by the US. We believe that the US has not raised any issue(s) that cannot be dealt with by way of written response for decision by the Panel at the time of the first substantive meeting. In accordance with paragraph 13 of the Panel Working Procedures, we look forward to the advice of the Panel as to the timing for the submission of such written views.

Moreover, we do not see how the US request should in any way require a change to the deadline for the receipt of the US First Submission. This is, after all, a deadline that all of the Parties (including the US) agreed upon following extensive discussions at the organisational meeting of the Panel on 28 March 2000. A request for a preliminary ruling by the Panel should not alter these agreed procedures.

As noted above, New Zealand will provide its detailed views on the US claims in a separate written communication. At this stage, however, we would wish to point out that the request for the establishment of a Panel was communicated to the US on 14 October 1999 and the organisational meeting of the Panel was held on 28 March 2000. Yet the US did not raise any alleged deficiencies in the terms of the Panel request or request any extension to the deadline for its First Submission until 5 May (less than a week before the expiry of the deadline). In this regard, we would recall the Appellate Body's remarks in *United States - Tax Treatment for "Foreign Sales Corporations"* (WT/DS108/AB/R) that the:

“principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes” (at para 166).

Indeed, as the Appellate Body went onto note:

“[t]he procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes” (*ibid*).

We look forward to the Panel's advice on the timing proposed for the submission of our written responses to the respective US claims.

ANNEX 2-3

**NEW ZEALAND'S RESPONSE TO UNITED STATES'
REQUEST FOR PRELIMINARY RULINGS**

(17 May 2000)

A. Introduction

1. The United States has requested preliminary rulings from the Panel on three issues.¹
2. First, it claims that New Zealand's request for the establishment of a Panel is insufficient as a matter of law to satisfy the requirements of Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).²
3. Second, the United States claims that New Zealand alleges the United States' safeguard statute, on its face, is inconsistent with United States' obligations under the Agreement on Safeguards (Safeguards Agreement) without having included the statute in its request for the establishment of a Panel.³ The United States requests a ruling that the consistency of that statute with the Safeguards Agreement is accordingly not within the Panel's terms of reference and is outside the scope of this dispute.⁴
4. Third, the United States raises issues relating to the disclosure of Business Confidential Information (BCI).⁵
5. In a communication from the Secretary to the Panel, New Zealand was invited to submit its views on the request by the United States for preliminary rulings as described above in written form by Wednesday 17 May 2000.⁶ New Zealand's views on the request by the United States are set out below.

B. Alleged Insufficiency of Panel Request

1. Background

6. The United States claims that New Zealand's request for the establishment of a Panel is insufficient as a matter of law to satisfy the requirements of Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) that such requests must "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". The United States further alleges that New Zealand failed to provide any indication of the legal basis for its claims and argues that nothing in its panel request provides any information that would in itself further clarify exactly which of the obligations in the named articles is alleged to be infringed. The United States relies, in making these claims, on the recent ruling of the Appellate Body in *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*.⁷

¹ United States' Request for Preliminary Rulings, 5 May 2000.

² United States' Request for Preliminary Rulings, paras 1-15.

³ United States' Request for Preliminary Rulings, paras 16-19.

⁴ United States' Request for Preliminary Rulings, para 20.

⁵ United States' Request for Preliminary Rulings, paras 21-23.

⁶ Letter to the Parties from the Secretary to the Panel, 10 May 2000.

⁷ WT/DS98/AB/R, 14 December 1999.

7. In addition, the United States alleges that the insufficiency of the panel request has substantially prejudiced the United States by compromising its ability to respond to the claims of New Zealand under Articles 2, 3, and 4 of the Safeguards Agreement. The United States in particular refers to Article 4 of that Agreement.⁸ The United States claims that the insufficiency of the panel request prevented it from knowing the true nature of the claims being made against it under these provisions and placed it in the position of “merely guessing” which of the many obligations in these articles might be at issue in this case.⁹ It states that this severely limited its ability to begin the task of preparing its defence.

8. In New Zealand’s view there is no insufficiency in the New Zealand panel request. Indeed, as New Zealand will demonstrate, in this case the request more than met the minimum standard to form the basis of the panel’s terms of reference. In addition, the United States failed to raise its procedural objections to New Zealand’s request at the appropriate time. Furthermore, even if, contrary to the New Zealand view, the request were considered to be defective, the United States has not been prejudiced in its defence and the participation of third parties has not been affected because the legal basis of the New Zealand claim was well known. Finally, even if the United States and third parties were prejudiced by any alleged insufficiency in the request for the establishment of a panel, the panel’s decision to extend the deadline for delivery of the United States’ First Submission has already addressed this issue.

2. *Legal Requirements of Panel Request*

9. Article 6.2 of the DSU requires that the “specific measures at issue” be identified in a request for the establishment of a panel and that a brief summary of “the legal basis of the complaint” be provided, “sufficient to present the problem clearly”.

10. New Zealand considers that given the circumstances of the case its request is, in the words of the Panel in *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, “sufficiently specific to comply with the minimum standards established by the terms of Article 6.2 of the DSU”.¹⁰

Misinterpretation of Korea Dairy

11. As stated above, the United States bases the justification for its claim regarding the alleged insufficiency of New Zealand’s request for the establishment of a panel on the recent Appellate Body decision in *Korea - Dairy*. However, the United States quotes only selected excerpts of the Appellate Body’s findings on this issue and so misrepresents the findings of the Appellate Body in that case. In fact, what the Appellate Body ruled was that while the identification of the treaty provisions claimed to have been violated was always necessary, it may not *always* be enough. It did not say that the mere listing of those provisions would in all cases *not* be enough. When quoted in full, the Appellate Body said:

“there may be situations where the simple listing of the articles of the agreement or agreements involved may, *in the light of attendant circumstances*, suffice to meet the clarity in the statement of the legal basis of the complaint. However, there *may* also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This *may* be the case, for instance, where the articles listed establish not one single, distinct obligation, but

⁸ United States’ Request for Preliminary Rulings, paras 6 and 7.

⁹ United States’ Request for Preliminary Rulings, para 9.

¹⁰ WT/DS27/R, 22 May 1997, para 7.29. This wording was supported by the Appellate Body: WT/DS27/AB/R, 9 September 1997 at para 141.

rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, *may* fall short of the standard of Article 6.2.¹¹ (Emphasis added.)

12. The Appellate Body in *Korea - Dairy* also clarified the meaning of its previous rulings in the *European Communities - Bananas* case. It did not purport in that case, it said, to establish that the mere listing of articles allegedly violated would *always* constitute sufficient compliance with the DSU, “*in each and every case*, without regard to the particular circumstances of such cases.”¹² In the *Korea - Dairy* case itself, the Appellate Body held that the examination of the approach taken in any panel request must be made on a case-by-case basis.¹³ It also ruled that it is the *claims* of the complainant, not detailed arguments, which must be set out with sufficient clarity.¹⁴ The Appellate Body found in that case that the European Communities’ request should have been more detailed “in view of the particular circumstances of the case”.¹⁵ These findings indicate that the particular circumstances of each case are fundamental to the sufficiency of any panel request.

13. Clearly then, it is by no means predetermined that the simple listing of relevant articles in a panel request will inevitably result in that request being insufficient to meet the standard required by the DSU. The sufficiency of the panel request in every case must be determined on its own merits, in light of the attendant circumstances and with regard to the particular background of each case. The question is whether the request sets out the claims of the complainant with sufficient clarity to clearly present the problem at the heart of the matter so as to comply with the letter and spirit of the DSU.¹⁶

14. New Zealand considers that this case, in light of its particular background and the attendant circumstances, is one in which the simple listing of articles of the Safeguards Agreement alleged to have been violated in the panel request is sufficient to present the problem clearly in such a way that the ability of the United States to defend itself in the course of Panel proceedings has not been prejudiced.

Multiple Obligations, Multiple Claims

15. The request by New Zealand for the establishment of a panel in this case listed the articles of the Safeguards Agreement and GATT 1994 which provide the basis of New Zealand’s legal claim. The United States alleges that this is insufficient with respect to Articles 2, 3, and 4 of the Safeguards Agreement because those provisions contain multiple obligations. It refers to the statement by the Appellate Body in *Korea - Dairy* which points out that Articles 2 and 4 of the Safeguards Agreement have multiple paragraphs, each of which has at least one distinct obligation.¹⁷

16. However, New Zealand has claimed a breach of the obligations of the United States under Articles 2.1, 2.2, 4.1(a), 4.1(b), 4.1(c), 4.2(a), 4.2(b), and 4.2(c). It would be redundant to specify in the request that there has been a breach of each of these sub-paragraphs when all of the obligations in those provisions form the basis of the New Zealand claim. In addition, Article 3 contains only one explicit obligation. That provision provides that a Member may only apply a safeguard following an investigation which, among other things, looks at whether or not the application of the safeguards measure would be in the public interest, and contains an obligation to publish a report setting forth the findings and reasoned conclusions reached on all pertinent issues of fact and law. It is this obligation which New Zealand complains the United States has breached.

¹¹ Para 124.

¹² Para 123.

¹³ Para 127.

¹⁴ Para 123.

¹⁵ Para 131.

¹⁶ See *Korea - Dairy*, paras 120 and 123.

¹⁷ United States’ Request for Preliminary Rulings, para 3, and *Korea - Dairy*, para 129.

17. Accordingly, the reference in New Zealand's panel request to Articles 2, 3, and 4 of the Safeguards Agreement in their entirety accords completely with the actual claims of New Zealand in this case.

"Evolving" Nature of Claims

18. In its allegations concerning the defective nature of the request, the United States refers to the "evolving" nature of the complainants' claims. However, as this submission has shown, New Zealand's claims in this case have been set out in very distinct terms. The Appellate Body has made clear that there is a significant difference between the *claims* identified in the request for a panel, which establishes the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions, and the first and second panel meetings with the parties as the case proceeds.¹⁸ For example, in *Korea - Dairy* the Appellate Body stated that "claims, not detailed arguments, are what need to be set out with sufficient clarity".¹⁹ The United States fails to draw the proper distinction between the claims identified in the request for the establishment of the panel, and the arguments supporting those claims. While the *arguments* will indeed continue to evolve throughout the development of the case, New Zealand's *claims* have been clearly set out in the request for a panel and have not changed since that time.

United States' Practice

19. The practice of the United States is also illustrative in determining the understanding of the United States as to the level of detail it considers to be required in panel requests alleging violation of provisions containing multiple obligations. For example, in its request for the establishment of a panel in *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, the United States simply listed a number of provisions, from several WTO Agreements, which it alleged to have been violated by Canada.²⁰ Yet its claims in that case related only to some of the obligations in some of those provisions. In particular, the listed provisions included "Article 9" of the Agreement on Agriculture. This Article consists of four paragraphs, several of which contain multiple obligations. The United States then argued before the panel violations only of paragraphs 1(a) and 1(c) of that Article.²¹ Similarly, in *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) From the United States*, Mexico alleged the insufficiency of the United States' request for the establishment of a panel on grounds remarkably similar to those now claimed by the United States.²² In that case the United States argued that it had exceeded the minimum requirements of Article 6.²³

3. United States' Failure to Raise Issues at Appropriate Time

20. In addition the United States has had various opportunities to raise its objections to the request for the establishment of a panel, but has failed to do so. New Zealand's request for the establishment of a panel was submitted to the United States on 14 October 1999. The request was considered by the DSB at its meetings of 27 October and 3 November 1999 and again at its meeting

¹⁸ *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R 19 December 1997, para 88.

¹⁹ Para 123.

²⁰ WT/DS103/4, 3 February 1998. See also the United States requests in *Canada - Term of Patent Protection* (WT/DS170/2, 15 July 1999) and *Korea - Government Procurement* (WT/DS163/4, 11 May 1999).

²¹ Report of the Panel, WT/DS103/R, 17 May 1999, para 3.6.

²² WT/DS132/R, 28 January 2000.

²³ Para 7.10.

of 19 November 1999.²⁴ At those meetings New Zealand referred to its panel request and repeated the statement that:

“New Zealand considered that the safeguard measure in question was inconsistent with the US obligations under Articles 2, 3, 4, 5, 11 and 12 of the Agreement on Safeguards and Articles I, II, and XIX of GATT 1994.²⁵

New Zealand went on to state in both meetings that it was requesting the establishment of a panel with standard terms of reference, which is what the DSB in fact agreed to at the 19 November 1999 meeting. According to Article 7.1 of the DSU, the standard terms of reference for a panel refer to the complainant’s written request in defining the parameters of the dispute to be considered by the panel.

21. No objection was raised by the United States or any other WTO Member to New Zealand’s request for a panel at those meetings of the DSB. Rather, the United States responded to the request with a statement that it believed its measure satisfied all the relevant provisions of the Safeguards Agreement. This contrasts with the discussion in the DSB of the European Communities’ request for the establishment of a panel in *United States - Countervailing Duties on Hot-Rolled Lead and Carbon Steel* on 17 February 1999, where the United States expressly raised its procedural objections to that request.²⁶

22. Neither was any objection to New Zealand’s request raised by the United States at the organisational meeting of the Panel on 28 March 2000. Indeed, the United States failed to raise any objection to the request for the establishment of a panel until 5 May 2000, one week before its First Submission was due, and nearly seven months after receipt of the panel request.

23. As the Appellate Body said in *United States - Tax Treatment for “Foreign Sales Corporations”*²⁷, a responding Member is required to:

“seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes.²⁸

It is incumbent on panels to prevent litigation techniques from detracting from the fair, prompt and effective resolution of trade disputes.

4. *No Serious Prejudice to the Interests of the United States*

24. In New Zealand’s view, the United States has not demonstrated that it was prejudiced by the alleged insufficiencies in the request for the establishment of a panel. The United States was aware of the detail of the legal basis of the complaint from the time of New Zealand’s request for the establishment of a panel.

²⁴ WT/DSB/M/70, 15 December 1999 and WT/DSB/M/71, 11 January 2000.

²⁵ WT/DSB/M/70, p 8 and WT/DSB/M/71, p 14.

²⁶ WT/DSB/M/55, 29 April 1999.

²⁷ WT/DS108/AB/, 24 February 2000.

²⁸ Para 166. The Appellate Body has also in *European Communities - Customs Classification of Certain Computer Equipment* (WT/DS62/AB/R, 5 June 1998) expressed its concern over the potential for long drawn out procedural battles at the early stage of the panel process if too much specificity were required, for example in that case, in the definition of products covered by the dispute: para 71.

25. The Appellate Body in *Korea - Dairy* stated that:

“whether the mere listing of articles claimed to have been violated meets the standard of Article 6.2 must be examined on a case-by-case basis. In resolving that question, we take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed provisions claimed to have been violated.”²⁹

26. The Appellate Body in that case denied Korea’s appeal relating to the inconsistency of the European Communities’ request for a panel with the DSU on the grounds that Korea had failed to demonstrate that the mere listing in the request of the articles alleged to have been violated had prejudiced its ability to defend itself in the course of the panel proceedings. Korea had asserted that it had sustained such prejudice, but had offered no supporting particulars.³⁰

27. Similarly, in the case of *European Communities - Bananas*, the Appellate Body found that the European Communities had not been misled by a panel request that merely listed the articles allegedly violated as to what claims were in fact being asserted against it as respondent.³¹ Likewise, in *European Communities - Customs Classification of Certain Computer Equipment*, the Appellate Body found that an alleged lack of precision of technical terms in a request for the establishment of a panel had not affected the rights of defence of the respondent in the course of panel proceedings.³²

28. The Appellate Body stated in *European Communities - Bananas* that Article 6.2 of the DSU requires claims to be specified sufficiently to allow the defending party and any third parties “to know the legal basis of the complaint.”³³ Accordingly, it seems clear that whether a panel request meets the requirements of the DSU depends on whether a respondent has suffered serious prejudice in its ability to defend itself, which in turn will depend in any case on whether the legal basis of the complaint was known by the respondent.

29. In the particular case under consideration, New Zealand considers that the United States has not been prejudiced in its defence. The United States knew of the full extent of New Zealand’s claims from the time of the request for establishment of a panel. It had also received notice of the full extent of those claims in consultations under both the Safeguards Agreement and the DSU. New Zealand’s request for a panel in fact did nothing other than confirm that the issues raised in the consultations were being claimed. This was then reconfirmed in New Zealand’s First Submission. There were no surprises in that Submission, and nothing that could have caused prejudice.

30. In particular, the United States had extensive knowledge of the claims of New Zealand under Articles 2, 3 and 4 of the Safeguards Agreement resulting from the three sets of consultations held on this matter. Two sets of consultations were held on the United States’ measure under Article 12.3 of the Safeguards Agreement, on 28 April 1999 and 14 July 1999. Further consultations were then held on 26 and 27 August 1999 under the DSU. Written questions were submitted to the United States at the first set of Article 12.3 consultations, and further such questions were submitted to the United States at the DSU consultations.³⁴ Australia also submitted questions to the United States at

²⁹ Para 127.

³⁰ Para 131.

³¹ Paras 140 and 141 and *Korea - Dairy*, para 123.

³² WT/DS62/AB/R, 5 June 1998, para 70. See also *Korea - Dairy*, para 126.

³³ Para 143. See also *Korea - Dairy*, para 125.

³⁴ Written questions submitted at consultations under Article 12.3 of the Safeguards Agreement are attached as Annex NZ11. Written questions submitted at consultations under the DSU are attached as Annex NZ12.

consultations under the Safeguards Agreement and the DSU, at which New Zealand also participated as an observer.³⁵

31. New Zealand's questions to the United States delivered at consultations under Article 12.3 of the Safeguards Agreement on 28 April 1999 included questions on the United States' obligations under Articles 2.1 (requirements for a valid safeguard), 4.1(c) (definition of domestic industry), and 4.2(b) (non-attribution of other factors and the United States' "substantial cause" test) of the Safeguards Agreement.³⁶ In addition, New Zealand's questions to the United States delivered at the DSU consultations, on which substantial discussion was held with the United States, included questions on the United States' obligations under Safeguards Agreement Articles 2.2 (exclusion of FTA partners from measure), 3.1 (failure to meet transparency requirements with regard to actual measure imposed), 4.1(b) (clearly imminent threat of serious injury), and 4.2(c) (failure to publish a demonstration of the relevance of the factors examined).³⁷ US responses to these questions frequently included a reference to specific pages in the USITC Report dealing with the areas under discussion, indicating a clear understanding by the United States as to which obligations under the Safeguards Agreement New Zealand's claims related to.

32. Furthermore, questions posed by Australia at consultations under Article 12.3 of the Safeguards Agreement on 4 May 1999, which New Zealand attended as an observer, in addition to the provisions mentioned above, also covered Articles 4.1(a) (significant overall impairment) and 4.2(a) (evaluation of factors to determine threat of serious injury).³⁸ The questions delivered to the United States by Australia at consultations under the DSU, on which there was substantial discussion, including by New Zealand, also covered the obligations of the United States under Articles 2, 3, and 4 of the Safeguards Agreement.³⁹ Once again, United States' responses to these questions, both oral and written, indicated a clear understanding of which obligations were alleged to have been violated by the complainants.

33. The significance of the consultations has been accepted by the Appellate Body in *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products* where it said:

"For the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of subsequent panel proceedings."⁴⁰

34. In conclusion, therefore, New Zealand does not see how any alleged lack of precision in the claims identified in the request for the establishment of a panel has affected the right of the United States to defend itself. The details of the legal claims made by New Zealand have been known to the United States for some time.

³⁵ Australian written questions to the United States at consultations are annexed to Australia's first written submission as Exhibits 25 to 27.

³⁶ New Zealand questions 2-5 (attached as Annex NZ11).

³⁷ New Zealand questions 2, 3, 12, 13, 27, and 28 (attached as Annex NZ12). In addition, questions 8, 10, 14, 15, and 16 dealt further with matters already raised in previous consultations under Article 12.3 of the Safeguards Agreement. Other questions for the large part related to provisions listed in New Zealand's request for a panel on which the United States does not claim to have been prejudiced.

³⁸ Australian questions 6, 9, 11, 13, and 23. See also questions 1, 2, 7, 8, 10-12, 17-19, and 27 in relation to other paragraphs of Articles 2-4 of the Safeguards Agreement. Australian questions at the Article 12.3 consultations of 4 May 1999 are annexed to Australia's first written submission as Exhibit 25.

³⁹ See in particular questions 1, 5, 7, 13-15, 18-20, and 31. Australia's questions at the DSU consultations are annexed to Australia's first written submission as Exhibit 27.

⁴⁰ WT/DS50/AB/R, 19 December 1997, para 94.

3. *Panel has Already Mitigated any Prejudice*

35. United States has not demonstrated that any alleged insufficiencies in New Zealand's request for the establishment of a panel are so great as to mean that the request is flawed and that it therefore cannot provide the basis of the Panel's terms of reference. Moreover, by arguing that any prejudice suffered by it could be mitigated by extending the deadline for delivery of its First Submission, the United States has acknowledged that an extension of the deadline for its First Submission would be sufficient to address any such prejudice. The alleged insufficiencies of New Zealand's panel request, even if accepted by the Panel, are clearly therefore not such as to warrant a ruling that the Panel lacks a legal basis and cannot go forward.

36. Article 12.1 of the DSU directs a panel to follow the Working Procedures set out in Appendix 3 of the DSU. However, at the same time it authorises a panel to do otherwise than follow those procedures after consulting the parties to the dispute. In this way the DSU gives panels "a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated".⁴¹ In this case the panel has extended the deadline for receipt of the United States' First Submission over the objections of the complaining parties.⁴² This is within the panel's discretion following consultations with the parties. New Zealand considers that the Panel has thereby mitigated any prejudice that was alleged to have been suffered by the United States. There are accordingly no grounds for a ruling such as that requested by the United States, that the Panel lacks a legal basis and cannot go forward.

C. *Exclusion of US Statute from Panel Terms of Reference*

37. The United States claims that New Zealand alleges in its First Submission that the United States' safeguard statute, on its face, is inconsistent with United States' obligations under the Safeguards Agreement.⁴³ The United States argues that the consistency of the United States' statute is not within the Panel's terms of reference, and requests that the Panel therefore rule that the statute is outside the scope of this dispute.⁴⁴

38. New Zealand fails to understand the basis for the United States' claims on this point. New Zealand requests no finding from the Panel on the consistency of the United States' statute with the Safeguards Agreement.

39. New Zealand claims that the United States wrongfully applies a "substantial cause" test that is not found in the Safeguards Agreement.⁴⁵ The application by the USITC of this test is inconsistent with the terms of the Safeguards Agreement. As was made clear in New Zealand's First Submission, it is the finding of the USITC, based on this test, which does not comply with the standards set out in the Safeguards Agreement. In New Zealand's view it is clearly within the Panel's terms of reference to examine the consistency of this finding, as well as the substantial cause test used by the USITC, with the Safeguards Agreement.

⁴¹ *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, 16 January 1998, page 61, fn 138. See also *EC Measures Concerning Meat and Meat Products (Hormones)*, Canada Panel Report (WT/DS48/R/CAN, 18 August 1997), para 8.18 and United States Panel Report (WT/DS26/R/USA, 18 August 1997), para 8.14. This approach of the panel was considered by the Appellate Body in *EC – Hormones* to be "reasonable": para 152.

⁴² Letter to the Parties from the Secretary to the Panel, 10 May 2000, final paragraph.

⁴³ United States' Request for Preliminary Rulings, para 16.

⁴⁴ United States' Request for Preliminary Rulings, para 20.

⁴⁵ New Zealand First Submission, paras 7.73-7.76.

40. In accordance with Article 7 of the Dispute Settlement Understanding, the panel is to examine “the matter referred to the DSB”. According to the Appellate Body in *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, the “matter” referred to a panel consists of two elements: the specific *measures* at issue and the *legal basis of the complaint*.⁴⁶

41. The specific measure at issue in this case is that referred to in New Zealand’s request for the establishment of a panel, namely the definitive safeguard measure imposed under the “Proclamation 7208 of 7 July 1999 - to Facilitate Positive Adjustment to Competition From Imports of Lamb Meat” and the “Memorandum of 7 July 1999 - Action under Section 203 of the Trade Act of 1974 Concerning Lamb Meat”.⁴⁷

42. It is clear from the documents referenced in the panel’s terms of reference that the subject matter of this dispute is the imposition of a definitive safeguard measure on imports of lamb meat and the United States’ domestic legal process which led to the imposition of the measure, including the investigation of the USITC, the findings and conclusions of the USITC, and the process leading to the final determination by the President of the United States. These, together with the claims made concerning their consistency with the Safeguards Agreement, are the “matter referred to the DSB”. This forms the basis for the Panel’s terms of reference.

43. The findings and conclusions of the USITC encompassed in the Panel’s terms of reference include those relating to the substantial cause test. As noted in New Zealand’s First Submission, the USITC based its substantial cause test on section 202(B)(1)B of the Trade Act 1974.⁴⁸ This is simply a statement of fact. It is not necessary for the panel to find that the United States’ statute falls within its terms of reference. Indeed, New Zealand made no such request of the Panel. What is clear, however, is that the issue of the consistency of the substantial cause test used by the USITC with the Safeguards Agreement falls squarely within the Panel’s terms of reference.

D. Business Confidential Information

44. Contrary to what the United States has implied, New Zealand has not sought business confidential information that was before the USITC but never disclosed to New Zealand. New Zealand’s position on confidential information is set out in paragraphs 7.22 to 7.25 of its First Submission. In the absence of disclosure of the information on which its competent authorities relied, the United States cannot rely on that information to support the conclusions reached by the USITC and by the US Administration to demonstrate its compliance with the obligations under the Safeguards Agreement or GATT 1994.

E. Conclusion

45. New Zealand has shown that there is no basis to the claims made by the United States in its request for preliminary rulings. New Zealand’s request for the establishment of a panel is clearly sufficient to satisfy the requirements of the DSU. Furthermore, there is no basis to the United States’ request for a ruling that its safeguard statute should be excluded from the Panel’s terms of reference. Finally, New Zealand has restated its position with regard to Business Confidential Information.

⁴⁶ WT/DS60/AB/R, 2 November 1998, para 72.

⁴⁷ New Zealand First Submission, Annex NZ5.

⁴⁸ New Zealand First Submission, para 7.73.

ANNEX 2-4

ORAL STATEMENT OF NEW ZEALAND CONCERNING REQUESTS FOR PRELIMINARY RULINGS

(25 May 2000)

Mr Chairman, members of the Panel, representatives of the United States, of our co-complainants Australia, and members of the Secretariat:

1. New Zealand has set out its detailed views on the requests by the United States in a written submission delivered to the Panel last week. Accordingly, I will not repeat those views in full in this statement. Instead, I will highlight the key elements of our position in relation to each of the United States requests.

Request Meets Required Standard in This Case

2. New Zealand does not accept that its request for a Panel in this case failed to meet the standard of Article 6.2 of the (DSU), nor that the United States has been prejudiced by the request. The United States delay in bringing this request would suggest that any prejudice to the United States has been caused by its own delay. Furthermore, even if the United States had been prejudiced as it claims, the panel's decision to extend the deadline for delivery of the United States First Written Submission has now addressed this issue. Finally, the lateness of the United States objections to the panel request clearly indicate that those objections are raised as a tactical litigation technique, the only purpose of which was to disadvantage New Zealand in its preparation for this Panel hearing.

3. Notwithstanding United States misrepresentations of the findings in that case, the Appellate Body decision in *Korea - Dairy* clearly indicated that the particular circumstances of each case are fundamental to the sufficiency of any panel request, and that it is the *claims* of the complainant, not detailed arguments, which must be set out with sufficient clarity.¹

4. In the particular circumstances of this case, New Zealand claimed a breach of the obligations of the United States under all of the sub-provisions of Articles 2 and 4 of the Safeguards Agreement. Any further specificity would have required New Zealand to detail its arguments, something which it is well accepted a Member is not required to do. Moreover, it would have been redundant to specify in the request that a breach of each of the sub-paragraphs in Articles 2 and 4 was claimed. As for Article 3, that provision contains only one explicit obligation, to publish a report setting forth the findings and reasoned conclusions reached on all pertinent issues of fact and law, and that is the obligation which New Zealand complains the United States has breached.

5. As we have pointed out, the United States own practice indicates that the listing of provisions of WTO Agreements allegedly violated can be sufficient in a panel request. In fact, New Zealand has gone beyond what the United States itself has done in the cases of *Canada - Dairy*² and *Mexico - High Fructose Corn Syrup*.³

¹ Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products (WT/DS98/AB/R, 14 December 1999), para 123.

² United States request for the establishment of a panel, *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products* (WT/DS103/4, 3 February 1998).

³ United States request for the establishment of a panel, *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) From the United States*, (WT/DS132/2, 14 October 1998).

No Prejudice to the United States

6. Even if New Zealand's request for a panel was insufficient, the United States has not demonstrated that it was prejudiced in its ability to defend itself in the course of the panel proceedings. In fact, it was aware of the detail of the legal basis of the complaint from the time of New Zealand's request for the establishment of a panel.⁴

7. The United States claims that it has suffered prejudice from the listing of Articles 2, 3, and 4 of the Safeguards Agreement in the panel request. It claims that it could not have known under which of the multiple obligations contained in those provisions New Zealand would raise claims.⁵ But where, as here, a party raises claims under each and every one of the multiple sub-provisions of Articles 2 and 4 and with regard to the only explicit obligation contained in Article 3, I find it difficult to understand how this could have resulted in any prejudice.

8. It might be possible to conceive of prejudice to the preparation of a defence in the opposite situation - that is, if the United States claimed it had understood from the panel request that only certain sub-provisions would be raised, only to find that in fact additional claims were made in the First Submission. In such a situation, the United States may well be justified in arguing that the additional claims made in the submission were prejudicial to its ability to defend itself, and should not be considered by the Panel.

9. However, in the present case this did not occur. New Zealand's panel request implied, through the listing of Articles 2, 3, and 4 of the Safeguards Agreement in their entirety, that all of the obligations of the United States under those provisions would be challenged. And that is exactly what happened. Accordingly, any time spent by the United States preparing its defence on any of those obligations would seem to be time well-spent. Where is the disadvantage?

10. Furthermore, the United States had received notice of the full extent of the complainants' claims prior to the request for a panel, in consultations under both the Safeguards Agreement and the DSU. New Zealand's request for a panel in fact did nothing other than confirm that the issues raised in the consultations were being claimed. The United States participated in discussions on those issues during consultations, and even provided written responses to questions raised by the complainants on the issues of which it now claims to have had no prior knowledge.⁶ Both the discussions and the written responses clearly indicate that the United States knew the basis of the claims made by New Zealand in its First Written Submission.

Third Parties

11. Similarly, no prejudice to the interests of third parties has been demonstrated. The European Communities, in its Third Party Submission, asserts that it has been disadvantaged by New Zealand's panel request through not knowing the exact legal basis of its claims under Articles 2, 3, and 4 of the Safeguards Agreement.⁷ However, it has provided no evidence of such a disadvantage. Accordingly, its claim is made on exactly the same basis as that of Korea in the *Korea*

⁴ In its Third Party submission the European Communities indicates that it agrees with New Zealand that in the specific circumstances of this case the United States was informed of the exact legal basis of the complaint, in keeping with the requirements of the DSU: para 12.

⁵ United States letter to the Chairman of 5 May 2000, para 9.

⁶ Letter from Permanent Mission of the United States to the Permanent Mission of the WTO of 23 July 1999, attached to New Zealand's Response to United States Request for Preliminary Rulings as Annex NZ11.

⁷ Para 11.

- Dairy case, which was rejected by the Appellate Body on the basis that “no supporting particulars” had been offered for the alleged impairment.⁸

12. As indicated earlier with regard to United States claims, the European Communities was aware of the detail of the legal basis of New Zealand’s claims from the time of the request for a panel. New Zealand’s request listed Articles 2, 3, and 4 of the Safeguards Agreement, and our claims relate to all of the sub-provisions under those Articles. Accordingly, the European Communities cannot have been prejudiced by the request.

Any Prejudice Already Mitigated

13. Finally, even if the United States had suffered any prejudice to its ability to defend itself in the course of panel proceedings due to the simple listing of provisions allegedly violated in New Zealand’s panel request, the extension by the Panel of the deadline for receipt of the United States First Written Submission has now mitigated any such prejudice.

Failure to Raise Objections at Appropriate Time

14. For all these reasons, the United States request has no basis. But there is an additional matter to which I would like to draw the Panel’s attention. The United States chose to raise its procedural objections to the panel request only at a late stage. Having known the contents of that request since October last year, the United States failed to indicate any problem either in the DSB, at the organisational meeting of the Panel, or at any other time to New Zealand. We consider this to be inconsistent with the Appellate Body’s ruling in the *Foreign Sales Corporations* case that respondents in dispute settlement cases should bring claimed procedural deficiencies to the attention of the complainant and the DSB or the Panel at an early stage in proceedings, with a view to fair, prompt and effective resolution of the dispute.⁹ This is even more important where the dispute relates to measures taken under the Safeguards Agreement.

15. There would have been no disadvantage to the United States in raising its procedural objection to the request at a much earlier stage. There was, however, a considerable disadvantage to New Zealand in raising it at this late stage. New Zealand had already agreed, in the spirit of prompt and efficient resolution of the dispute, to a working timetable of the Panel which allowed it less than 10 working days between receipt of the United States First Written Submission and presentation of New Zealand’s case at this hearing. New Zealand’s preparation time for this hearing, already minimal, was then further reduced by the need to write an additional submission, at short notice, in response to the United States request for preliminary rulings and by the extension of the United States deadline for its First Written Submission.

16. New Zealand has accordingly been disadvantaged in presenting its claim in the course of the panel proceedings. The United States, however, has suffered no prejudice. As the Appellate Body said in the *Foreign Sales Corporations* case, litigation techniques should not detract from the fair, prompt and effective resolution of trade disputes. Accordingly, in New Zealand’s view the Panel should reject the United States request for a ruling that the panel request in this case was insufficient.

Exclusion of US Statute from Panel Terms of Reference

17. As we have noted in our written submission on this matter, New Zealand fails to understand the basis for the United States request for a ruling that its safeguard statute is outside the scope of this

⁸ *Korea - Dairy*, para 131.

⁹ United States - Tax Treatment for “Foreign Sales Corporations” (WT/DS108/AB/R, 24 February 2000), para 166.

dispute.¹⁰ New Zealand has in fact not requested any finding from the Panel on the consistency of that statute with the Safeguards Agreement. What New Zealand does ask the Panel to find is that the “substantial cause” test applied by the USITC in the course of its safeguard investigation has no justification in the Safeguards Agreement and thus is in violation of its WTO obligations.

18. It is clear from the documents referenced in the panel’s terms of reference that the subject matter of this dispute is the imposition of a safeguard measure on imports of lamb meat and the United States domestic legal process which led to the imposition of that measure. That process includes the USITC’s investigation and its findings and conclusions, as well as the process leading to the final determination by the President of the United States. These findings and conclusions in turn include those relating to the substantial cause test used by the USITC.

Confidential Information

19. New Zealand made clear in its written submission responding to the United States request for preliminary rulings that, contrary to what the United States has implied, New Zealand has not in fact sought the disclosure of business confidential information from the United States.¹¹ Our position on confidential information is set out in our First Written Submission.¹² That is, that the United States cannot rely on information not disclosed by the USITC to support the conclusions reached by the USITC in order to demonstrate its compliance with the obligations under the Safeguards Agreement or GATT 1994. Nor can the United States rely on information not disclosed by the United States Administration to demonstrate the compliance of the measure with the obligations under the Safeguards Agreement and the GATT 1994.

Conclusion

20. To conclude, Mr Chairman, the claims made by the United States in its request for preliminary rulings should be rejected.

¹⁰ New Zealand’s Response to United States Request for Preliminary Rulings, para 38.

¹¹ Para 44.

¹² Paras 7.22-7.25.

ANNEX 2-5

FIRST ORAL STATEMENT OF NEW ZEALAND

(25 May 2000)

Mr Chairman, members of the Panel, representatives of the United States, of our co-complainants Australia, and members of the Secretariat:

1. This case involves the interpretation of important provisions of the Safeguards Agreement and of GATT 1994. At issue is the right of Members to have safeguard measures applied against them only in strict accordance with the provisions of the Safeguards Agreement. The United States has imposed a safeguard measure in this case that does not comply with those obligations. Hence, New Zealand has brought this matter before the Panel.

2. In my presentation this morning I shall not go over at length what was said in New Zealand's First Written Submission. Instead, I shall give a brief resumé of the essence of New Zealand's case and then focus on the key issues for the Panel to determine. In doing so, I shall make some comments on the arguments raised by the United States in its First Written Submission. However, at the outset, I would like to make some general comments about the approach of the United States in its response to New Zealand's claim.

3. The central questions in this case are whether the competent agencies of the United States have conducted the investigation and made the determinations that are required by the Safeguards Agreement and GATT 1994 before applying the measure in question, and whether they have applied the measure in accordance with the relevant provisions of those agreements. Much revolves, of course, around the investigation and report of the USITC.

4. In its First Written Submission, the United States simply misses the mark. It provides a rebuttal of arguments that New Zealand did not make, and fails to rebut the arguments that New Zealand did make. It characterises New Zealand's position as one that seeks to reargue the case that was presented to the USITC, and as a result mischaracterises New Zealand's arguments. In particular, the United States says, New Zealand "improperly seeks to have the Panel make its own *de novo* interpretation of the record"¹, inconsistently with the relevant standard of review.

5. This, of course, is not the position of New Zealand. In its First Written Submission, New Zealand pointed out that the USITC had failed to make the determinations or provide the analysis or reasoning that are required by the Safeguards Agreement. This is not a rearguing of the facts; it is an assertion, substantiated by reference to the report of the USITC, that the specific obligations of the Safeguards Agreement and of GATT 1994 have not been met.

6. Moreover, in the light of the allegations it makes in respect of the New Zealand claim, the United States own response is curious. In its First Written Submission, the United States describes the report that it wishes that the USITC had written, not the report that the USITC actually wrote. It fills in gaps in the USITC report and seeks to ascribe reasoning and conclusions to the USITC that simply are not found in the report. In doing so, it misrepresents the findings of the USITC. In this regard, New Zealand respectfully suggests that the Panel look closely at the way the United States First Written Submission allegedly bases its arguments on the USITC Report.

¹ Para 44.

7. Two examples will illustrate this, one relating to the threat of serious injury and the other relating to causation. First, in paragraph 78, the United States says “The essence of the USITC’s threat determination rests on evidence in the USITC record supporting four principal findings”. These “findings” are then listed in paragraphs 79 to 82. Members of the Panel might have thought, as we did, that this reference to “findings” was to “findings” made by the USITC. But the first clue that this is not so is found in the fact that there are no footnote references to these “findings”. And, on further investigation we discovered that none of these alleged “findings” were in fact “findings” of the USITC. They are “findings” cobbled together by the United States in its First Written Submission for the purposes of this case -- an attempt to do the job that the USITC failed to do.

8. Second, in paragraph 110 of its First Written Submission, the United States asserts, “The USITC did not find increased imports to be one among several causes of lower prices and domestic industry sales volumes.” This time there is a footnote provided. It takes the reader to page I-26 of the USITC Report. There, the only conceivable statement of the USITC to which the United States could be referring is the statement that, “we find that the increased imports are an important cause, *and a cause no less important than any other cause*, of the threat of serious injury to the domestic lamb meat industry.” (Emphasis added.) Thus, the reference actually contradicts the statement in the text. And, indeed, the text prior to page I-26 lists all of those several factors other than increased imports that were considered by the USITC to cause a threat of serious injury, but which were of equal or less importance than increased imports.

9. Thus, it can be readily seen, Mr Chairman, that a careful reading of the actual report of the USITC shows that the USITC did not do what the United States now claims that it had done.

10. The United States cavalier approach to the facts and to the report of the USITC is paralleled by its treatment of the law. In its First Written Submission, New Zealand pointed out that in view of the extraordinary nature of the safeguard remedy, the Agreement on Safeguards was to be interpreted strictly², a point with which the EC agreed in its Third Party Submission.³ The United States did not disagree with this in its First Written Submission and would appear to accept that a strict approach to the interpretation of the Safeguards Agreement is correct.

11. However, in practice, the United States deviates fundamentally from the proper approach to the interpretation of safeguard obligations under the WTO agreements. The novel, extravagant and expansive interpretations of the provisions of the Safeguards Agreements that the United States offers in its arguments would turn emergency action into routine action. It would turn measures designed to provide interim relief in extraordinary circumstances into measures that would protect a domestic industry from the impact of internal domestic factors or from fluctuations that occur routinely in certain markets.

12. In short, Mr Chairman, the United States arguments in this case, developed in order to justify a domestic process to which the United States appears to be particularly attached, fly in the face of the very object and purpose of rules on emergency action in the Safeguards Agreement and GATT 1994.

Summary of the New Zealand Case

13. As New Zealand pointed out in its First Written Submission, the long-term decline in the United States lamb meat industry, which has been caused by domestic factors, was used by the USITC to justify the imposition of a safeguard measure on imports of lamb meat. In short, imports of lamb meat were to become the scapegoat for problems within the United States lamb meat industry. In doing so, the United States ignored the fact that the increase in imports responded to a demand in the United States that was not being filled by domestic production for the very reasons that were

² Para 7.19.

³ Para 3.

causing its decline. Imports were a response to circumstances that were occurring in the United States lamb meat industry, not the cause of those circumstances.

14. Knowing that it could not justify a case on the basis of the USITC's actual report, the United States First Written Submission sought to focus on a brief window of the period of investigation used by the USITC, essentially a fifteen month period in 1997-98. However, as New Zealand will point out later in this Statement, the United States not only provides a misleading description of what happened in that period, it also seeks to justify the decision of the USITC on the basis of reasoning that is not the reasoning of the USITC. Moreover, in seeking to rely on this new basis for upholding the USITC's determination, the United States misapplies the decision of the Appellate Body in *Argentina-Footwear*.⁴

15. Mr Chairman, there are five fundamental ways in which the United States has failed to comply with its obligations under the Safeguards Agreement and GATT 1994.

First, the United States failed to identify any "unforeseen developments" which resulted in increases in imports, notwithstanding that under Article XIX of GATT 1994 such "unforeseen developments" are a prerequisite to the taking of a safeguard measure.

Second, the United States defined its "domestic industry" for the purposes of the safeguard investigation in a way that has no basis in Article 2.1 and Article 4.1(c) of the Safeguards Agreement.

Third, the United States reached a conclusion that there was a "threat of serious injury" without complying with its obligation under Article 4.1(b) of the Safeguards Agreement to establish that serious injury was "clearly imminent".

Fourth, the United States did not make a finding that the alleged threat of serious injury was caused by an increase in imports because it applied a test for the determination of causation that cannot be justified under Article 2.1 and Article 4.2(b) of the Safeguards Agreement.

Fifth, in adopting the actual safeguard measure applied against New Zealand, the United States did not comply with its obligation under Article 5.1 of the Safeguards Agreement to apply such measures "only to the extent necessary" to prevent serious injury and to facilitate adjustment, nor did it provide any justification for its measure.

Finally, New Zealand has also claimed that the United States is not in compliance with its obligations under Articles 2.2 and 3.1 of the Safeguards Agreement and of GATT Articles I and II. Furthermore, in the light of information now disclosed by the United States in its First Written Submission, New Zealand will also argue that the United States is in breach of its obligations under Article 12.2 of the Safeguards Agreement.

16. Mr Chairman, I would like now to treat each of these arguments in more detail. However, as a preliminary matter, I would point out, that the obligations under the Safeguards Agreement and under GATT 1994 are obligations with which a Member must comply in determining whether to take a safeguard measure or in the taking of that safeguard measure. The United States cannot now, in these proceedings, stand in the shoes of the USITC and cure the defects that exist in the USITC's reasoning or analysis.

⁴ Argentina - Safeguard Measures on Imports of Footwear (WT/DS121/AB/R, 14 December 1999).

Unforeseen Developments

17. In its First Written Submission, New Zealand pointed out that nowhere in the report of the USITC is there any reference to “unforeseen developments” that resulted in an increase in imports, let alone any attempt to identify what those developments might have been.⁵ Yet the existence of such “unforeseen developments” is a prerequisite set out in Article XIX of GATT 1994. That is not a problem, the United States says in its First Written Submission, such unforeseen developments are apparently implicit in the USITC report⁶, even though the USITC does not use the term “unforeseen developments” at all.

18. However, the “significant, unexpected changes” identified by the United States as “unforeseen developments” turn out to be nothing more than an increase in imports. Thus, the United States is seeking to establish that the need for “unforeseen developments” as required by GATT Article XIX, is satisfied by showing that there has been an increase in imports, a condition required by Article 2.1 of the Safeguards Agreement.

19. If such an argument was correct, then there would have been no need for the Appellate Body in both *Argentina-Footwear* and *Korea-Dairy*⁷ to conclude that the requirement of “unforeseen developments” in GATT Article XIX continues as an obligation on Members. It would have been sufficient to show that imports had increased. In effect, having failed as a third party in *Argentina-Footwear* and *Korea-Dairy* to write the need for “unforeseen developments” out of its WTO obligations, the United States is seeking to achieve that same objective through a different argument in this case.

20. Furthermore, as the EC has pointed out in its Third Party Submission⁸, the United States argument is nonsensical. GATT Article XIX provides that in order for a safeguard measure to be applied, increases in imports of a product must “result” from “unforeseen developments.” Thus, the United States argument is that increases in imports of lamb meat are the result of an increase in imports of lamb meat, which is simply a tautology. And, as the EC also noted, the United States cannot give such an argument respectability by talking about changes in product mix from frozen to chilled.

21. Indeed, even if this were not a tautology, imports in chilled lamb meat could not be an “unforeseen development”. Such imports had been in the United States market at least since 1990. They were a response to developments within the United States market and not an “unforeseen development”. Imports of chilled lamb meat increased to meet unfulfilled domestic demand and, as the USITC itself recognised, to respond to new demands. The United States domestic industry was unable to meet that demand because of a contraction in the domestic supply of lambs. Thus, even if imports of chilled lamb meat could qualify in principle as “unforeseen developments”, they were in fact foreseeable and foreseen.

22. In any event, the United States arguments on this issue constitute nothing more than *ex post facto* rationalisation. It is an attempt to find within the USITC report some development which can be characterised as “unforeseen” in order to justify consistency with Article XIX of GATT 1994. In order to do this, however, the United States has to mischaracterise what the USITC concluded.

23. The United States argues that the USITC concluded that imported and domestic product became more similar during the period of investigation, through increased imports of fresh and chilled

⁵ Para 7.31.

⁶ Para 60.

⁷ Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products (WT/DS98/AB/R, 14 December 1999).

⁸ Para 22.

lamb meat and increases in the size of imported product.⁹ The United States places particular emphasis on the alleged consideration by the USITC of the increasing proportion of imported chilled product.¹⁰ In fact as the USITC made clear in its discussion of remedy, “The conditions of competition in both the domestic and world lamb meat markets have changed in *several* important respects during the past several years.”¹¹ (Emphasis added.) These “several important respects” included not only the increasing proportion of chilled product, but also the fact that lamb meat consumption represents a minimal portion of United States protein consumption; the “significant change” as a result of the repeal of the Wool Act; and the substantial drop in pelt prices occurring around mid-1998.¹² What the United States has done in its First Written Submission is highlight one of these factors, and claim that it is a development that was considered by the USITC to be unforeseen.

24. However, the United States has attributed to this one factor a weight that the USITC did not give it. There was no discussion by the USITC of a “sudden” and unexpected” change in the competition from imported lamb meat. The 1995 USITC Report cited by the United States highlights the fact that chilled lamb meat represented 31 per cent of all lamb meat imports in 1990.¹³ In the case of New Zealand product, this proportion was at the same level in 1997.¹⁴ Increases in exports of chilled product cannot therefore have been a sudden and unexpected development.

25. Indeed, the USITC could not have viewed any change from frozen to chilled product as constituting an unforeseen development. It noted that lamb meat was increasingly entering the United States market in chilled and fresh form in making its determination that imported and domestic lamb meat were like products.¹⁵ In doing so, it concluded that both frozen and chilled lamb meat were “like” domestic lamb meat. It would be incongruous to conclude that there was something “sudden”, “unexpected”, or “unforeseen” about a change from one like product to another.

26. Thus, in order to try and make an argument that increased imports were a result of unforeseen developments, the United States has ignored what the USITC actually found and sought support from what the USITC did not find. It seeks to construct an argument out of things the USITC said when it was assessing causation and like product, and in considering a remedy determination. But, the reality is that at no time did the USITC turn its mind to the question of whether those increased imports resulted from “unforeseen developments” and it is now too late for the United States to concoct such an argument for the USITC.

Domestic Industry

27. In its First Written Submission, New Zealand pointed out that the United States had not applied the terms of the Safeguards Agreement in its determination of what constituted the domestic industry that was allegedly threatened with serious injury.¹⁶ Instead of determining what industry produced a product that was “like or directly competitive” with imported lamb meat, as Articles 2 .1 and 4.1(c) of the Safeguards Agreement require, the United States instead applied a test to determine what constituted the abstract class of “producers as a whole”, regardless of whether members of that

⁹ USITC Report, I-22.

¹⁰ United States First Written Submission, paras 56 and 57.

¹¹ USITC Report, I-32.

¹² USITC Report, I-30.

¹³ USITC, Lamb Meat: Competitive Conditions Affecting the US and Foreign Lamb Industries, Inv. No. 332-357, August 1995, Table 2-14.

¹⁴ USITC Report, I-32.

¹⁵ USITC Report, I-11.

¹⁶ Para 7.41.

class actually produced a “like or directly competitive product.”¹⁷ In doing so, the United States ignored the now well-established rules of interpretation applicable to WTO agreements.

28. Article 31 of the Vienna Convention on the Law of Treaties requires that the words of a treaty be given their ordinary meaning in their context and in the light of the object and purpose of the treaty as a whole. The United States approach is to interpret the words “producers as a whole” in isolation from their context, ignoring the fact that it is only those producers who produce a “like or directly competitive product” that can be included in the class of “producers as a whole”.

29. The United States approach equally ignores the fact that the qualifying term “as a whole” defines the scope of the producers within an industry; it is not a term that defines the scope of the industry itself. Its purpose is to ensure that a safeguard investigation is not limited to selected individual members of an industry. Rather, it must look at the industry as a whole. The term “as a whole” was not designed to be used to expand the membership of an industry beyond those who produce “like or directly competitive products.”

30. The USITC’s determination of the “domestic industry” was based on its view that there was a “continuous line of production” from raw to processed product and a “substantial economic interest” between growers and processors. The United States seeks to justify this approach on the grounds that it is the “traditional USITC approach.”¹⁸ But the fact that it is traditional is irrelevant. New Zealand was not accusing the USITC of inconsistency; rather it was asking and still asks, how can such an approach be justified under the Safeguards Agreement?

31. The United States seeks to distinguish the cases referred to by New Zealand where “vertical integration” and “continuous lines of production” theories were rejected. It argues that the facts were different or that the panel report was not adopted.¹⁹ But, the United States cannot find any case where its “vertical integration” or “continuous line of production” theories were applied. And so they remain just that; theories that have not been applied.

32. Nor could those theories have been applied. The United States was right to be so hesitant in its assertion that its analysis, although not necessarily required by the Safeguards Agreement, is nonetheless “permitted” by it.²⁰ The United States theories could only be “permitted” by the Safeguards Agreement if the actual wording of Articles 2.1 and 4.1(c) is ignored.

Threat of Serious Injury

33. In its First Written Submission, New Zealand demonstrated that the USITC had failed to make any determination that a “significant overall impairment” constituting serious injury was “clearly imminent”.²¹ Thus its determination that there was a threat of serious injury was not in conformity with the provisions of Article 2.1 and Articles 4.1(a) and 4.1(b) of the Safeguards Agreement. The USITC had referred to a whole variety of factors but had failed to “evaluate” them as required by Article 4.2(a), nor had it “demonstrated the relevance of the factors examined” as required by Article 4.2(c) of the Safeguards Agreement. Moreover, it made no prospective analysis that could be the basis for a determination that what would happen in the future could be regarded as a threat.

¹⁷ USITC Report, I-12 to I-14.

¹⁸ United States First Written Submission, para 62.

¹⁹ United States First Written Submission, paras 72 - 76.

²⁰ United States First Written Submission, para 70.

²¹ Page 53.

34. The United States has objected to New Zealand's analysis, arguing that it constitutes an attempt to reweigh the evidence before the USITC.²² But the United States misses the point. New Zealand was not, in its First Written Submission, second-guessing the USITC. It was pointing out that the USITC had not analysed the relevant factors as it was required to do under the Safeguards Agreement, nor had it produced reasoned conclusions based on objective evidence.

35. However, the United States own approach to the issue of threat of serious injury is masked in obscurity. Instead of dealing separately with the issues of threat of serious injury and causation, the United States conflates these two issues. Although, it feels somewhat guilty about doing so, stating that Article 4.2(b) "certainly suggests that the demonstration of a causal link may be a distinct conclusion from the establishment of a threat of serious injury"²³, its objective is patent. By mixing the two issues together the United States is able to use considerations relating to causation to bolster its arguments about threat, and to use considerations relating to threat to appear to provide support for its causation argument. If the United States had dealt with the issues separately it would have been readily apparent that the USITC had failed to meet the test for either.

36. In its First Written Submission the United States argues that there was a threat of serious injury to its domestic industry because of increases in imports that occurred in a window during the period of investigation.²⁴ The United States refers to this as a "surge" in imports "late in the period of investigation" which was projected to continue into 1999.²⁵ The United States discussion is focused then on increases in imports that occurred in 1997-98. It seeks to draw support for emphasising the most recent period from the decision of the Appellate Body in *Argentina-Footwear*.²⁶

37. However, the United States only focuses on part of what was said by the Appellate Body in *Argentina-Footwear*, referring to "the Appellate Body decision's admonition that an injury analysis must examine sudden, recent developments."²⁷ In fact what the Appellate Body said was that both Article 2.1 of the Safeguards Agreement and Article XIX of the GATT require that "the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'".²⁸

38. When the findings of the USITC are examined in fact, it is clear that the conditions set out in *Argentina-Footwear* have not been met. Once again, the United States puts words into the mouth of the USITC that are not to be found in its report. The USITC did not find that imports from Australia and New Zealand *surged* late in the period of investigation. The market share of imports in terms of quantity increased from 11.2 per cent in 1993 to 23.3 per cent in interim 1998.²⁹ Of that increase in market share, 45 per cent of that increase took place between 1993 and 1996, with 55 per cent occurring between 1997 and interim 1998.³⁰ This is neither a "surge" as the United States claims, nor something "sudden" or "sharp" enough to come within the terms of *Argentina-Footwear*.

39. Similarly, the United States tries to ascribe to the USITC the view that a change in product mix, from frozen to chilled, led to a fall in domestic prices.³¹ But the USITC did not say this. It simply noted that "the increase in imports has caused prices to fall in the short run."³² There is no

²² United States First Written Submission, para 139.

²³ United States First Written Submission, para 147.

²⁴ Para 83.

²⁵ Para 79.

²⁶ Paras 78 and 83.

²⁷ Para 83.

²⁸ *Argentina - Footwear*, para 131.

²⁹ USITC Report, Table 32, II-50.

³⁰ USITC Report, Table 32, II-50.

³¹ United States First Written Submission, para 81.

³² USITC Report, I-24.

reference by the USITC to the impact of different product mixes. Furthermore it is incorrect to state, as the United States does³³, that the USITC found that the trends in lamb meat prices would continue in the future. There was no prospective analysis by the USITC of what the trend in the economic indicators might show in the future.

40. The United States seeks to link its window of increases in imports with a fall in domestic prices in 1997-98.³⁴ But in doing so, it fails to take into account the fact that according to the USITC the fall in domestic prices which began in mid-1997 had begun to recover by July 1998.³⁵ What the United States is asking the Panel to accept is that such a price decline in one season alone is a sufficient basis on which to place a safeguard measure on imports. Further, were one to adopt the United States approach to the interpretation of *Argentina- Footwear*, of focusing only on the *most* recent developments, the focus in this case would then be on the last three months, when domestic prices had increased.

41. The United States First Written Submission also produces a new theory. Drawing on the USITC's conclusion that there had been a stabilisation of demand from 1996 on, the United States now claims that faced with such a demand an increase in supply as a result of increased imports will have a negative effect on prices.³⁶ This, too, is a theory that cannot be found in the USITC's Report. Moreover, such a theory ignores several factors, all of which can be found in the USITC's Report.

42. Even where demand has stabilised, an increase in supply does not necessarily mean that there will be a decrease in price. Promotional or market development activities will affect price. The USITC itself recognised that the failure of the United States industry to implement an effective marketing programme to bolster demand could have had an important impact on the industry, and hence on price.³⁷ Prices may also decline because of the competing prices of other meats. Lamb meat competes on the market with other meats, notably pork. Indeed, there was a fall in the prices of beef and pork over much the same period as the fall in lamb meat prices.

43. The assumption in the United States First Written Submission that an increase in imports during a period of stabilised demand would result in price declines, is also based on a supposition that domestic prices for lamb meat would fall in the face of undercutting of prices by imported product. The United States claims underselling by imports of some individual cuts apparently throughout the period of investigation, but has failed to disclose the data on which it relies.³⁸ As Figure 5 in New Zealand's First Written Submission shows, imported prices followed domestic prices, they did not lead them and they did not fall to the same degree as domestic prices over 1997 and 1998.

44. In short, the new United States theory that increased imports into a market where consumer demand had stabilised would result in a threat of serious injury simply does not stand up to analysis. The fallacy in the position now advocated by the United States in its First Written Submission, is that conclusions can be drawn about the impact of imports by taking a snap-shot of a short period of time. Only in circumstances where the short-term indicators are clear can any such conclusions be drawn. But, as has been pointed out already, the short-term indicators are not conclusive in this case. That is why the USITC sought to look at a broader picture. What the United States is doing is seeking to base a safeguard measure on a conclusion that it has drawn on the basis of what is no more than a usual fluctuation in agricultural trade.

³³ United States First Written Submission, para 81.

³⁴ United States First Written Submission, para 81.

³⁵ USITC Report, I-20; II-55. On page I-18 of its report the USITC states, however, that the fall in domestic prices began in late-1997 and continued in 1998.

³⁶ Para 81.

³⁷ USITC Report, I-26.

³⁸ Para 87.

45. The reality is that neither the USITC nor the United States, in its role as the reviser of the USITC Report, has examined any trends in economic indicators which might have demonstrated that significant overall impairment was “clearly imminent”. There is no prospective analysis undertaken by the United States of the likely trends in the economic indicators of the health of the domestic industry. The only prospective analysis is related to increased imports. And that is no more than an assumption, based on the United States commingling of the issues of causation and threat, that if imports increase then domestic industry indicators will deteriorate. This is the kind of conjecture that the Safeguards Agreement proscribes.

46. By focusing on just one aspect of the decision of the Appellate Body in *Argentina-Footwear*, that of the need to look at a recent period, the United States has ignored the essential point of that decision. It has identified an increase in imports that are recent enough, but none of the United States arguments demonstrate that they are sudden enough, sharp enough or significant enough to meet the standard established in *Argentina-Footwear*.

Causation

47. As New Zealand pointed out in its First Written Submission, Article 2.1 of the Safeguards Agreement provides that a safeguard measure may be imposed only where increased imports cause the threat of serious injury.³⁹ The Safeguards Agreement does not qualify the concept of “cause” in any way. Indeed, it provides that injury caused by factors other than increased imports cannot be attributed to increased imports. As a result, a Member cannot apply a safeguard measure to a threat of serious injury that is caused by both increased imports and other factors. A safeguard measure can be applied only if the threat of serious injury is caused by increased imports.

48. Accordingly, the USITC’s determination that causation existed is flawed because it was based not on a finding that the alleged threat of serious injury was caused by increased imports, but on a finding that increased imports were a “substantial cause” of that alleged threat. But nowhere in the Safeguards Agreement is the word “cause” qualified by the word “substantial”, nor is such an interpretation justified under that Agreement or under GATT 1994.

49. The United States appears to argue that the “substantial cause” test is justified because it is found in a United States statute and has been here for “over 25 years.”⁴⁰ Neither of these considerations is relevant. It does not matter whether the test applied by the USITC is based on a statute or developed by the USITC of its own accord. The question for a WTO panel is simply whether the test conforms with WTO law. The fact that the test has been applied by the USITC for over 25 years is equally irrelevant. Longevity is hardly a defence to WTO-inconsistency.

50. The United States argues that the wording of Article 2.1 on causation leaves open the “*degree of cause required*” before a safeguard measure can be imposed.⁴¹ This belief in the open-ended nature of the causation test allows the United States to assert that a test that attributes to imports a cause “which is important and not less than any other cause” complies with the terms of the Safeguards Agreement. The United States criticises the New Zealand argument that this is less stringent than the WTO standard, and asserts as a matter of dogma that “US law in fact embodies a *more stringent* test” than that provided in the Safeguards Agreement.⁴²

51. Yet, the United States own description of the test applied by the USITC demonstrates that it cannot be in conformity with the provisions of the Safeguards Agreement. By the United States own

³⁹ Para 7.70.

⁴⁰ United States First Written Submission, para 112.

⁴¹ United States First Written Submission, para 114.

⁴² Para 120.

admission, a safeguard measure can be applied even where increased imports are, for example, only one of three equal causes of a threat of serious injury. In such circumstances, the increased imports would be an “important” cause and a cause not less important than any other cause”. Yet it would still be a minority cause of the threat of serious injury.

52. Such a situation cannot be regarded as complying with the provisions of the Safeguards Agreement. It would certainly be true to say that in such circumstances increased imports were a “substantial cause” of the threat of serious injury, but it would be a misuse of language to say that the “cause” of the threat of serious injury was increased imports. The first sentence of Article 4.2(b) requires the competent authority to establish “the existence of *the* causal link between increased imports of the product concerned and serious injury or threat thereof”, not the existence of *a* link between increased imports and serious injury or threat, as the United States misquotes the provision in paragraph 77 of its First Written Submission.

53. Mr Chairman, the example I have given of multiple causes is not an hypothetical illustration. It closely accords with what happened in this case. In seeking to establish causation, the USITC looked at other factors.⁴³ It found that the termination of the Wool Act was a less important cause than increased imports. It concluded that competition from other meat products was not a more important cause. It concluded also that concentration in the packer segment of the industry was not a more important cause. But in none of these instances did the USITC conclude that these factors were not causes of injury at all; they were just not causes that were more important than increased imports.

54. Moreover, with respect to the failure of the industry to develop and implement an effective marketing arrangement, the USITC found that such a programme could have had an important impact on the industry, but it was not a more important cause of the threat of serious injury than increased imports.⁴⁴ In this case, the USITC did not conclude that it was a less important factor, simply that increased imports were no less important. In effect, they were of equal importance.

55. Thus, contrary to the United States claim, the USITC found that increased imports was one of a number of factors that caused a threat of serious injury. Collectively, those other factors may well have been more significant than increased imports. Individually they were not, and that was sufficient to satisfy the “substantial cause” test.

56. The United States also misrepresents the effect of the second sentence of Article 4.2(b) which provides that injury caused by other factors is not to be attributed to increased imports. This implies, the United States says, that since injury can be caused by a variety of factors this mandates “the application of a ‘substantial cause’ or similar causation standard.”⁴⁵ This is truly an “Alice in Wonderland” approach to the interpretation of the second sentence of Article 4.2(b). A provision that is designed to prevent injury attributable to other factors from being attributed to increased imports, is being interpreted as justifying a finding of serious injury caused by increased imports when a significant part of that injury is not in fact caused by increased imports.

57. In the course of its rather contradictory discussion of the second sentence of Article 4.2(b), the United States makes an important point. That provision, the United States says, “instructs Members not to blame increased imports for any injury caused by other factors.”⁴⁶ Precisely. But of course, the United States recognition of this carries with it a corollary. A determination that a threat of serious injury has been caused by increased imports when in fact not all of that injury has been caused by increased imports is doing exactly what the United States says cannot be done. That is, it is blaming increased imports for injury caused by other factors.

⁴³ USITC Report, I-24 and I-25.

⁴⁴ USITC Report, I-26.

⁴⁵ United States First Written Submission, para 118.

⁴⁶ United States First Written Submission, para 119.

58. Once again, the United States is failing to apply the correct approach to interpretation of the provisions of the Safeguards Agreement. It is seeking to ascribe to the words of Article 2.1 a meaning that does not conform with the ordinary meaning of the words, in their context. Under Article 2.1, the increased imports must “cause” the injury. Article 2.1 does not say that the increased imports need only be a contributing, albeit an important, cause. Yet that is the meaning the United States wishes to ascribe to the concept of causation in the Safeguards Agreement.

59. The United States also criticises New Zealand for its suggestion that the USITC might have considered using econometric analysis in order to determine whether the alleged threat of serious injury was caused by increased imports.⁴⁷ The United States argues that the USITC does not perform econometric analysis; instead, it “evaluates the evidence of an objective and factual nature with respect to each of the relevant factors and makes its findings and conclusions on the basis of that analysis”.⁴⁸

60. However, in its criticism of the New Zealand position, the United States overlooks the essential point. That is, in order to make any determination of causation, the USITC had to find a methodology that would allow it to distinguish between injury caused by domestic factors and injury caused by increased imports. In its First Written Submission New Zealand pointed out that the USITC’s approach does not allow it to distinguish between circumstances where domestic production declines because of domestic factors and where it declines because of increased imports. The United States denies that this could be done by econometric analysis, but even if that form of analysis is denied, economic analysis can provide guidance on those issues.

61. In order to illustrate this, New Zealand has attached to this Statement an economic analysis of the relationship between imports and domestic decline in the United States lamb meat industry during the USITC’s period of investigation.⁴⁹ This analysis shows, first, that it is possible for such analysis to be done, and second, that if it had been done by the USITC in the course of its investigation, the USITC would have reached a different conclusion. But the USITC did not do this. Instead, its analysis focused on factors that, in its view, led to a conclusion that there was threat of serious injury and then, almost as a matter of intuition, it found causation. No methodology, or any method at all, was invoked by the USITC for reaching this conclusion. The USITC did not demonstrate the “causal link” between increased imports and the threat of serious injury on the basis of objective evidence as required by Article 4.2(b) of the Safeguards Agreement.

The Application of the Safeguard Measure

62. In its First Written Submission, New Zealand set out the failure of the United States to comply with its obligation under Article 5.1 of the Safeguards Agreement, to apply a safeguard measure only “to the extent necessary” to prevent serious injury and to facilitate adjustment.⁵⁰ New Zealand pointed out that the obligation to do no more than necessary was an obligation to apply the least trade restrictive measure that would prevent serious injury and facilitate adjustment. This, the United States has not done.

63. In its First Written Submission, the United States contests this interpretation of the concept of “necessary” in Article 5.1. It purports to make a distinction between “necessary” and “only to the extent necessary”, which turns out to be a distinction without a difference.⁵¹ It describes the “least

⁴⁷ United States First Written Submission, paras 131-133.

⁴⁸ Para 133.

⁴⁹ Attached as Annex NZ13.

⁵⁰ Paras 7.97-7.111.

⁵¹ Paras 183-185.

trade restrictive” test as “a virtually impossible standard” that is at variance with the way that Article 5.1 has been interpreted to date.⁵² However, the United States does not explain how this test is different from the one posited by the panel in *Korea-Dairy*, which the United States cites.⁵³

64. The United States then embarks on an analysis of New Zealand’s errors. Finally, some seven pages and 25 paragraphs later, the United States puts forward its own view of the obligations of a Member under Article 5.1. What we find as part of the United States “multi-step inquiry” is that there has to be an assessment of whether the measure is “more restrictive than required” to prevent serious injury and to assist in adjustment.⁵⁴ In the context in which the United States uses the term “restrictive”, it can only mean “trade restrictive”.

65. Mr Chairman, apparently we stand corrected. The “least trade restrictive” test is a “no more restrictive of trade than required” test.

66. Beyond this rather pointless diversion into semantics, the United States also asserts that it is not prohibited from imposing a safeguard measure that goes beyond preventing the threat that gives rise to the right to impose the measure. According to the United States a Member may impose a safeguard measure that will restore the industry in question to competitiveness.⁵⁵

67. The United States arguments on this point reflect once again its confusion over the relationship between threat and causation and over what it is that can be the subject of a safeguard measure. If an industry’s competitiveness is threatened because of the threat of serious injury caused by increased imports, then a safeguard measure that prevents the threat of serious injury will prevent the threat to its competitiveness. However, if the threat to competitiveness is caused by factors other than increased imports, then a measure that prevents only the threat from increased imports will not get at the problem. It will not prevent the threat to competitiveness caused by other factors.

68. Thus, the United States claim that it is entitled to adopt a measure that will restore competitiveness would only be compelling if the United States had properly excluded injury threatened by other factors from its determination of a threat of serious injury. It did not do so in this case, and thus it cannot place on imports the burden of preventing a threat to its domestic industry that was not caused by imports. For that is what its claim to be able to restore competitiveness is seeking to do.

69. Furthermore, the United States mischaracterises New Zealand’s arguments on the nature of the United States obligations under Article 5.1 of the Safeguards Agreement. New Zealand did not argue that the United States must accept the majority recommendation of the USITC on remedy. New Zealand argued that the United States must apply a remedy that is no more trade restrictive than is necessary to prevent serious injury and facilitate adjustment. The United States Administration is free to choose a remedy that will prevent serious injury and facilitate adjustment, provided that such a remedy is applied only to the extent necessary to achieve that goal. Thus, assuming that the appropriate conditions had been met, the application of a safeguard measure which was less trade restrictive than that proposed by the majority of the USITC, but which equally prevented serious injury and facilitated adjustment, would have been consistent with the United States obligations under Article 5.1.

70. Mr Chairman, there is a final point that New Zealand wishes to make in relation to the actual measure applied by the United States. In its First Written Submission, the United States sought to demonstrate that it had devised a measure that would address the threat to injury only to the extent

⁵² Para 182.

⁵³ Para 190.

⁵⁴ Para 210.

⁵⁵ United States First Written Submission, para 177.

necessary to prevent that threat, by referring to an “economic model” that it had developed.⁵⁶ Information on that economic model has never been disclosed to New Zealand. Accordingly, the United States is precluded from relying on that alleged modelling to justify its measure.

Additional Arguments

71. In its First Written Submission, New Zealand pointed out that the United States had failed to publish its findings and reasoning on the necessity of the safeguard measure chosen, contrary to Article 3.1 of the Safeguards Agreement.⁵⁷ New Zealand reaffirms those arguments. Equally, New Zealand reaffirms its arguments that the United States exclusion of certain countries from the application of its safeguard measure constitutes a violation of Article 2.2 of the Safeguards Agreement and of GATT Article I.⁵⁸ I shall not elaborate on these matters in this statement, but New Zealand will provide further details in its Final Written Submission.

72. However, New Zealand wishes now to make an additional point. In the course of the consultations pursuant to Article 4 of the DSU, the United States was asked if any further analysis had been done following the USITC Report which formed the basis for the final determination of the President. In the course of its responses, the United States said: “Nothing exists that you don’t have”, and later it said: “The USITC Report is the sum total of the universe for us.”⁵⁹ On the basis of that answer, New Zealand decided that it would not include an argument on breach of Article 12.2 of the Safeguards Agreement by the United States in its First Written Submission.

73. Nevertheless, in its First Written Submission, the United States referred to modelling that was done by the United States “to test various combinations of in-quota and out-of-quota tariffs in order to find the combination of variables that would address the injury without going beyond the extent necessary.”⁶⁰ Clearly, if this modelling was done after the report of the USITC was rendered, then the answer given to New Zealand in the consultations was incorrect.

74. In these circumstances, New Zealand can only conclude that the United States did not disclose to the Committee on Safeguards “all pertinent information”, as required by Article 12.2 of the Safeguards Agreement, and thus the United States is in violation of its obligations under that provision.

Conclusion

75. Mr Chairman, that concludes the Oral Presentation of New Zealand. We shall be providing additional details in our rebuttal submission and are ready to respond to any questions the Panel may have.

⁵⁶ Para 216.

⁵⁷ Paras 7.110 and 7.111.

⁵⁸ Paras 7.112-7.114.

⁵⁹ Consultations under the DSU between the United States, New Zealand, and Australia, held in Geneva on 26 August 1999 (afternoon session).

⁶⁰ Para 216.

ANNEX 2-6

ORAL RESPONSE OF NEW ZEALAND TO UNITED STATES'
COMMENTS ON EXHIBIT NZ-13

(26 May 2000)

Mr Chairman, Members of the Panel, yesterday the United States made some comments about Annex NZ13, attached to New Zealand's Oral Statement. I would like to make some remarks in response.

1. New Zealand wishes to point out that under paragraph 14 of the panel's working procedures a Member may deposit supporting material up until the conclusion of the first substantive meeting. In attaching the Annex, New Zealand was simply availing itself of that right.
2. The New Zealand Annex was prepared in response to the assertion of the United States in paragraph 130 of its First Written Submission that the USITC had "conducted the appropriate analysis in determining that imports of lamb meat were in such increased quantities as to cause the threat of serious injury." New Zealand has been unable to discover what analysis the USITC undertook to reach that conclusion.
3. In accordance with the terms of the Safeguards Agreement, the USITC was obliged by Article 4.2(b) to establish "the causal link" between increased imports and the threat of serious injury. As New Zealand has argued, this causal link must be demonstrated, not assumed.
4. In *Argentina-Footwear* the Appellate Body took the view that any conclusions reached by the competent authority must be based on reasoned analysis. In order to determine whether economic analysis could provide a basis for a reasoned conclusion on the relationship between increased imports and the threat of serious injury to the domestic industry, New Zealand commissioned the study that is set out in the Annex.
5. New Zealand did not attach the study to its Statement in order to invite the panel to engage in a *de novo* review. New Zealand provides this study as a illustration, an example, of reasoned analysis of the question that was before the USITC. It demonstrates that the issue that the USITC had to address could be addressed by reasoned analysis and not merely by intuition.
6. The information on which the study is based is information drawn from primary data sources cited in the USITC Report. Thus, it is information available to the staff of the USITC. All of that information is available on disc and can be provided to the Panel and the parties.
7. The United States raises concerns about limitations on its ability to file appropriate responsive material. Again, we would refer the United States to paragraph 14 of the working procedures. The United States is fully entitled to file any supporting rebuttal material it wishes with its final submission.

ANNEX 2-7

CLOSING STATEMENT OF NEW ZEALAND

(26 May 2000)

Mr Chairman, members of the Panel:

1. In my closing statement, I would like briefly to recap what New Zealand sees as the essence of this case. As you stated yesterday morning in the context of discussing the preliminary requests, Mr Chairman, the central issue in this case is whether the United States has complied with its WTO obligations in imposing its safeguard measure on imports of lamb meat.
2. In its statement yesterday the United States described at some length its view that the Safeguards Agreement embodies a fundamental component of multilateral trading rules which has existed for over 50 years. It made the point that Members must be able to take temporary action to prevent or remedy serious injury or threat of serious injury to their domestic industry in emergency situations.
3. New Zealand fully agrees. However, in exercising their rights to impose safeguard measures, Members must also have regard to the rights of other Members. The Safeguards Agreement seeks to establish rules to maintain the balance of rights between Members imposing safeguards and Members on which those measures are imposed. It lays down clear requirements which Members *must* follow in imposing any safeguard measure. Thus, the central issue in this case is simply whether the United States has met those requirements in imposing this safeguard measure.
4. Yesterday the United States described once more what it claims the USITC did. I would like to make two comments on that description. The first is that, as in its First Written Submission, the United States Oral Statement has attributed to the USITC conclusions and analysis that cannot be found in the USITC Report.
5. Secondly, although the United States continued to *assert* in its Oral Statement that it had complied with all of the requirements of the Safeguards Agreement, it again made no attempt to show *how* its actions comply.
6. As I said in my statement yesterday, and as New Zealand has previously made clear in its First Written Submission, a careful analysis of the report of the USITC shows that the United States did not in fact meet its obligations under the Safeguards Agreement. The United States has not rebutted New Zealand's arguments on the key issues of unforeseen developments, domestic industry, threat of serious injury, causation, and the necessity of the measure imposed, or on other matters, either in its First Written Submission or in yesterday's statement.

ANNEX 2-8

NEW ZEALAND'S RESPONSES TO QUESTIONS BY THE PANEL

(22 June 2000)

Was the "unforeseen developments" provision of Article XIX:1 of GATT 1994 fulfilled?

1 You seem to argue (citing to the Appellate Body reports in Korea Dairy and Argentina Footwear) that since developments subsequent to the negotiation of a trade concession could have been foreseen there was no basis for the safeguard measure to be applied to US imports of lamb meat. How could it ever be proven by a Member that has applied a measure that it could not have foreseen or did not foresee a given development occurring after its negotiation of a concession?

Answer 1

New Zealand argues that the United States cannot take the measure it has imposed on imports of lamb meat unless it was applied in response to developments subsequent to incurring obligations under GATT 1994 that were unexpected or unforeseen.¹

A Member need not prove that in the particular case it could not have foreseen or did not foresee a given development occurring after it incurred obligations under GATT 1994. It is not required that the developments be "unforeseeable", or "incapable of being foreseen or anticipated".² Rather, a Member is required objectively to demonstrate as a matter of fact the existence of circumstances or events that were unforeseen or unexpected at the time obligations under GATT 1994, including tariff concessions, were incurred. It is the developments which lead to the increased imports which must be unforeseen or unexpected, and must be demonstrated.

A demonstration of the existence of "unforeseen developments" would involve an objective consideration by the competent authorities of the facts, events and circumstances which led to the product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry, and whether these were of an unexpected nature so that a Member would not have foreseen them when the trade obligation was incurred.

Depending on the circumstances of a particular case, a Member would be able to demonstrate the existence of such unforeseen or unexpected developments where, for example, there had been a diversion of product as a result of a collapse in another market, or a massive currency revaluation which encouraged imports into a country because they were comparatively cheaper. What is essential is that there be an objective consideration of the circumstances which lead to the importation of the product at issue and a demonstration of the existence of such unforeseen or unexpected developments.

2 You seem to argue that the existence of "unforeseen developments" in the sense of Article XIX is a "prerequisite" (NZ) or a "legal requirement" (AUS). The Appellate Body in Korea - Dairy Safeguard and Argentina - Footwear Safeguard explicitly stated that "unforeseen developments" do not constitute an "independent condition" for the application of a safeguard

¹ The Appellate Body has noted that it must be demonstrated as a matter of fact that an importing Member has incurred obligations under the GATT 1994, including tariff concessions (*Argentina - Footwear*, para 91, *Korea - Dairy*, para 84). The unforeseen developments must be subsequent to the *incurring of obligations* under GATT 1994, not subsequent to the *negotiation of a concession*.

² *Argentina - Footwear*, para 91; *Korea - Dairy*, para 84.

measure but rather constitute a “circumstance” the existence of which “must be demonstrated as a matter of fact”. By arguing that it is a “prerequisite” or “legal requirement”, are you not in effect arguing that “unforeseen developments” constitutes a “condition”? How would you define the difference if any between a “legal condition” and a “factual circumstance”?

Answer 2

The Appellate Body reasoning in *Argentina - Footwear* and *Korea - Dairy* in relation to “unforeseen developments” is based on the ordinary meaning of Article 11.1(a) of the Safeguards Agreement that “any safeguard action must conform with the provisions of Article XIX of the GATT 1994 as well as with the provisions of the Agreement on Safeguards”³. Furthermore the Appellate Body suggested that Article XIX not only continues in full force and effect but “establishes certain prerequisites for the imposition of safeguard measures”⁴.

The Appellate Body went on to state that it did not view the first clause of Article XIX:1(a) as establishing “independent conditions” for the application of a safeguard measure, additional to the conditions set forth in the second clause of that paragraph. Rather, it describes “circumstances” which “must be demonstrated as a matter of fact” in order for a safeguard measure to be applied consistently with Article XIX.⁵ It is clear from the Appellate Body’s rulings that such circumstances *must* be demonstrated as a matter of fact. If they have not been demonstrated a safeguard measure has not been applied consistently with Article XIX. It is therefore a prerequisite or a legal requirement that the existence of “unforeseen developments” be demonstrated in order for a safeguard measure to be applied consistently with Article XIX. This is borne out by the Appellate Body in *Korea - Dairy* which expressly *reversed* the Panel’s conclusion in that case that Article XIX of GATT did not contain a “requirement”⁶

The Appellate Body rightly drew a distinction between an independent condition and a factual circumstance which must be demonstrated. An independent condition is a stipulation that must be complied with in order for a particular action to be legally valid. In the case of a factual circumstance it is the demonstration of that factual circumstance which is required by the Safeguards Agreement. Both independent conditions and the demonstration of the factual circumstance of unforeseen developments are legal requirements. One can ask whether a safeguard measure can be applied if “unforeseen developments” have not been demonstrated? The answer to this question is clearly no. The existence of “unforeseen developments” must, therefore, be *demonstrated* for the safeguard measure to be applied consistently with the provisions of Article XIX of GATT 1994 and the Safeguards Agreement. As New Zealand pointed out in its First Written Submission and Oral Statement, the USITC in this case failed to demonstrate the existence of “unforeseen developments”.⁷

3 You also seem to argue that there must be an explicit “finding” of, in so many words, “unforeseen developments” in a report on an investigation. If this is your position, on what treaty language do you base this contention, particularly in the light of the above-quoted language of the Appellate Body? If the “existence” of “unforeseen developments” can be discerned from the report of a competent authority, even if these precise words are not found in that report, why would this element of Article XIX not be fulfilled?

³ Argentina Footwear, para 83; Korea - Dairy, para 77.

⁴ Argentina - Footwear, para 83.

⁵ Argentina - Footwear, para 92; Korea - Dairy, para 85.

⁶ Para 90.

⁷ New Zealand’s First Written Submission, paras 7.29 and 7.31 and Oral Statement at the First Panel Hearing, para 17.

Answer 3

New Zealand argues, in accordance with the Appellate Body's rulings, that the existence of "unforeseen developments" must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with GATT 1994 and the Safeguards Agreement. That the competent authorities must demonstrate the existence of "unforeseen developments" is clear from the decision of the Appellate Body in *Argentina – Footwear*.⁸ Furthermore, Article 3.1 of the Safeguards Agreement requires the competent authorities to publish a report setting forth their findings and reasoned conclusions reached on "all pertinent issues of fact and law". The unforeseen developments requirement is a "pertinent issue of fact and law". To comply with the provisions of the Safeguards Agreement and to be consistent with the ruling of the Appellate Body, therefore, the competent authorities must demonstrate the existence of "unforeseen developments" and set forth their findings and reasoned conclusions reached on "unforeseen developments".

4 You seem to focus in your arguments concerning unforeseen developments on the contention that the increase in imports, as such, must be the result of "unforeseen developments" and in turn must cause or threaten to cause serious injury, for a safeguard measure to be permissible. The relevant language of Article XIX:1 of GATT 1994 seems broader than this, however, in that it refers to imports "in such increased quantities and under such conditions" resulting in part from unforeseen developments. The Appellate Body in Korea - Dairy Safeguard and Argentina - Footwear Safeguard also referred to both "increased imports" and "under such conditions" in its discussion of unforeseen developments. The text of Article XIX:1 thus might import that in a given case, the "unforeseen developments" might be in respect of the "conditions" under which the increased imports are competing in the importing country market, rather than solely in respect of their quantity. In such a case, this "unforeseen" change in the conditions of competition (rather than some other unforeseen factor bringing about an increase in imports as such) might be the reason that the increased imports are causing or threatening to cause serious injury. Please comment.

Answer 4

Article XIX.1(a) of GATT 1994 provides in part:

If, as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions, any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products,

The Appellate Body in *Argentina - Footwear* and *Korea - Dairy* considered that the first clause of Article XIX:1(a), the "unforeseen developments" clause, was a dependent clause that was linked grammatically to the words "is being imported" in the second clause of the article.⁹ The Appellate Body also made explicit that the developments which *lead* to a product being imported in such increased quantities and under such conditions must have been "unexpected".¹⁰ The use of the conjunction "and" means that the increased quantities of imports *and* the conditions under which they are imported must "result" from something unexpected. To be consistent with the views of the Appellate Body and the ordinary meaning of the clause, therefore, the unforeseen developments must relate to the importation of the product in terms of quantity *and* conditions, and must be the unexpected events or circumstances which lead to that importation.

⁸ Para 98. The Appellate Body stated that it was not necessary in that case to rule on "whether the Argentine authorities have, in their investigation, demonstrated" the existence of unforeseen developments.

⁹ *Argentina - Footwear*, para 92; *Korea - Dairy*, para 85.

¹⁰ *Argentina - Footwear*, para 91; *Korea - Dairy*, para 84.

There is a logical progression of events from the unforeseen developments to the import of the product in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry. Neither increased imports nor the conditions under which they are imported can in themselves be an unforeseen development within the meaning of Article XIX, as increased imports and the conditions under which they are imported must be the *result* of the unforeseen developments. To foreshorten the progression from unforeseen developments to serious injury incurred by the domestic industry in this way would be to ignore the views of the Appellate Body that there is a *logical connection* between the circumstances described in the first clause (unforeseen developments) and the conditions set out in the second.¹¹ This would also effectively write the “unforeseen developments” clause of Article XIX out of GATT 1994. This would be inconsistent with the exhortation of the Appellate Body that “a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them harmoniously”.¹²

Is the definition of the “domestic industry” that was used in the USITC’s investigation consistent with the Safeguards Agreement and GATT 1994?

5 The USITC noted some vertical integration and common ownership between companies operating in the grower, feeder, packer and breaker industry segments. Australia and New Zealand do not contest that fact per se but argue that there are few such examples in the US industry. In WTO dispute settlement practice (eg, EC - Bananas III) vertically integrated companies have been deemed potential suppliers of like distribution services. By the same token, any grower or feeder of live lambs could at the same time actually or potentially enter the packing or breaking business. On what basis could such potential producers of lamb meat be excluded from the domestic industry producing like or directly competitive products?

Answer 5

New Zealand contests the United States claim that “extensive integration exists between firms at different stages in that continuous line of production”.¹³ New Zealand considers that this is not consistent with either the record of evidence before the USITC or the USITC report.

The USITC report gives examples of some firms identified as feeders which were also growers¹⁴, and of some firms identified as packers which also processed lamb into cuts.¹⁵ Thus most of the integration actually found by the USITC was between growers and feeders on the one hand and packers and breakers on the other hand: namely, integration between the producers of live lambs on the one hand and between producers of lamb meat on the other.

The USITC also noted in its report that “there are some growers who engage in both feeding and slaughtering of lambs”.¹⁶ This is hardly surprising. Amongst 74,000 United States lamb growers, many of whom the USITC found to be part-time or hobby farmers raising only a few animals¹⁷, it would not be unusual for some of them to feed and slaughter animals for their own use. However, the USITC Report contains no evidence of firms which both grow live lambs and engage in packing operations.

¹¹ Argentina - Footwear, para 92; Korea - Dairy, para 85.

¹² Argentina - Footwear, para 81.

¹³ United States First Written Submission, para 69.

¹⁴ USITC Report, II-13.

¹⁵ USITC Report, II-15.

¹⁶ USITC Report, I-13 and I-14.

¹⁷ USITC Report, II-12.

The only example given by the USITC of vertical integration and common ownership between companies is that of Transhumance, a domestic lamb packer, which also owns a breaker operation and a feeder operation.¹⁸ Transhumance actively opposed the petition before the USITC. In light of the total number of producers in the United States industry, such vertical integration is clearly a rarity. This does not accord with the United States claim of “extensive integration”, nor that “the industry is so highly integrated it is not possible to focus on only one respective sector of the production process”.¹⁹

Even if the Panel accepts the United States claim of vertical integration, the *Bananas III* case does not detract from New Zealand’s argument that only packers and breakers are “producers of the like or directly competitive product” as required by the Safeguards Agreement. The Panel in that case found that where service distributors form part of vertically integrated companies and provide services to those companies, the distributors have the *capability* and *opportunity* to also enter the market for distribution of like services to others.²⁰ As applied to producers of goods, this simply means that the producer of a raw product which is part of a vertically integrated company also producing an end-product, and to which the producer supplies the raw product, has the capability and opportunity to also enter the market for supply of that raw product to others.

The relevant domestic industry for the purposes of a safeguards investigation depends on the *actual* producers of like or directly competitive products, not potential future producers of those products. Accordingly, New Zealand considers that growers and feeders should be excluded from the domestic industry producing like or directly competitive products, as they are not actual producers of lamb meat.

6 Suppose a market situation where virtually all of the value of the end-product is added through raw materials and intermediate goods and where the industry segment producing the end-product is highly concentrated and has the market power to “pass back” virtually all injury caused by imports of like or directly competitive end-products to producers of those raw materials or intermediate goods. In such a situation, why should not all of these producers be included in the domestic industry? In your view, in the absence of serious injury suffered by the industry producing the end-product due to the “pass-back” effect, would it simply become practically impossible to impose safeguard measures on like or directly competitive end-products of foreign origin? How would Australia or New Zealand treat such a situation under their own domestic safeguard procedures? Please explain in detail.

Answer 6

Article 4.1(c) of the Safeguards Agreement expressly defines the relevant domestic industry for the purposes of a safeguards investigation as “the producers as a whole of the like or directly competitive product”. Accordingly, the determination of what constitutes the domestic industry for the purposes of a safeguards investigation has to be based on a determination of whether the industry produces a “product” that is “like or directly competitive” with the imported product. Any broadening of the definition so as to include producers of raw materials and intermediate goods as well as those of the “like or directly competitive” product would require a rewriting of the clear provisions of the Safeguards Agreement. It would in effect be a substitution of one Member State’s judgement of what is equitable in the place of what the Safeguards Agreement actually says.²¹

¹⁸ USITC Report, I-14.

¹⁹ United States First Written Submission, para 73.

²⁰ European Communities - Regime for the Importation, Sale and Distribution of Bananas WT/DS27/R, 22 May 1997, para 7.320.

²¹ Panel on United States Definition of Industry Concerning Wine and Grape Products, adopted 28 April 1992, SCM/71, BISD 39/436, para 3.19.

Accordingly, if the producers of an end-product are the only producers of the “like or directly competitive product”, then there must be serious injury to *those* producers, caused by increased imports, in order to justify a safeguard measure. If those producers of the end-product cannot be shown to have suffered serious injury, then no safeguard measure can be imposed. If the only serious injury that can be shown is serious injury suffered by producers of other products used in the production process, and not by producers of the end-product, then there is no serious injury which meets the requirements of the Safeguards Agreement.

Under New Zealand’s domestic safeguard procedures, a safeguard measure can be imposed only where serious injury or threat thereof is found to the industry which produces the like goods and directly competitive goods. Furthermore, in determining the like goods and directly competitive goods, New Zealand authorities take a competition analysis approach, looking at whether there is direct competition between products in a particular market. New Zealand procedures do not allow for account to be taken of any “pass-back” effect to producers of other products used in the production process. Over the years, a number of primary producers in New Zealand have made applications in the trade remedies context regarding injury alleged to have been suffered due to imports of processed products. These applications have consistently been rejected on the basis that the primary producers are not producers of like goods to the imported processed product.²² For example, in the case of a recent application to the New Zealand authorities to initiate a safeguard investigation on imports of pork meat, pig farmers have been considered not to be part of the domestic industry producing pork meat. The complainants have been asked to resubmit their application for an investigation on behalf of a more narrowly defined industry.

Did the USITC demonstrate that there was a “threat of serious injury” due to “increased imports”?

7 Could you specify how a prospective analysis of injury factors should be conducted in order to assess whether a “threat of serious injury” exists? Under which conditions would you consider projections of how injury factors would develop in the near future a sufficient basis for an analysis of threat? What in your view are the flaws of the US methodology in making such projections in the case? Would you consider that certain injury factors are more important for an analysis of “threat” than others? If so, which ones? How could any such “prospective” analysis about future developments in the various injury factors be anything other than “allegation, conjecture or remote possibility”?

Answer 7

The Safeguards Agreement defines a “threat of serious injury” as significant overall impairment in the position of a domestic industry that is “clearly imminent” and is a determination “based on facts and not merely on allegation, conjecture or remote possibility”. Any determination of threat must be supported by “specific evidence and adequate analysis”.²³ In order to determine whether a development is “clearly imminent” or soon to happen, there must be an objective assessment of what is likely to happen in the future. Such an assessment must be based on facts and must examine the likely trends in the relevant factors having a bearing on the position of the domestic industry. There are various methods by which such a prospective analysis, or an analysis of future developments, may be undertaken. New Zealand does not suggest that a particular methodology should be adopted. However there must be an analysis that is grounded in relevant factual evidence and examines the likely future position of the domestic industry in terms of the relevant injury factors. In examining the likely future position of the industry it is not sufficient to look merely at a projected increase in imports. A threat of *serious injury* must be demonstrated, not a threat of *increased*

²² For example, producers of tomatoes, apricots, and grapes, in dumping complaints regarding canned tomatoes, canned apricots, and bulk wine.

²³ Panel Report, *Argentina - Footwear*, WT/DS121/R, 25 June 1999, para 8.285.

imports. In order to assess how injury factors may develop in the future, the New Zealand competent authorities would examine the trends in supply and demand of a product in the domestic market. They would examine the factual evidence of the position of the domestic industry in the past and extrapolate how it was likely to develop in the future. They would pay particular regard to trends in the domestic and imported prices of the product and, based on these past trends and on any evidence of forward contract prices, how prices were likely to develop in the future. Their analysis of trends would be based on data relating to at least the last three preceding years. The New Zealand competent authorities regard this as especially important in the case of a seasonal or agricultural product because of the seasonal fluctuations that occur in such markets. In such cases an analysis of price trends based on information from one season alone would not provide the basis for an objective determination “based on facts, and not merely on allegation, conjecture or remote possibility”.

In order to determine whether there was a threat of serious injury, it is not sufficient, as the United States has done, to examine simply whether imports are projected to increase in the future and then to assume that this will adversely affect the position of the domestic industry. This is the same as finding a threat of serious injury based on the threat of increased imports, an approach that was rejected by the Panel in *Argentina – Footwear*.²⁴

8 Please clarify your argument at para. 13 of New Zealand’s oral statement and para. 37 of Australia’s oral statement (and the similar arguments in your first written submissions). In particular, you seem to be arguing both that the US industry is in a long-term decline because of declining consumption, as demand for lamb meat has contracted due to changing consumer tastes, (i.e., that US supply was significantly in excess of demand), and that the reason that imports increased was to fill demand that was not being filled by domestic supply (i.e., that US supply was significantly below demand). Is this a correct understanding of your argument? Please explain.

Answer 8

The long term decline in the United States live lamb and lamb meat industries is due to a combination of domestic demand and supply factors. Over any given period either supply or demand factors will exert the dominant influence. From the mid-1970s through to 1993 there was a substantial decline in the real price of lamb, indicating that over that period United States supply exceeded demand. This was most likely the result of the loss of price competitiveness with other meats combined with the general shift in consumer preferences away from red meat. The fall in the real price of lamb in this period increased the importance of the Wool Act subsidies to live lamb growers.

From 1993 to 1997 consumption of lamb meat declined further. However, at the same time the real price of live lamb and lamb meat increased significantly. This clearly indicates that demand was exceeding supply over this period as purchasers were prepared to pay a higher price for a product that was in short supply. In these circumstances the declines in production created latent demand, that is, demand from consumers that would normally have been filled but for the shortage of supply. The significant fall in domestic production which occurred over this period was most likely in response to the removal of the Wool Act subsidies, since prices for lamb had increased. The shortfall in supply, reflected in higher prices, stimulated an increase in imports. By 1997 imports had increased by 47.5 per cent over 1993 levels even though prices for live lambs and lamb meat were significantly higher in real terms than in 1993.²⁵

²⁴ Panel Report, *Argentina - Footwear*, WT/DS121/R, 25 June 1999, para 8.284.

²⁵ New Zealand First Written Submission, Figure 2, page 14 and Figure 5, page 61.

In interim 1998 imports increased a further 19.5 per cent. All of this increase in imports was accounted for by higher lamb meat consumption.²⁶ In other words there was latent demand in the United States market which absorbed increases in both imports and domestic shipments in interim 1998.²⁷ Prices for lamb in 1998 declined relative to 1997, but this was most likely in response to the decline in prices for competing meats, in particular pork, which occurred over the same period.

9 What specific information in the USITC report shows that the effect of the termination of the Wool Act subsidies had not finished by 1996?

Answer 9

The USITC stated on page I-24: “We also believe that it is unrealistic to conclude that the effects of the termination of Wool Act payments had completely disappeared as of 1997”. There was no explanation of how the USITC came to this conclusion.

The Wool Act subsidy payments to producers of live lambs totaled US \$125 million and \$69 million in 1994.²⁸ The USDA estimated that wool producers would have received an additional US \$60 million if the phase-out of the wool subsidies had not taken place.²⁹ The proportion of total net sales revenue from wool and wool subsidies obtained by growers dropped from 25.4 per cent in 1993, to 21.1 per cent in 1995, and to 12.2 per cent in 1996. It fell even further to 5.5 per cent in interim 1998.³⁰ Given that the Wool Act had provided subsidies for 40 years, and that the last payments were not phased out until 1996, it is not realistic to conclude that an industry would be able to adjust in a short period of time to a 20 per cent drop in its revenue.

Support for this comes from the USITC Report and the discussion of the USITC Commissioners on remedy, where they identified the termination of the Wool Act payments as a *significant* change in the market conditions under which the domestic industry must operate.³¹ As a result of this change, the Commissioners concluded that the domestic industry producing live lambs would have to continue to adjust *in the future* to a domestic market without the Wool Act subsidy payments.³²

10 The United States has argued that even if the domestic industry would be defined as comprising only packers, packers/breakers and breakers, the investigation would have led to a determination that a safeguard measure is necessary to prevent a “threat of serious injury” and facilitate adjustment. On the basis of which specific elements in the USITC report do you consider that this statement is unfounded?

Answer 10

Article 4.2(a) of the Safeguards Agreement identifies the factors to be considered by an investigating authority in determining whether increased imports have caused or are threatening to cause serious injury to a domestic industry, as, aside from imports: changes in the level of sales, production, productivity, capacity utilisation, profits and losses, and employment.

²⁶ USITC Report, II-17, Table 5.

²⁷ Domestic shipments increased slightly in interim 1998: USITC Report, II-17, Table 5.

²⁸ USITC Report, II-78, Table 45.

²⁹ USITC Report, II-78.

³⁰ USITC Report, II-26, Table 12.

³¹ USITC Report, I-30.

³² USITC Report, I-32.

The USITC found that production of packers fluctuated over the period, while production of breakers trended upwards.³³ More specifically production of packers in 1997 was 11.5 per cent higher than in 1995.³⁴ Production of lamb meat decreased by 2 per cent in interim 1998.³⁵ On a full year basis, therefore, production in 1998 was still significantly higher than in 1995.

In relation to capacity the USITC Report found that the largest firms in the United States packing industry were shown to be increasing their capacity over the period 1995-interim 1998.³⁶ In particular capacity increased by 15 per cent between 1995 and 1997 and then rose by 14 per cent in interim 1998. This follows a reduction in capacity over 1993 to 1995. Such an expansion suggests that the firms in question are profitable. This is not consistent with the assertion that the industry faces a threat of serious injury.

Given that the production in 1998 was still significantly higher than in 1995, the decline in capacity utilisation in the packing industry identified by the USITC³⁷, must have been solely due to the expansion in capacity. This was probably occurring in the largest firms as they sought to increase their market share of a declining lamb slaughter market.

In relation to profitability, the USITC stated that there was a significant decline in the value of net sales and in operating income of packers and breakers.³⁸ No further information on the financial condition of the packers, packer/breakers and breaker is disclosed by the United States. Nevertheless it would seem clear that given the increase in capacity undertaken by the United States packing operations, any decline in operating incomes could not be caused by imports, but rather must have been caused by the firms' own actions in expanding capacity.

Inventories of packers decreased in interim 1998 by comparison with the previous year.³⁹ This would seem to indicate an improved ability to make sales over this period. The only statement on employment in relation to packers is that direct labour and other costs of packing operations remained relatively constant over the period of investigation.⁴⁰ In relation to productivity the USITC stated that the data on direct labour costs from packers and breakers indicated that productivity remained relatively constant over the period of investigation.⁴¹ No further information is disclosed. The information on inventories, employment and productivity does not, therefore, support a conclusion that packers and breakers were threatened with serious injury.

Specific information concerning breakers is confidential and has not been disclosed. However, the fact that the USITC had financial data from only one specialist breaker⁴², suggests that the USITC would not have had a reliable basis for assessing whether the breakers were facing a threat of serious injury.

It follows that there is no basis in the information set out in the USITC Report on which to draw the conclusion that there is a significant overall impairment in the position of the packers, packer/breakers and breakers that is clearly imminent. Rather, the evidence in the USITC Report would indicate that there was no such imminent significant overall impairment to the lamb meat producers.

³³ USITC Report, I-18, fn 78.

³⁴ USITC Report, II-22, Table 8.

³⁵ USITC Report, II-21.

³⁶ USITC Report, II-22, Table 8.

³⁷ USITC Report, I-20.

³⁸ USITC Report, I-19.

³⁹ USITC Report, II-22.

⁴⁰ USITC Report, II-27.

⁴¹ USITC Report, I-20.

⁴² New Zealand First Written Submission, para 4.9.

11 On what statement(s) in the USITC report do you base your argument that the USITC made a “finding” that there was no serious injury?

Answer 11

On page I-16 of the USITC Report the USITC set out the statutory criteria of “whether the domestic industry is *either* seriously injured *or* threatened with serious injury” (emphasis added). It then found that “the domestic industry is threatened with serious injury that is clearly imminent”.⁴³ Later, in their conclusions on the remedy to be imposed, the Commissioners stated that they “have taken into account that the US lamb industry is not currently experiencing serious injury, but rather is threatened with serious injury”.⁴⁴ There is a similar statement by the Commissioners that they “found a threat of serious injury ... as opposed to present serious injury”.⁴⁵ Based on these statements New Zealand concludes that the USITC made a finding that there was no serious injury.

12 What is the specific, detailed basis in the record evidence as set forth in the USITC’s report for New Zealand’s argument (oral statement at para. 38) that the increase in imports during 1997 and interim 1998 was neither “sudden” enough nor “sharp” enough to meet the standard enunciated by the Appellate Body in Argentina - Footwear Safeguards?

Answer 12

In order to assess the suddenness and sharpness of increases in imports it is useful to look at the rate of increase in imports in one year over the previous year. Table 5 of the USITC Report⁴⁶ shows that imports began to increase in 1995 when they rose by 11.9 per cent. Imports increased by 17.1 per cent in 1996, 19.2 per cent in 1997 and 19.5 per cent in interim 1998. Thus the increase in imports was already well underway by 1997 and the rate of increase in 1997 and interim 1998 was similar to that occurring in 1996. Moreover the increase in imports in interim 1998 was fully accounted for by the expansion in consumption in that year.⁴⁷ This shows that imports are rising in response to an expansion in demand.

The market share being held by imports is another useful indicator of the relative importance of imports in a market. The USITC Report, Table⁴⁸, shows that the market share of imports in terms of quantity increased from 11.2 per cent in 1993 to 23.3 per cent in interim 1998. Of that increase in market share, 45 per cent took place between 1993 and 1996, with 55 per cent of that increase occurring between 1997 and interim 1998.

It is clear, therefore, from the evidence before the USITC that the increase in imports in 1997 to interim 1998, whether viewed in isolation or as a share of the total market, is neither “sudden” nor “sharp” and therefore does not come within the ambit of the statement of the Appellate Body in *Argentina - Footwear*.

Is the USITC’s finding that increased imports were a “substantial cause” of threat of serious injury consistent with the Safeguards Agreement and GATT 1994?

⁴³ USITC Report, I-16.

⁴⁴ USITC Report, I-29.

⁴⁵ USITC Report, I-33, fn 166.

⁴⁶ USITC Report, II-17.

⁴⁷ USITC Report, II-17, Table 5.

⁴⁸ USITC Report, II-50.

13 We note New Zealand's arguments (i) that if there were three equal causes of a threat of serious injury of which imports was one, imports would be a "minority cause" of the threat of serious injury (para 51 of New Zealand's oral statement), and (ii) that a determination that a threat of serious injury has been caused by increased imports when in fact not all of that injury has been caused by increased imports constitutes blaming increased imports for injury caused by other factors (para 57 of New Zealand's oral statement). These arguments seem to suggest that in New Zealand's view, only where imports are the sole cause of serious injury could a safeguard measure be justified. If this is your argument, how do you reconcile your position with the reference in Article 4.2(b) to factors other than increased imports that are causing injury "at the same time"? If this is not a correct understanding of your argument, please explain.

Answer 13

New Zealand's argument is that, consistent with Article 2.1, a safeguard measure can only be applied in circumstances where *increased imports* cause or threaten to cause "serious injury". In determining whether increased imports have caused or threatened serious injury, Article 4.2(b) specifically provides that "when factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports". In accordance with well-established WTO jurisprudence, these provisions are to be given their ordinary meaning in their context.⁴⁹ Where injury is caused by factors other than increased imports, such injury cannot be attributed to increased imports in assessing whether "serious injury" has been caused or threatened by the increased imports. In other words, a safeguard measure can only be applied where increased imports in themselves cause or threaten to cause a degree of injury that is "serious", regardless of any injury that might be caused by or attributed to other factors.

Serious injury or threat thereof may be contributed to by a variety of factors, including increased imports. If, when the injury caused by factors other than increased imports is excluded "serious injury" or threat thereof still remains, then that serious injury or threat can be attributed to increased imports. In that sense, increased imports have to be *the* cause or the sole cause of the "serious injury" or threat thereof. If, on the other hand, when the injury attributable to other factors is excluded what is left is not "serious injury" or threat thereof, then there is no "serious injury" or threat to attribute to increased imports.

14 In a hypothetical situation in which increased imports were one of three equal causes of serious injury, in your view would this by definition mean that a safeguard measure could not be applied? What if it could be shown that the portion of the injury attributable to increased imports by themselves could be characterised as "serious" injury (ie that the total injury suffered by the industry far surpassed the "serious injury" threshold such that one-third of that level of injury was still "serious")?

Answer 14

In New Zealand's view, a safeguard measure could be applied in a hypothetical situation where increased imports were one of three equal causes of serious injury if the domestic industry was suffering or was threatened with significant overall impairment caused by increased imports in themselves and the injury caused by other factors was not attributed to increased imports.

Is the measure imposed by the US President, which differs from the USITC's recommendation, consistent with the United States' obligations under the Safeguards Agreement and the GATT 1994?

⁴⁹ *Japan - Taxes on Alcoholic Beverages* WT/DS8/AB/R, 4 October 1996, page 12.

15 It appears to be your view that Article 5.1 requires, where a measure is to be applied, that that measure must be the least trade restrictive measure that would prevent or remedy serious injury and facilitate adjustment. Is this a correct understanding of your position? If not, please explain. How in your view should the burden of proof be allocated under Article 5.1?

Answer 15

A measure that is more trade restrictive than necessary to achieve the objectives of preventing serious injury and facilitating adjustment is not a measure that is “applied only to the extent necessary” to fulfill those objectives. In that sense, what is required is a measure that is the least trade restrictive *of those measures that will achieve the objectives*. A recommendation by a Member’s competent authorities, following a full investigation into the facts, must be considered a measure that would achieve the goals of preventing serious injury and facilitating adjustment. Accordingly, to impose a measure more restrictive than such a recommendation would not be to apply the measure “only to the extent necessary” within the meaning of Article 5.1.

The Appellate Body has held that it is up to the Member alleging any inconsistency with WTO obligations to present evidence and argument sufficient to establish a presumption of inconsistency.⁵⁰ Once such a presumption is established, the burden then shifts to the Member accused of inconsistency to bring evidence and argument to rebut the presumption. In the present case New Zealand has established a presumption that the safeguard measure imposed by the United States was not the least trade restrictive of those measures that would achieve the objectives of preventing serious injury and facilitating adjustment, and therefore was applied to a greater extent than necessary to prevent serious injury and facilitate adjustment. Accordingly, the burden is now on the United States to rebut the presumption that it has failed to apply a measure “only to the extent necessary to prevent serious injury and facilitate adjustment” as required by Article 5.1 of the Safeguards Agreement.

16 In view of the infinite number of potential safeguard measures that could be applied, how could a Member ever conclusively determine that the measure it chose to apply in fact was the one measure that was the least trade restrictive measure that would prevent or remedy serious injury and facilitate adjustment?

Answer 16

New Zealand’s argument is that a Member must impose the least trade restrictive *of those measures that will achieve the objective of preventing serious injury and facilitating adjustment*. There may be several such measures, and in certain circumstances more than one of those measures may be equally least trade restrictive. In any event, a recommendation by a Member’s competent authorities, familiar with all the facts, must be considered to be a measure that will achieve the goals of preventing serious injury and facilitating adjustment. Accordingly, where such a recommendation exists, a Member must not impose a measure more restrictive of trade than that recommendation. Otherwise its measure would clearly be applied to an extent more than necessary to achieve the objectives of a safeguard measure. It would not, however, be necessary for a Member to conclusively determine that the measure it had chosen to apply was *the one measure* that was the least trade restrictive of an infinite number of potential measures that could be applied. It must simply show that it was no more trade restrictive than other measures available which would achieve the desired objectives.

⁵⁰ United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India WT/DS33/AB/R, 25 April 1997, p 13.

17 On what basis, specifically, do you argue that the measure applied by the United States is more restrictive than the measure recommended by the USITC, given that the recommended measure was of four years duration, while the measure applied is of three years duration only?

Answer 17

New Zealand considers that in assessing the relative trade restrictiveness of the measures recommended by the USITC and imposed by the United States, the initial duration of the measure is irrelevant. Under both the Safeguards Agreement and the United States legislation a safeguard measure can be extended for a maximum duration of eight years. Accordingly, whether a measure is initially imposed for three or four years cannot be an accurate assessment of its trade restrictiveness. There are three levels of restrictions to be assessed in comparing the USITC recommended measure and the actual United States measure: quota levels, in-quota tariffs, and out-of-quota tariffs. The quota levels under both measures are roughly equivalent.⁵¹ The USITC recommended measure contained no in-quota tariff beyond the ordinary WTO bound rate of 0.8c per kg.⁵² Accordingly, in-quota costs under the USITC recommended measure amount to no more than they would be with no safeguard measure in place. The only additional costs to trade under the USITC recommended measure, in all years, is the out-of-quota cost. In particular, the only cost which can be attributed to the fourth year of the USITC recommended measure, when there may be no safeguard under the actual United States three-year measure imposed⁵³, is the out-of-quota tariff rate. The USITC recommended a rate of 10 per cent in that year, 1 per cent higher than the first year in-quota tariff rate of the actual United States measure.

With regard to the first three years of both measures, the United States has argued that there is no difference in the trade restrictive effect of a 20 per cent out-of-quota tariff rate, as recommended by the USITC, and a 40 per cent out-of-quota rate, as imposed by the United States, because both were designed to be trade-preclusive.⁵⁴ The United States is evidently wrong. By any definition, 20 per cent is less than 40 per cent. Furthermore, according to basic economic principles, trade at the out-of-quota rate will nevertheless be profitable any time that the difference in percentage terms between the United States wholesale price for lamb and the world price for lamb is greater than the out-of-quota rate. Clearly, this is more likely to happen when the out-of-quota rate is 20 per cent than when it is 40 per cent. The out-of-quota rate imposed by the United States is therefore more restrictive of trade than the out-of-quota rate recommended by the USITC.

A comparison of in-quota costs under both measures also reveals that the actual United States measure is considerably more trade-restrictive than the USITC recommended measure. Estimated costs to trade for New Zealand at levels up to the quota level under the USITC recommended measure in year one would be US\$116,000.⁵⁵ Under the actual United States measure up to the quota level imposed estimated costs would be US\$7,125,000. The difference between these figures is US\$7,010,000. In year two, in-quota costs to New Zealand under the USITC recommended measure would be US\$121,000, and under the actual United States measure they would be US\$4,878,000: a difference of US\$4,757,000. In year three, respective costs to New Zealand would be US\$106,000 and US\$2,503,000, with a difference of US\$2,397,000. In total, over the first three years of both measures, the measure imposed by the United States would result in in-quota costs to New Zealand of US\$14.164 million more than under the measure recommended by the USITC.

The measure imposed by the United States set similar quota levels as the USITC recommended measure. The shorter initial duration of the measure imposed by the United States is

⁵¹ Each measure allows for a small increase in the quota level after the first year of the measure.

⁵² This is scheduled to drop to 0.7c per kg in 2001.

⁵³ Assuming that the measure had not been extended.

⁵⁴ United States First Written Submission, para 202.

⁵⁵ Based on a constant 1998 CIF price.

irrelevant to a determination of the trade restrictiveness of the measure as it can be extended to a duration of up to eight years. The out-of-quota costs to New Zealand trade of the actual United States measure are clearly substantially more than those of the USITC recommended measure. And the in-quota costs to New Zealand of the United States measure will be approximately US\$14.2 million more than the USITC recommended measure. It is on this basis that New Zealand argues the measure imposed by the United States is more restrictive than the measure recommended by the USITC.

18 Article 5.1 provides that “a Member shall apply safeguard measures only to the extent necessary to prevent ... serious injury and to facilitate adjustment”. In order to fulfill that standard, does a Member imposing a safeguard have to apply, e.g., (i) an “effective” measure, (ii) the least trade-restrictive measure, (iii) a “proportionate” measure, or something else?

Answer 18

The words “only to the extent necessary” as used in Article 5.1 clearly indicate a constraint on the measure that can be imposed. In the context of an agreement concerned with restrictions on trade for the legitimate purpose of preventing serious injury, that constraint must refer to the extent of the trade restrictiveness of the measure. A more trade restrictive measure than necessary to achieve the goals of the measure would not be one that was applied “only to the extent necessary” as required by Article 5.1. In addition, the words “necessary to prevent serious injury and facilitate adjustment” clearly require that the measure must achieve the goals of preventing serious injury and facilitating adjustment. Taken together, the phrase “only to the extent necessary to prevent serious injury and facilitate adjustment” must therefore mean that there has to be some proportionality between the ends and means of the measure. In this sense, whether the standard of Article 5.1 is expressed as “the least trade restrictive”, or “no more restrictive than required”⁵⁶, or more generally as a requirement of proportionality, the end result is the same.

However, New Zealand does not consider that an “effective” measure would by itself fulfill the standard provided in Article 5.1 of the Safeguards Agreement. A measure does have to achieve the dual objectives of preventing or remedying serious injury and facilitating adjustment. In that sense, a measure must be “effective”. But an “effective” measure would not necessarily be limited “only to the extent necessary” to achieve those objectives. In other words, a measure could be “effective”, and also go beyond the limits provided for in Article 5.1.

Is the exclusion of Canada, Mexico and Israel from the safeguard measure consistent with the Safeguards Agreement and GATT 1994?

19 In the light of the interpretative note to Annex 1A to the Agreement Establishing the WTO, what is the relationship between Article 2.2 and the last sentence of footnote 1 to Article 2.1 of the Safeguards Agreement, on the one hand, and Article XXIV:8(b) of GATT 1994 on the other?

Answer 19

Article XXIV:8 does not include safeguards amongst the explicit exceptions in Article XXIV to the requirement that all restrictive regulations of commerce be eliminated from FTAs. Article 2.2 provides that safeguard measures must be applied to a product, irrespective of source. The interpretative note to Annex 1A to the Agreement Establishing the WTO gives priority, in the event of any conflict between the provisions of GATT 1994 and of a WTO Agreement such as the Safeguards Agreement, to the provisions of the latter. However, the last sentence of footnote 1 to the Safeguards

⁵⁶ As formulated by the United States in its First Written Submission, para 210.

Agreement indicates that that Agreement does not take any position on the relationship between Article XIX and Article XXIV:8.

New Zealand considers that, consistent with the findings of the Appellate Body in *Argentina - Footwear*, there must be a parallel between a determination of injury in a safeguards investigation and the application of a safeguard remedy.⁵⁷ In New Zealand's view there is no foundation in either the Safeguards Agreement or GATT 1994 for the United States claims that the case of *Argentina - Footwear* should be distinguished from the present case simply on the grounds that there is a difference in the quantity of imports involved. The Appellate Body based its conclusions on the legal principle, not on the amount of imports involved.

Furthermore, the objective of both the Safeguards Agreement and Article XIX of GATT 1994 is to provide temporary relief from imports as an "emergency action" in certain strictly defined circumstances. In accordance with those defined circumstances, New Zealand considers that the imposition of safeguard measures should be allowed only to provide temporary relief from imports *which are found to be causing or threatening serious injury*. Accordingly, imports from FTA partners which are excluded from a safeguard remedy must also have been excluded from the safeguard investigation establishing injury and causation.

Under their Closer Economic Relations Agreement, in any safeguards investigation Australia and New Zealand do exactly that: they exclude each other's imports from the entire safeguards process, including determinations on injury and causation. There is no requirement of a separate causation or "important contribution" determination. All such imports are excluded from the whole safeguards process as a matter of course. In contrast, under NAFTA the United States includes imports from its NAFTA partners in its determination of injury and causation. It then excludes those imports from any safeguard measure imposed unless a separate causation test establishes that they accounted individually for a "substantial share" of total imports and "contributed importantly" to the injury which was found to have been caused by all imports.

Nothing in Article XXIV of GATT provides for the approach taken by the United States. Nor does this approach have any basis in the Safeguards Agreement or in Article XIX of GATT. New Zealand considers that, taken together, those provisions establish a definitive safeguards regime under the WTO. The United States approach of "important contribution" has no foundation in those provisions and is therefore not consistent with that regime.

⁵⁷ Para 113.