

ANNEX 2-9

SECOND SUBMISSION OF NEW ZEALAND

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- NZ20. Ambassador Barshefsky, United States Trade Representative, transcript of House Agriculture Committee Meeting, 23 June 1999.

I. INTRODUCTION

1.1 In its written and oral pleadings in this case, New Zealand has established how the United States actions in imposing safeguard measures on imports of lamb meat do not conform with the United States obligations under the Safeguards Agreement and the GATT 1994: no unforeseen developments that resulted in increased imports have been demonstrated; the domestic industry allegedly threatened with serious injury has been improperly identified; there has been a failure to demonstrate that any threat of serious injury was caused by increased imports; the measure imposed cannot be demonstrated to have been applied only to the extent necessary to prevent serious injury or to facilitate adjustment; and the measure has not been applied to all imports irrespective of source.

1.2 The United States response in its First Written Submission and in its Oral Statement before the Panel, has sought to refashion the report of the USITC in attempt to demonstrate that it complies with the United States WTO obligations. However, a careful comparison of what the USITC said with what the United States now claims it said, shows that the United States description of the USITC report does not withstand analysis. The United States ascribes to the USITC conclusions that it did not make and draws together a range of disparate comments made by the USITC, and then claims that they collectively represent a conclusion of the USITC. In this way, the United States seeks to reconstruct the USITC report, by suggesting that it draws conclusions that are not made and omits statements that are. This attempt by the United States to disregard the actual report prepared by the USITC in favour of a new report prepared by the United States in an effort to defend the claims made against it in this case cannot be entertained. The Safeguards Agreement requires that the investigating authority "evaluate" and "demonstrate" and provide reasoned conclusions and analysis. Such obligations are not met by subsequent attempts by the United States to show what the USITC should have said.

1.3 The United States also seeks to have the Panel give it broad latitude in its interpretation of its obligations under the Safeguards Agreement. In its Oral Statement to the Panel at the First Hearing, the United States argued that the ability of Members to take safeguards measures should not be unduly limited.¹ In its responses to questions from the Panel, the United States argues that the Panel should not interpret safeguards obligations "narrowly" or "strictly".² Clearly, the United States has in mind that its ability to take safeguards measures should not be subject to close scrutiny.

1.4 In its First Written Submission, New Zealand pointed out that safeguards actions are exceptional measures and, as the Appellate Body stated in *Argentina – Safeguard Measures on Imports of Footwear*, "when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account."³ This approach does not depend on any characterisation of the safeguards provisions of the WTO agreements as exceptions. It is a recognition that Members must observe their obligations carefully when taking measures that involve a temporary suspension of treaty obligations that deprives other Members of negotiated benefits. In short, there is no basis for the latitude in interpretation that the United States claims in this case. Rather, the Safeguards Agreement should be interpreted according to the ordinary meaning of its words in their context, and that interpretation should not be stretched to accommodate the way in which it has been interpreted domestically by one Member.

1.5 In this Second Written Submission, New Zealand will reaffirm the arguments that it has made in its earlier written and oral submissions, showing that the United States attempts at refuting New Zealand's arguments are ill-founded. New Zealand will show that the USITC did not demonstrate the existence of unforeseen developments. It will also show that the United States

¹ United States Oral Statement at the First Panel Hearing, para 3.

² United States Responses to Questions by the Panel, paras 119 and 120.

³ WT/DS121/AB/R, 14 December 1999, para 94. See paras 7.16 and 7.18 of New Zealand's First Written Submission.

definition of the “domestic industry” allegedly threatened by serious injury has no basis in WTO law. New Zealand will demonstrate that the USITC made a determination that its domestic industry was threatened with serious injury on the basis of nothing more than a supposition that if imports increase the domestic industry will suffer, and not on the basis of reasoned objective analysis. Furthermore, the United States did not demonstrate that any threat of serious injury to its domestic industry was caused by imports and it attributed injury caused by other factors to increased imports. Finally, the United States failed to apply a remedy only to the extent necessary to prevent serious injury and facilitate adjustment, and did not apply the remedy to all of the imports which allegedly contributed to the threat of serious injury facing its domestic industry.

II. UNFORESEEN DEVELOPMENTS

2.1 In its First Written Submission, New Zealand pointed out that the USITC had failed to identify any “unforeseen developments”, within the meaning of GATT Article XIX, to which the safeguard measures imposed by the United States responded.⁴ Moreover, as New Zealand made clear, there were no such unforeseen developments, since the decline in the United States lamb industry was well-known, foreseen and foreseeable.⁵ In its First Written Submission, the United States sought to remedy this defect in the USITC Report by referring to “significant, unexpected changes” which it perceived to be increases in imports and particularly increases in chilled product.⁶ However, as New Zealand argued in its Oral Statement at the First Panel Hearing, such increases do not constitute “unforeseen developments” within the meaning of GATT Article XIX on which the United States can rely in this case.⁷ Furthermore, it is up to the USITC at the time of its investigation, not the United States *ex post facto*, to demonstrate the existence of unforeseen developments.

2.2 GATT Article XIX.1(a) provides in relevant part,

“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, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury....”

In *Argentina – Footwear* the Appellate Body said that although by referring to “unforeseen developments” the opening clause of Article XIX.1(a) did not establish independent conditions for the application of a safeguard measure, it did describe “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.”⁸

2.3 In articulating the test in this way, the Appellate Body made clear that although the existence of “unforeseen developments” was not a “condition” in the sense of the provisions of Article 2.1 of the Safeguards Agreement relating to increased imports, causation and serious injury, it was, nevertheless, something that had to be demonstrated. The Appellate Body did not say that “unforeseen developments” have simply to exist; it said that they have to be “demonstrated”. Moreover, the Appellate Body also indicated that it was for the competent authorities to make such a demonstration. It pointed out in *Argentina – Footwear* that since it had reached a decision on other grounds that there was no legal basis for the safeguard measure imposed by Argentina, “we do not believe that it is necessary to complete the analysis ... by ruling on whether the Argentine authorities

⁴ New Zealand’s First Written Submission, para 7.31.

⁵ New Zealand’s First Written Submission, paras 7.33 to 7.35.

⁶ United States First Written Submission, paras 49 and 59.

⁷ New Zealand’s Oral Statement at the First Panel Hearing, paras 20 to 25.

⁸ Argentina - Footwear, para 92.

have, *in their investigation*, demonstrated that the increased imports in this case occurred ‘as a result of unforeseen developments...’.⁹ The issue was whether the Argentine authorities conducting the investigation had demonstrated the existence of unforeseen developments; it was not whether the Argentine government acting *ex post facto* in the course of WTO proceedings had been able to do so.

2.4 That the competent authorities themselves must demonstrate the existence of “unforeseen developments” also follows from Article 3.1 of the Safeguards Agreement. The demonstration of the existence of “unforeseen developments” clearly falls into the category of “all pertinent issues of fact and law” on which Article 3.1 requires the competent authority to report.

2.5 In its response to the Panel’s questions, the United States seeks to bolster its view that the competent authorities do not have to find the existence of unforeseen developments in the course of their investigation, by arguing that there is nothing in Articles 2, 3 and 4 of the Safeguards Agreement that furnishes a standard on the basis of which the competent authorities could decide whether negotiators could have foreseen later developments.¹⁰ Competent authorities, the United States claims, would accordingly have to make additional inquiries into whether unforeseen developments existed and whether they were foreseen.¹¹

2.6 However, such a suggestion is a thinly disguised reiteration of the argument, rejected in *Argentina - Footwear*, that the Safeguards Agreement does not impose an obligation on Members to find the existence of unforeseen developments. That obligation is found in GATT Article XIX, not the Safeguards Agreement, and so it is not surprising that no articulation of the standards for its application are found in Articles 2, 3 or 4 of the Safeguards Agreement. Moreover, WTO Members have an obligation to carry out the terms of the WTO agreements, and not just to comply with those obligations only in those circumstances where specific standards are found in the agreements for their application.

2.7 Furthermore, the distinction between a legal condition and a factual circumstance on which the United States places so much emphasis does not carry with it the consequence that the United States implies. While there is obviously a difference between a legal condition which has to be fulfilled and a factual circumstance whose existence has to be demonstrated, in both instances they constitute a legal requirement that has to be met. Failure to meet a legal requirement for the application of a safeguard measure means that the measure cannot be applied.

2.8 In its First Written Submission, the United States appears to suggest that a demonstration of “unforeseen developments” can be implied from the USITC’s Report.¹² It bases its argument on things that were said in a range of disparate contexts and seeks to put them together as an implicit demonstration of the existence of “unforeseen developments.” The USITC discussed changes in conditions of competition when discussing causation;¹³ it discussed changing market conditions when discussing remedy;¹⁴ and it discussed increases in chilled product when considering whether imported and domestic lamb meat were like products.¹⁵ These references are apparently meant to show that the USITC was inferentially demonstrating that “unforeseen developments” were resulting in increased imports. But this inference is simply manufactured out of thin air. It bears no relationship to what the USITC actually said in its Report.

⁹ *Argentina - Footwear*, para 98 (emphasis added).

¹⁰ United States Responses to Questions by the Panel, para 14.

¹¹ United States Responses to Questions by the Panel, footnote 11.

¹² United States First Written Submission, paras 49 to 60.

¹³ USITC Report, I-22.

¹⁴ USITC Report, I-30.

¹⁵ USITC Report, I-11.

2.9 Even if it were possible at this late stage for the United States to remedy a defect in the USITC Report, it has not done so in its First Written Submission or in its Oral Submission to the Panel. In large measure, the United States argument is that there was an increase in imports. But the requirement of “increased imports” is a condition of the application of a safeguard measure set out in Article 2.1 of the Safeguards Agreement that is separate from the circumstance of “unforeseen developments”. That is the precise point of the decision of the Appellate Body in *Argentina – Footwear* which established that unforeseen developments constituted a circumstance that must be demonstrated.¹⁶ It is not sufficient simply to show that the conditions of Article 2.1 of the Safeguards Agreement have been met. It must also be *demonstrated* that the increased imports occurred *as a result of* unforeseen developments. That is the very question that the Appellate Body said in *Argentina - Footwear* it did not have to address because it had decided on other grounds. If those other grounds had not been present, the Appellate Body would have had to address the question of whether the Argentine competent authorities had demonstrated that increased imports had resulted from unforeseen developments.

2.10 Nor can the other implicit argument of the United States withstand analysis. In its First Written Submission, the United States implies that it was not just the increase in imports that constituted an “unforeseen development”, it was the change in product mix from frozen to chilled that constituted a change in conditions of competition or market conditions that was unforeseen.¹⁷ But this argument suffers from the same defects as the one considered above. It stems from a misreading of Article XIX.1(a) of the GATT 1994. That provision makes clear that any increase in imports and any change in the conditions under which they are imported must be as a result of “unforeseen developments”. It is necessary to show that increased imports *and* the conditions of import are a result of something unexpected.

2.11 To allow the import increase or any change in the conditions of import to be “unforeseen developments” would be to accept that increased imports and the conditions under which they are imported must occur as a result of increased imports and the conditions under which they are imported. This is tantamount to saying that they must “result” from themselves. Such an approach would render meaningless the requirement that the existence of unforeseen developments be demonstrated. It would be to read out of the law precisely what the Appellate Body confirmed in *Argentina – Footwear* was part of the law.

2.12 In its responses to the questions posed by the Panel, the United States tried to characterise New Zealand’s position as an argument that the term “as a result of” in Article XIX of the GATT 1994 means the same as the term “to cause” in that Article and in Article 2.1 of the Safeguards Agreement.¹⁸ New Zealand makes no such argument. Rather, New Zealand argues that in order to comply with the requirement that unforeseen developments be demonstrated, the United States must indicate some developments that were unforeseen that led to products being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury. As the United States itself appears to recognise, the “outcome” of increased imports under such conditions as to cause or threaten to cause serious injury must “generally follow” from certain unforeseen developments.¹⁹ But it need not be caused by them. In short, the United States characterisation of the New Zealand position as imposing a double causation test is incorrect.

¹⁶ *Argentina - Footwear*, para 92.

¹⁷ United States First Written Submission, paras 50 to 59.

¹⁸ United States Responses to Questions by the Panel, para 5.

¹⁹ In its responses to the Panel the United States says, “the expression ‘If, as a result of’ suggests that the framers of Article XIX were seeking to characterize a situation in which a particular outcome (‘a result’) has followed generally from earlier occurrences.”: United States Responses to Questions by the Panel, para 3.

2.13 As the Appellate Body affirmed in *Argentina – Footwear*, the classic interpretation of the term “unforeseen developments” remains that laid down by the GATT Working Party in the *Hatters Fur* case:

“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.”²⁰

In that case, it was the “degree to which the change in fashion affected the competitive situation” that constituted the unforeseen development.²¹

2.14 In its response to questions from the Panel, the United States has attempted to minimise the significance of the *Hatters’ Fur* test to the point of non-existence.²² The essence of the United States position is that if imports increase that is sufficient of itself to constitute an unforeseen development. Indeed, the United States goes as far as saying that there is a presumption that subsequent increases in imports were not foreseen.²³ The United States 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.”²⁴ Moreover, from the Exhibits attached to the United States responses to the Panel’s questions, it is apparent that this is a long-held position of the United States.²⁵ The United States itself quotes from the remarks of the Chairman of the Tariff Commission in testimony to the Senate Finance Committee in June 1948 that when imports enter in such increased quantities and under such conditions as to cause or threaten to cause serious injury, the situation “must, in the light of the objective of the trade agreements program and of the escape clause itself, be regarded as the result of unforeseen developments.”²⁶

2.15 Notwithstanding the United States claim to parentage of the escape clause, the United States arguments demonstrate both the unreliability of relying on the negotiating history of one party as well as the United States determination to remove any content from the concept of unforeseen developments. Its arguments in this case come to little more than an attempt to read any requirement of demonstrating the existence of “unforeseen developments” out of its safeguards obligations.

2.16 GATT Article XIX requires that there must have been something that was unexpected or unforeseen that triggered an increase in imports in such quantities and under such conditions as to cause or threaten to cause serious injury. The United States must show that something unexpected or unforeseen occurred. It has not done this. Indeed, as New Zealand has pointed out, the developments that resulted in increased imports were the direct result of actions taken by the United States government, and thus could not have been unforeseen. As a result, the United States has fallen back on trying to show that the developments that were unforeseen were the increased imports themselves. However, as New Zealand has pointed out, that approach, too, voids the requirement of unforeseen developments of any content.

²⁰ Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under the Terms of Article XIX (“Hatters’ Fur”) GATT/CP/106, adopted 22 October 1951, para 9. See *Argentina - Footwear*, para 96.

²¹ *Hatters’ Fur*, para 12.

²² United States Responses to Questions by the Panel, paras 23 to 25.

²³ United States Responses to Questions by the Panel, para 26.

²⁴ United States Responses to Questions by the Panel, para 8.

²⁵ See in particular United States Exhibit 25, attached to its Responses to Questions by the Panel.

²⁶ United States Response to Questions by the Panel, para 21.

2.17 Nor is the United States argument that the unforeseen developments were increased imports made any more plausible when it is couched in terms of a change in the conditions of competition. The United States argues that there was an “abrupt reversal” in the pattern of competition after 1995²⁷, which was “sudden” and “unexpected”²⁸, and that this constituted an “unforeseen development” within the meaning of Article XIX of the GATT 1994.²⁹ The United States bases its reasoning on the alleged view of the USITC that the imported and domestic product became more similar and therefore more directly competitive from 1995, as a result of the change in the product mix from frozen to fresh and chilled product, and an increase in the size of the imported product.

2.18 However, the record of evidence in the USITC report does not support this allegation. The USITC attempted to examine the conditions of competition between imported and domestic product by comparing the sales of eight different product cuts.³⁰ Of the eight cuts chosen, three could not be compared because there were insufficient sales of either the domestic or imported product, and in two cases (both frozen product) there were few domestic sales. There were sufficient domestic and imported sales of only three products, two of which were considered to be domestic products and one an imported product. Based on the evidence before it³¹, the USITC did not find much overlap, and therefore not much direct competition, between those imported and domestic lamb meat cuts. Furthermore, responses to questions put to importers on what significant changes in lamb meat cuts had occurred over the last five years identified an increase in the types of imported products which the domestic industry did not produce.³² This is consistent with the USITC’s finding of “evidence of *differences* between products from different sources”³³, rather than of direct competition.

2.19 Similarly the claim by the United States of more direct competition through the larger size of the imported product does not stand up to scrutiny. The USITC found that the average carcass weight of the United States product was 67 pounds, compared to 35 pounds for New Zealand slaughter lambs.³⁴ The USITC also found that New Zealand racks of lamb were commonly in the 14 to 16 ounce range.³⁵ The United States racks are in the 24 to 28 ounce range.³⁶ The only real evidence before the USITC concerning an increase in the size of the imported product is evidence that the average carcass weight of Australian product increased from 40 pounds in 1993 to 42 pounds in 1996 and 1997.³⁷ This is hardly a sufficient basis on which to conclude that the imported product has become more comparable in size to the domestic product. Indeed the United States now appears to acknowledge this in its responses to questions of the Panel, where there is no mention made of the larger size of the imported product.³⁸

2.20 Nor is there any hard evidence that a change in the product mix from frozen to fresh and chilled made the imported product more directly competitive with the domestic product. The USITC found that domestic and imported lamb meat have the same uses, citing evidence that fresh, chilled and frozen lamb meat are used in the same way.³⁹ If that is the case, a shift in the product mix can have had no impact on the degree to which the products compete in the marketplace.

²⁷ United States First Written Submission, para 54.

²⁸ United States First Written Submission, para 56.

²⁹ United States First Written Submission, para 60.

³⁰ USITC Report, II-74 to II-76.

³¹ Testimony of Kirk Halpern, injury hearing, attached as Annex NZ-14.

³² USITC Report, II-65.

³³ USITC Report, I-23 (emphasis added).

³⁴ USITC Report, II-8.

³⁵ USITC Report, II-75.

³⁶ USITC Report, II-74.

³⁷ USITC Report, II-37.

³⁸ United States Responses to Questions by the Panel, paras 9 to 13.

³⁹ USITC Report, I-11.

2.21 Even if that were not the case, it is clear that much of the increase in the fresh and chilled product did not compete with the domestic product. The USITC found that many imports supplied new demand.⁴⁰ Since 1994 New Zealand fresh and chilled lamb meat has been supplied to a major American restaurant chain and to warehouse clubs which preferred the small size, taste, leanness and consistency of New Zealand lamb. These firms had not purchased lamb meat before 1994. Most of the growth in fresh and chilled imports has been due to the natural growth in the number of outlets of those American purchasers.⁴¹ The fresh and chilled imported lamb meat supplying this new demand is therefore not in direct competition with the domestic product. Imported product cannot therefore be “displacing domestic product” as alleged by the United States.⁴²

2.22 Furthermore, the increase in fresh and chilled product cannot have been an “unforeseen” development within the meaning of Article XIX:1(a) of the GATT 1994. Fresh and chilled lamb meat has been imported from New Zealand since 1986.⁴³ Fresh and chilled product represented 31 per cent of all lamb meat imports in 1990.⁴⁴ In 1997 the majority of total lamb meat imports was still frozen.⁴⁵ Fresh and chilled lamb meat imports from New Zealand comprised only 30 per cent of New Zealand total lamb meat imports in 1997.⁴⁶ Given the higher prices of fresh and chilled product, and therefore the likely higher returns to exporters from that type of product, it would have been both expected and foreseen in 1995 that fresh and chilled product would increase. Indeed the USITC in its 1995 report referred to the lifting of the restrictions on imports of New Zealand chilled lamb meat entering the European Community market by 1 July 1995 in the context of identifying the allowance for “high-value chilled sheepmeat” within total New Zealand imports.⁴⁷ Clearly, therefore, the likelihood of an increase in high-value chilled lamb imports into the United States would have been expected and foreseen at the beginning of 1995.

2.23 The United States has accordingly failed to show that the imported and domestic product competed more directly since 1 January 1995, when the United States incurred obligations under GATT 1994. Even if this had been shown, the United States has failed to demonstrate that this would have constituted an “unforeseen development” within the meaning of Article XIX.1(a) of the GATT 1994.

2.24 Thus, even if it were possible to do so *ex post facto* the United States has failed to discharge the burden of demonstrating the existence of “unforeseen developments”. New Zealand has shown in its First Written Submission⁴⁸ and Oral Statement at the First Panel Hearing⁴⁹ that the increase in imports in this case resulted from a decline in domestic production, which in turn was a consequence in large part of the removal of the subsidy paid to producers under the Wool Act. Such a consequence was clearly foreseeable. The United States has not even attempted to rebut this. It has not sought to demonstrate that the decline in domestic production was unforeseen or unforeseeable, nor could it do so, as that decline was the consequence of the United States own actions. The resulting decline in domestic production drew imports into the market in order to meet demand that was not being filled.

⁴⁰ USITC Report, I-32.

⁴¹ Testimony of John Cassidy and Brian Comfort, injury hearing, attached as Annex NZ-15.

⁴² United States Responses to Questions by the Panel, para 12. The United States claim, at para 12 of its responses to questions of the Panel, that New Zealand conceded that imports displaced lamb meat is incorrect. New Zealand made no such concession.

⁴³ USITC Report, II-20.

⁴⁴ USITC, Lamb Meat: *Competitive Conditions Affecting the US and Foreign Lamb Industries*, Inv. No. 332-357, August 1995, USITC Publication No 2915, Table 2-14, attached as Exhibit 10 to the United States First Written Submission.

⁴⁵ USITC Report, II-43.

⁴⁶ USITC Report, II-43.

⁴⁷ USITC, Lamb Meat: *Competitive Conditions Affecting the US and Foreign Lamb Industries*, Inv. No. 332-357, August 1995, USITC Publication No 2915, page 4-20.

⁴⁸ New Zealand’s First Written Submission, paras 7.33 to 7.35.

⁴⁹ New Zealand’s Oral Statement at the First Panel Hearing, para 21.

As New Zealand has pointed out, this case involves an attempt by the United States to pass on to imports by means of a safeguard measure burdens that result from its own actions within its domestic market.

III. DOMESTIC INDUSTRY

3.1 In its First Written Submission, New Zealand pointed out that the USITC had determined what constituted the domestic industry allegedly threatened with serious injury on the basis of a test that finds no justification in the Safeguards Agreement.⁵⁰ Rather than determining the domestic industry by looking at the producers of “like or directly competitive products”, the USITC sought to expand the category of producers to those who did not produce “like or directly competitive products.” The United States claims that this approach is consistent with the Safeguards Agreement on the basis that the term “producers as a whole” in Article 4.1(c) of the Safeguards Agreement should be interpreted to include “producers” who are part of a “continuous line of production” from the raw to the processed product, and where there is a “substantial coincidence of economic interest” between the producer of the raw product and the producer of the processed product.⁵¹ However, such an approach ignores the context in which the words “as a whole” are used in Article 4.1(c) and has no basis in the Safeguards Agreement or in the GATT 1994.

3.2 In its First Written Submission, the United States does not argue that live lambs are “like or directly competitive” with lamb meat. It simply says that the issue is “inapposite”.⁵² Rather, it seeks to sustain the position taken by the USITC on the ground that there is an integral relationship between the producers of live lambs and the producers of lamb meat. In this case, the United States asserts, there is extensive integration between firms at different stages in a continuous line of production. Such “vertical integration” justifies, in the United States view, the inclusion of those who do not produce like or directly competitive products within the domestic industry for the purposes of the USITC’s investigation. In seeking to support this argument, the United States relies on a case that is not relevant, and seeks to distinguish, or to simply ignore, cases that are directly on point.⁵³

3.3 The GATT panel decision in *New Zealand – Imports of Electrical Transformers from Finland*⁵⁴, on which the United States relies, simply has no relevance to this case. There, the panel rejected the idea that distinctions could be made between different producers of the same product. That is not the question here. It is whether producers of different products – products that are not like or directly competitive – can be included within the definition of domestic industry. The case would be relevant if the argument was made that producers of certain kinds of lamb meat ought to have been excluded from the definition of domestic industry. But that is not New Zealand’s contention.

3.4 Equally, the United States attempt to distinguish the cases of *Canada - Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC*⁵⁵ and *Panel on United States Definition of Industry Concerning Wine and Grape Products*⁵⁶ is unconvincing. The fact that the panel decision in *Canada -Manufacturing Beef* was never adopted is irrelevant. New Zealand did not cite the case as binding authority. It cited it to show a consistent pattern of reasoning under which the idea that a like or directly competitive product determination should be made on the basis of some

⁵⁰ New Zealand’s First Written Submission, paras 7.40 and 7.41.

⁵¹ United States First Written Submission, paras 62, 63 and 68. In responding to questions by the Panel on this point, the United States cited three different dictionaries as support for its alleged “ordinary meaning” of the three words “product”, “production”, and “output”: United States Responses to Questions by the Panel, para 30. This illustrates that the “ordinary meaning” of those words is constructed by the United States for the purposes of interpretation of Article 4.1(c).

⁵² United States First Written Submission, para 61.

⁵³ United States First Written Submission, paras 71 to 76.

⁵⁴ BISD 32S/55, adopted on 18 July 1985.

⁵⁵ SCM/85, 13 October 1987.

⁵⁶ Adopted by SCM Committee on 28 April 1992, SCM/71, BISD 39S/436.

notion of the vertical integration of an industry was consistently rejected by GATT panels. That pattern of reasoning is illustrated as well in *Canada – Import Restrictions on Ice Cream and Yoghurt*⁵⁷, a decision that the United States conveniently ignores.

3.5 In *United States - Wine and Grape Products* the panel recognised that the processing of primary agricultural products is often a separately identifiable economic process, irrespective of ownership, so that it is in fact an industry that is separate from the industry that is engaged in the production of those primary products.⁵⁸ The panel also said that economic interdependence between such separate industries is irrelevant to the definition of the industry.⁵⁹ In *Canada – Manufacturing Beef* the panel stated that the only case in which common ownership will affect the definition of industry is where it results in such complete integration of production processes that it is impossible to analyse each process separately.⁶⁰ As the USITC itself recognised, that type of integration occurs in this case only between grower and feeder operations and between packers and breakers.⁶¹ There is accordingly no support in WTO or GATT jurisprudence for the approach taken by the United States in determining the domestic industry in this case.

3.6 In any event, even if it had some basis in law, the United States “vertical integration” theory fails on the facts of this case. In the United States, the vertical integration that occurs within sectors, that is between growers and feeders, the producers of live lambs, and between packers and breakers, the producers of lamb meat, does not occur in the same way across those sectors. Only one firm, Transhumance, a firm that actively opposed the petition to the USITC, operates across both live lamb and lamb meat sectors. But, even in the case of Transhumance separate business operations could be identified and treated as separate industries for the purposes of investigating serious injury or threat. Thus, the reality of “vertical integration” actually supports New Zealand’s contention on the appropriate domestic industry, not that of the United States.

3.7 Moreover, the United States “continuous line of production” theory characterises live lambs as no more than a raw input in a production process. But that is completely misleading. Live lambs are a distinct product. They are sold for breeding stock. They are a source of wool.⁶² They are not just inputs into the production of lamb meat. The claim by the representatives of the United States in the oral hearing that the United States has no export trade in live lambs does not alter the fact that live lambs constitute a separate and distinct product from lamb meat.

3.8 Apart from its incompatibility with the reality of the live lamb and lamb meat industries, and with the actual wording of Article 4.1(c) of the Safeguards Agreement, the United States argument that the producers of inputs into products should be treated as part of the domestic industry for a determination under the Safeguards Agreement also has important systemic implications. It opens the possibility that the producers of all inputs, no matter how insignificant, could be considered part of the domestic industry. Such an approach would render safeguard disciplines meaningless.

3.9 In its responses to questions from the Panel, the United States has sought to minimise the consequences of its arguments by saying that the USITC includes producers of a raw input in the class

⁵⁷ Adopted on 5 December 1989, BISD 36S/68.

⁵⁸ United States - Wine and Grape Products, paras 4.3 and 4.5.

⁵⁹ United States - Wine and Grape Products, para 4.5.

⁶⁰ Canada - Manufacturing Beef, para 5.14.

⁶¹ USITC Report, II-29 and II-33. In answer to a question from the Panel during the hearing on 26 May 2000 as to whether the United States industry is so highly integrated that the segments cannot be separated, the United States replied only that as most lamb is produced for meat, there is a tendency for all segments to rise and fall together. This does not amount to an inability to differentiate between industries.

⁶² The USITC itself recognised that the removal of the Wool Act subsidy had a significant impact on producers of live lambs, illustrating that the production of wool is also an important use of live lambs: USITC Report, I-30.

of producers of the final processed product only in the case of agricultural products.⁶³ In other words, the United States is claiming that there are two definitions of producers of like or directly competitive products applied in United States safeguards practice. One applies to agricultural products and the other applies to manufactured products. But a justification for such a distinction cannot be found in either the Safeguards Agreement or the GATT 1994. The only distinction made between agricultural products and other products for the purposes of safeguard measures in the WTO system is found in Article 5 of the Agreement on Agriculture, which provides a special safeguard measure for certain agricultural products. The negotiators of the Safeguards Agreement were well aware of the option of distinguishing between agricultural and other products if they wished to do so. They did not do so for the purposes of defining the domestic industry under Article 4.1(c) of the Safeguards Agreement. Thus, this new United States position does nothing more than highlight the extent to which its safeguards practice deviates from its obligations under the WTO agreements.

3.10 The concept of “the domestic industry that produces like or directly competitive products” in Article 2.1 of the Safeguards Agreement was intended to have a limiting effect. Indeed, Article 2.1 provides the primary reference to domestic industry, and defines it clearly by the qualification that it is the industry “that produces like or directly competitive products”. The primacy of Article 2.1 in this respect is made clear by Article 4.1(c) which explains in its first clause that a domestic industry is to be understood as the “the producers as a whole of *the* like or directly competitive products ...”. The definite Article “the” can refer only to like or directly competitive products as identified in Article 2.1.

3.11 The wording of Article 4.1(c) also makes clear that the term “producers as a whole” is a quantitative measure of the class of producers. It does not serve to expand the class to those who do not produce a like or directly competitive product, as the United States argues. This is reinforced by the second clause of Article 4.1(c) which refers, as an alternative to “producers as a whole”, to “those whose collective output of the like or directly competitive products constitutes a major proportion of the domestic production of those products.” Both are alternative ways of ensuring that there is a representative class of the domestic industry and not just isolated producers within that industry that are claiming serious injury or threat.⁶⁴ Neither phrase expands the meaning of “producer” to include more than producers of the like or directly competitive product, as the United States seeks to do.

3.12 In short, the problem with the United States approach to the determination of the domestic industry in the present case is that it simply does not do what the Safeguards Agreement requires, that is, to determine who constitutes a producer by looking at what they produce. The United States claims that in this case this would constitute an “artificial definition” of the domestic industry.⁶⁵ However, it is the United States, not New Zealand, that advances an artificial definition. Such artificiality arises because of the United States insistence that producers of a product that is *not* like or directly competitive with an imported product should nevertheless be part of the industry composed of producers of a product that *is* like or directly competitive with the imported product. In arguing this way, the United States seeks to rewrite the clear words of the Safeguards Agreement.

3.13 Finally, the United States seeks to nullify the effect of the USITC’s wrongful determination of the domestic industry by arguing that on the facts it does not matter. It claims that even if the domestic industry were restricted to packers and breakers – those who actually produce a like or directly competitive product in this case – that domestic industry would still be threatened with serious injury caused by increased imports.⁶⁶ However, as New Zealand will show in the next

⁶³ United States Responses to Questions by the Panel, para 28.

⁶⁴ The United States expressly agrees with this position in para 41 of its responses to questions by the Panel.

⁶⁵ United States Oral Statement at the First Panel Hearing, para 15.

⁶⁶ United States Oral Statement at the First Panel Hearing, para 16.

section, even if it were admissible to make such a claim at this late stage, the claim that a domestic industry composed of packers and breakers is threatened with serious injury has no basis whatsoever.

IV. THREAT OF SERIOUS INJURY

4.1 In its First Written Submission, New Zealand pointed out that the USITC had failed to demonstrate that a threat of serious injury existed because it had not shown that any serious injury was "clearly imminent".⁶⁷ In both its First Written Submission and before the Panel, the United States has sought to obscure this issue, arguing that causation factors go to show the existence of a threat and that threat factors prove causation. The United States also seeks to discourage the Panel from looking closely at the USITC's reasoning on the specious ground that this would constitute a *de novo* review.⁶⁸ However, the fact remains that the USITC did not determine on the basis of facts, rather than "allegation, conjecture or remote possibility" that there was a threat of serious injury.⁶⁹ Neither the USITC nor the United States in this case have explained how the continuation of an economic pattern that has a long past history and which does not constitute serious injury in the present, can suddenly become a threat of serious injury in the future.

4.2 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. What must be demonstrated is a threat of serious injury, not a threat of increased imports. The panel in *Argentina - Footwear* expressly rejected the possibility of finding a threat of serious injury based simply on the threat of increased imports.⁷⁰

4.3 As New Zealand has argued in its First Written Submission, the USITC failed to apply any method that would allow it to determine whether there was any significant overall impairment that was clearly imminent.⁷¹ The Appellate Body has indicated that in looking at significant overall impairment, the competent authority is to look at the "overall picture" of the industry.⁷² In examining whether a significant overall impairment in the position of the domestic industry was "clearly imminent", a competent authority should therefore examine how the overall picture of the industry is likely to develop in the future, compared to its position in the past.

4.4 In this way serious injury or threat thereof is a relative concept. It means significant overall impairment in the position of the domestic industry relative to some point in the past. In the case of threat of serious injury an investigating authority must compare the overall position of the domestic industry in the past with how it is likely to develop in the future, based on those past trends. In order to make a determination that is not based on allegation, conjecture or remote possibility, an investigating authority should therefore 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.

4.5 The USITC failed to establish "threat" on the basis of any serious analysis of either the past or the future. The USITC took the view that there had been a continuation of an impairment that existed in the past, but which did not constitute serious injury, and concluded, as the United States pointed out in its responses to the questions from the Panel, that the industry was "on the verge of a significant overall impairment of its position."⁷³ But this "verge" of impairment was based only on information for 1997 and through to September 1998 - information which in the nature of agricultural markets can

⁶⁷ New Zealand's First Written Submission, paras 7.56 and 7.69.

⁶⁸ United States First Written Submission, para 92.

⁶⁹ See Article 4.1(b) of the Safeguards Agreement.

⁷⁰ Panel Report, *Argentina - Footwear* WT/DS121/R, 25 June 1999, para 8.284.

⁷¹ New Zealand's First Written Submission, paras 7.56 to 7.70.

⁷² *Argentina - Footwear*, para 139.

⁷³ United States Responses to Questions by the Panel, para 43.

be no more than a measurement of a fluctuation, as indeed it was. Prices rose from the latter part of 1998 and, as now disclosed in information provided by the United States they continued to rise through 1999.⁷⁴ The industry was clearly not on the “verge” of impairment. There was therefore no reasoned basis for the conclusion of the USITC that the industry was faced with significant overall impairment or that significant overall impairment was “clearly imminent”.

4.6 In attempting to argue that there was a threat of significant overall impairment in the position of the domestic industry, the United States argues that prices are the key indicator of the domestic industry’s financial condition and that where demand is stable increased imports will result in a decline in prices.⁷⁵ However, its conclusion that there was a threat of serious injury to the domestic industry caused by increased imports, based as it was on the period 1997 to September 1998, did not reflect the industry as a whole over a representative period. It was not based on any analysis grounded in the factual evidence before the USITC.

4.7 What the USITC engaged in was speculation, not informed or reasoned analysis. This is contrary to the decision of the panel in *Argentina - Footwear* that “any determination of threat must be supported by specific evidence and adequate analysis.”⁷⁶ The United States has sought to support its reliance on a short period of price fluctuation for determining the existence of a threat of serious injury by invoking the Appellate Body decision in *Argentina – Footwear*.⁷⁷ But that case involved a determination of actual serious injury. Such a determination is a factual matter. Either an industry has reached a state of significant overall impairment or it has not. If it has reached that state then serious injury has occurred and it does not matter that it has only just reached such a state. A determination of a threat of serious injury is different. It is an analysis of what is likely to happen in the future based on past trends. Reliable assessments of what will happen in the future cannot be made on the basis of the analysis of short-term conditions. Based on a fluctuation in the prevailing prices in one season only, the United States could not reasonably extrapolate that price dip into the future.

4.8 In this regard, it is necessary to examine what the USITC did in reaching its determination that there was a threat of serious injury. Such an examination does not constitute a *de novo* review as the United States claims. The United States cannot shield the actions of the USITC from Panel scrutiny or use *de novo* review claims to chill proper Panel consideration of this case. In accordance with Article 11 of the DSU, the function of the Panel is to make an objective assessment of the facts of the case and of the conformity of the actions of the United States with its obligations under the Safeguards Agreement. This involves determining whether the competent authorities of the United States made the appropriate determinations and supported those determinations with reasoning on all pertinent issues of fact and law. Furthermore, contrary to the claims of the United States in its responses to the Panel’s questions, New Zealand did assert in its first Submission that Article 3.1 of the Safeguards Agreement applied to the United States obligations in respect of its determination of a threat of serious injury.⁷⁸

4.9 If, as the United States argues, the key indicator of the health of the domestic industry was prices, the USITC should have examined how prices might develop in the future, based on an analysis of price trends. However, the USITC failed to undertake any price analysis. Indeed, based on USDA information that came before the USITC, domestic prices were expected to increase in 1999.⁷⁹ In fact, prices recovered somewhat in the final three months of interim 1998⁸⁰, at the same time as

⁷⁴ United States Exhibit 42, attached to its Responses to Questions by the Panel.

⁷⁵ United States First Written Submission, paras 81 and 86.

⁷⁶ Panel Report, *Argentina - Footwear*, para 8.285.

⁷⁷ United States First Written Submission, para 93.

⁷⁸ New Zealand’s First Written Submission, paras 7.9 and 7.54.

⁷⁹ Testimony of Daniel Sumner, injury hearing, attached as Annex NZ-16.

⁸⁰ USITC Report, II-55, Figure 3.

increased imports occurred. This fact is consistent with the view that increased imports had and were likely to have little direct influence on domestic prices.

4.10 The United States determination of threat of serious injury is based on a number of suppositions. It assumes that increased imports had a negative effect on domestic prices. This assumption appears to be based on the allegation that imported lamb meat undersold domestic lamb meat by 20 per cent over the period of investigation.⁸¹ The evidence indicates that this statement is grossly misleading. A close examination of the product comparisons relied upon for this statement demonstrates that in fact there was little direct comparison between the products considered. Moreover, the information recently made available by the United States in its responses to questions of the Panel, shows that there is no consistent trend for the imported products to grow faster than the equivalent domestic product, which one would expect if the United States “displacement” theory had any validity.⁸²

4.11 The information provided by the United States shows that the price difference between imported and domestic product has fluctuated throughout the period of investigation. Often the price gaps recorded over the last year of the period were less than those observed earlier.⁸³ In one case where there was direct comparison of fresh chilled square cut shoulder (a large volume cut, especially for the domestic lamb meat producers), the imported product was virtually always priced higher than the domestic product.⁸⁴ Overall, the so-called “underselling” tended to *reduce* over the period of investigation and in any case was present *throughout* that period. United States allegations of underselling cannot, therefore, explain the contraction in the domestic price for lamb meat. For such a situation of persistent “underselling” to exist would be more an indication of product differentiation than of price undercutting. Moreover, as indicated in New Zealand’s First Written Submission, imported prices did not fall to the same degree as domestic prices over 1997 and 1998.⁸⁵ It cannot, therefore, have been increased imports which led to a decline in domestic prices in 1997 and interim 1998.

4.12 The United States also assumes that there was and would be no impact on prices due to changes in the competing prices of other meats. However, whether prices rise or fall for a product will always depend at least in part on the prices for other products which directly compete with that product in the market. The fall in the price of lamb meat on the domestic market occurred at the same time as a fall in the price of competing meats, particularly pork.⁸⁶ To claim that domestic lamb meat prices are driven by imports, is therefore to ignore the key relevant factor of the price of competing meats. In this regard, the United States assertion, made in its responses to questions from the Panel⁸⁷, that “with respect to competition from other meat products, the USITC found no evidence that other meat products were displacing lamb meat” is simply incorrect.

4.13 The USITC Commissioners clearly had competition with other meats in the forefront of their deliberations, one stating that “there’s a good argument to be made that the bigger competition [to imported lamb meat], the more difficult competition is from other alternative sources of protein, most particular[ly] other meats”.⁸⁸ Neither is the United States statement consistent with the actual findings of the USITC. The USITC Commissioners found that lamb meat consumers are sensitive to

⁸¹ United States First Written Submission, para 87.

⁸² United States Exhibit 41, Tables 39 and 40, attached to its Responses to Questions by the Panel.

⁸³ United States Exhibit 41, Tables 39 to 42, attached to its Responses to Questions by the Panel.

⁸⁴ United States Exhibit 41, Table 43, attached to its Responses to Questions by the Panel.

⁸⁵ New Zealand’s First Written Submission, page 61, Figure 5. The United States, in para 45 of its First Written Submission, queries the source of Figure 5 (and Figure 6). The *Red Meat Yearbook*, which is the source of the Figures is referred to as the data source for Table 37 of the USITC Report, and Tables D1 and D2 in Appendix D of the USITC Report.

⁸⁶ USITC Report, II-70, Figure 17.

⁸⁷ United States Responses to Questions by the Panel, para 70.

⁸⁸ Commissioner Crawford, remedy hearing, attached as Annex NZ-17.

price.⁸⁹ And it considered that it was “plausible” that some purchasers of lamb meat had substituted other meats.⁹⁰ The United States assertion on the lack of impact of the competition of other meats is therefore groundless.

4.14 The United States also does not take into account the fluctuation in agricultural prices and the situation pertaining to the rest of the United States agriculture sector in 1997 and 1998. The background to the USITC investigation was a dramatic fall in the prices of all agricultural products in 1997 and 1998. The USITC was told during its hearing that “you can’t make the money in anything these days” and that when prices for hogs and cattle drop, so do those for live lambs.⁹¹ The United States, however, ignores the impact of these other competing meats on the price of lamb meat.

4.15 The third false assumption that the United States makes is that with the stabilisation of consumption from 1996, increased imports would depress prices. This reliance on the stabilisation in consumption in the 1996 to 1998 period as an indication of health in the industry is also misplaced. The United States fails to take account of the fact that consumption over that period had fallen from previous years and that total consumption of lamb meat had been higher in the earlier part of the period of investigation.⁹² The reason for the stabilisation in 1996-1998 was the slow-down in the decline in the production of domestic lamb meat. The fall in domestic shipments in 1997 was the smallest decline in the four years since 1993, and shipments increased in interim 1998.⁹³ Even though consumption of lamb meat stabilised from 1996, and even increased in interim 1998, it was still far below the level of consumption in 1993.

4.16 The United States also fails to take into account the nature of demand and supply in the United States lamb meat market. Prices for lamb meat in 1996 and early 1997 were at high levels not witnessed in the preceding years. These high prices were the result of a reduction in supply below the levels of demand existing in the market. The fall in domestic production over 1993 to 1996, due to the elimination of the Wool Act subsidy payments, left key purchasers with little option but to turn to imports in order to maintain sales. While imports increased over this period, they increased by less than the fall in domestic production.⁹⁴ In such circumstances imports cannot be displacing domestic product. Indeed increased imports in interim 1998 were channelled into increases in consumption, meeting both unfilled demand and new demand previously not supplied with lamb meat.

4.17 The position of the domestic industry in 1998 was influenced by supply and demand factors on the lamb meat market. The termination of the Wool Act had been expected to have, and did have, a profound effect on the domestic industry. This effect continues today. In order to withstand a 20 per cent drop in revenues, growers and feeders increased prices until mid 1997. But once consumers of lamb meat were faced with a choice between high priced lamb meat and significant falls in the price of competing meats, there was a natural correction in prices. By addressing only what was occurring in the period since 1997 the United States has failed to take into account this overall position of the domestic industry. This is not a reasoned basis on which to impose a determination that significant overall impairment in the position of the domestic industry was clearly imminent.

4.18 In addition, the United States failed to undertake any analysis of how the position of the domestic industry was likely to develop in the future, compared to its position in the past. There was no factual basis or analysis on which to determine how prices would develop in the future. Had a

⁸⁹ USITC Report, I-31.

⁹⁰ USITC Report, II-80.

⁹¹ Testimony, Daniel Sumner, remedy hearing, quoting a United States grower representative, attached as Annex NZ-18.

⁹² USITC Report, II-17, Table 5.

⁹³ USITC Report, II-17, Table 5.

⁹⁴ USITC Report, II-21, Table 7.

proper analysis been undertaken, the United States could not have concluded that the domestic industry was threatened with serious injury that was clearly imminent.

4.19 The United States both in its First Written Submission and in its Oral Statement at the First Panel Hearing fails to explain how the USITC's reasoning conforms with the terms of the Safeguards Agreement. The United States now advances the new argument that even if the domestic industry were restricted to packers and breakers, a threat of serious injury would be established.⁹⁵ However, even if this were true it would be irrelevant. The USITC made no such finding. The United States cannot now make such a finding in place of the USITC. If the competent authority has not made the findings as required by the Safeguards Agreement, then the measure adopted by the United States cannot stand. Furthermore, even if this new claim by the United States were admissible, the factual evidence in this case simply does not support such an argument.

4.20 The USITC found that production of packers fluctuated over the period of investigation, while production of breakers trended upwards.⁹⁶ More specifically production of packers in 1997 was 11.5 per cent higher than in 1995.⁹⁷ Production of lamb meat decreased by 2 per cent in interim 1998.⁹⁸ On a full year basis, therefore, production in 1998 was still significantly higher than in 1995. Furthermore the information now disclosed by the United States shows that the unit value of packers' total shipments increased over 1993 to 1997, with the only decline occurring in interim 1998.⁹⁹

4.21 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 1998.¹⁰⁰ 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. Similarly in the case of breakers both production and capacity increased since 1995 with capacity rising faster than production. These trends continued into 1998.¹⁰¹ 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.

4.22 Given that the production in 1998 was still significantly higher than in 1995, the reported decline in capacity utilisation in the packing industry identified by the USITC¹⁰², 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.

4.23 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.¹⁰³ The information now provided by the United States shows that direct labour and other processing costs of packers rose substantially in interim 1998, clearly contributing to a decline in profits in that period.¹⁰⁴ The evidence of the financial condition of packer/breakers shows gross profit increasing in interim 1998, up 53 per cent.¹⁰⁵ No information on the financial condition of the one reporting breaker is disclosed by the United States. It would seem clear that on the information provided only packers had some declining profitability in 1998. Given the increase in capacity undertaken by the United States packing

⁹⁵ United States Oral Statement at the First Panel Hearing, para 16.

⁹⁶ USITC Report, I-18, fn 78.

⁹⁷ USITC Report, II-22, Table 8.

⁹⁸ USITC Report, II-21.

⁹⁹ United States Exhibit 41, Table 9, attached to its Responses to Questions by the Panel.

¹⁰⁰ USITC Report, II-22, Table 8.

¹⁰¹ United States Exhibit 41, Table 3, attached to its Responses to Questions by the Panel.

¹⁰² USITC Report, I-20.

¹⁰³ USITC Report, I-19.

¹⁰⁴ United States Exhibit 41, Table 16, attached to its Responses to Questions by the Panel.

¹⁰⁵ United States Exhibit 41, Table 18, attached to its Responses to Questions by the Panel.

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.

4.24 Inventories of packers decreased in interim 1998 by comparison with the previous year.¹⁰⁶ This would seem to indicate an improved ability to make sales over this period. The only statement in the USITC Report on employment in relation to packers is that direct labour and other costs of packing operations remained relatively constant over the period of investigation.¹⁰⁷ However it is clear from the information now disclosed that direct labour costs and other processing costs rose substantially in interim 1998.¹⁰⁸ 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.¹⁰⁹ 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.

4.25 Specific information concerning breakers is confidential and has not been disclosed. However, the fact that the USITC had financial data from only one specialist breaker¹¹⁰, suggests that the USITC would not have had a reliable basis for assessing whether the breakers were facing a threat of serious injury. Indeed the information made available on breakers' production capacity and unit values is supportive of the view that breakers are not threatened with significant overall impairment.¹¹¹

4.26 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. In short, if the domestic industry had been restricted to packers and breakers no determination of threat of serious injury could have been made.

4.27 In summary therefore, the USITC failed to take account of the facts regarding the overall situation of the domestic industry, including its long term decline, the effect of the termination of the Wool Act payments, and the price of competing meats. It sought to determine that there was a threat of significant overall impairment simply on the ground that prices which reached a high in early 1997 could not be maintained. That was not a reasoned conclusion based on objective evidence. It was a determination based on conjecture. This is not consistent with the requirements of the Safeguards Agreement.

V. CAUSATION

5.1 In its First Written Submission New Zealand demonstrated that the United States had failed to meet its obligations under Articles 2.1 and 4.2(b) of the Safeguards Agreement to show the causal link between increased imports and the threat of serious injury.¹¹² Furthermore the USITC had applied a "substantial cause" test that had no basis in the Safeguards Agreement or in GATT 1994¹¹³, and had attributed to increased imports injury caused by other factors.¹¹⁴ Although the United States affirms that in its view the substantial cause test conforms with WTO law, it seeks to support the USITC

¹⁰⁶ USITC Report, II-22.

¹⁰⁷ USITC Report, II-27.

¹⁰⁸ United States Exhibit 41, Table 16, attached to its Responses to Questions by the Panel.

¹⁰⁹ USITC Report, I-20.

¹¹⁰ New Zealand's First Written Submission, para 4.9.

¹¹¹ United States Exhibit 41, Tables 3 and 4, attached to its Responses to Questions by the Panel.

¹¹² New Zealand's First Written Submission, paras 7.77 to 7.93.

¹¹³ New Zealand's First Written Submission, paras 7.73 to 7.76.

¹¹⁴ New Zealand's First Written Submission, paras 7.94 to 7.96.

determination on causation on the basis that the USITC in fact found increased imports to be in effect the sole cause of the threat of serious injury.¹¹⁵ In doing so, the United States has had to refashion the USITC's Report to conform to this new interpretation.

5.2 Article 2.1 of the Safeguards Agreement stipulates that increased imports must "cause or threaten to cause" serious injury. The causal link between imports and serious injury or threat, Article 4.2(b) provides, must be demonstrated on the basis of objective evidence. The second sentence of Article 4.2(b) provides that injury caused by other factors is not to be attributed to increased imports.

5.3 In New Zealand's view, the effect of these provisions is that the causal relationship between the threat of serious injury and increased imports must be such that the threat of serious injury must have been *caused* by imports. This is "the causal link" that must be demonstrated in accordance with Article 4.2(b). Furthermore, where there are multiple causes that go to make up serious injury or the threat of serious injury, the injury caused by other factors cannot be attributed to increased imports. The "serious injury" or "threat of serious injury" found must be traced back to or attributed to increased imports, not to those other factors. This is the meaning of the second sentence of Article 4.2(b).

5.4 It is for this reason, as New Zealand has argued, that the "substantial cause" test does not comply with the Safeguards Agreement. The approach of the United States in situations where there are multiple causes of serious injury or threat of serious injury is to consider the "relative importance" of those causes through the application of the "substantial cause" test.¹¹⁶ The United States in this case concludes that since no factors other than increased imports were found to be "significant" by the USITC, there could not have been any attribution of serious injury or threat thereof to factors other than increased imports.¹¹⁷ However, this approach is not consistent with the Safeguards Agreement, in particular Article 4.2(b).

5.5 Article 4.2(b) allows for the possibility that other factors besides increased imports may impair the position of a domestic industry. Where that is the case, Article 4.2(b) requires that any such injury not be attributed to increased imports. In applying the "substantial cause" test the USITC instead determined that there were no factors of "significance" other than increased imports that caused or threatened to cause serious injury. The United States claims on the basis of that determination that there was no attribution of serious injury to factors other than increased imports. In adopting this approach the United States is not in compliance with Article 4.2(b).

5.6 Furthermore, as New Zealand pointed out in its Oral Statement at the First Panel Hearing, the "substantial cause" test as articulated by the USITC means that where serious injury or the threat of serious injury is caused by three factors equally, one of which is increased imports, then that would be sufficient in itself to meet the causation test. But such a result involves attributing to increased imports injury that is caused by other factors. It involves treating as the cause of "serious injury" or "threat of serious injury" a cause that may in fact be a minority cause of that serious injury or threat thereof. This is not consistent with Article 4.2(b), under which the injury caused by the causal factors other than increased imports must not be attributed to those imports. Only if "serious injury" or "threat of serious injury" still remains once the injury caused by those other factors is excluded can it be said that increased imports have "caused" the serious injury or threat.

5.7 Serious injury 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

¹¹⁵ United States First Written Submission, para 108.

¹¹⁶ United States First Written Submission, para 118.

¹¹⁷ United States First Written Submission, para 108.

sense, increased imports have to be *the cause* or the sole cause of the “serious injury” or threat thereof for which a safeguard remedy is applied. If, on the other hand, when 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.

5.8 The United States seeks in its responses to the Panel’s questions to avoid the consequences of this analysis by resorting to dictionary definitions of the term “cause” in order to show that the word is *capable* of bearing the meaning of one of many causes that the United States wishes to ascribe to it.¹¹⁸ It justifies this resort to the generic term “cause” by stating that Articles 2.1 and 4.2 of the Safeguards Agreement both “employ the verb ‘to cause’ in one form or another.”¹¹⁹ The objective of the United States in resorting to these dictionary definitions is made clear in a single revealing statement. It asserts that “Article 4.2(b) requires a competent authority simply to demonstrate a connection between the increased imports and the injury it has found.”¹²⁰ Thus, “cause” in the Safeguards Agreement is reduced by the United States to nothing more than a mere “connection”.

5.9 Apart from this attempt to read causation, as well as unforeseen developments, out of its safeguards obligations, the United States resort to the dictionary definition of “cause” also misses the point. Article 2.1 uses the term “to cause” which gives the generic concept of cause more specific direction or content. To cause something is different from being one of many causes of something. Moreover, the critical provision of Article 4.2(c) employs the term “cause” as an adjective, referring to the causal link as “*the* causal link” which refers to a single causal link, not “*a* causal link” which could be one among many. Thus, the whole United States argument about the open-ended nature of the concept of cause is based on a false premise.

5.10 Moreover, the United States resort to negotiating history simply does not prove the point the United States wishes to make.¹²¹ Rather, it shows that the negotiating history does not provide any assistance on this matter. There was obviously a variety of views on the meaning of cause in the negotiations, and no consensus. This reinforces the importance of the cardinal rule of interpretation, that the intention of the parties is to be gained from the text itself, and not from the often conflicting views of the parties in the drafting process which ultimately coalesced around the final text.

5.11 The United States also argues in its response to the Panel’s questions, that the decision of the panel in *United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*¹²² somehow supports its view that serious injury or the threat of serious injury can be contributed to by other factors.¹²³ However, the panel in *United States - Atlantic Salmon* found that the USITC had concluded that “material injury” had been caused by increased imports. Since the USITC had reached that conclusion, it was not, in the panel’s view, obligated to assess other factors that might also have contributed to the injury being suffered by the domestic industry in question.¹²⁴ As the panel noted, the obligation on the USITC was that it was

“required to conduct an examination sufficient to ensure that in its analysis of the factors set forth in Articles 3:2 and 3:3 it did not find that material injury was caused by imports from Norway when material injury to the domestic industry allegedly

¹¹⁸ United States Responses to Questions by the Panel, para 46.

¹¹⁹ United States Responses to Questions by the Panel, para 46.

¹²⁰ United States Responses to Questions by the Panel, para 48.

¹²¹ United States Responses to Questions by the Panel, paras 52 and 53.

¹²² ADP/87, 30 November 1992.

¹²³ United States Responses to Questions by the Panel, paras 54 and 55.

¹²⁴ United States - Atlantic Salmon, paras 547 and 548.

caused by imports from Norway was in fact caused by factors other than these imports."¹²⁵

The problem in the present case is that the USITC did not do this. The threat of serious injury that the USITC found was contributed to by a variety of causes. Nevertheless, the USITC attributed it all to increased imports.

5.12 In the present case, the USITC did not exclude injury caused by other factors from its causation analysis. It did not conclude that there was a threat of "serious injury" that was attributable to increased imports. It concluded instead that increased imports were a cause that was no less important than any other single cause of the threat of serious injury. But if the USITC had eliminated the injury that was caused by factors other than increased imports it would have had to conclude that what remained did not constitute a threat of "serious injury". There was, in fact, no threat of serious injury to attribute to increased imports.

5.13 Furthermore, in its First Written Submission and Oral Statements to the Panel at the First Hearing, the United States has sought to recharacterise the USITC's determination as a determination that "increased imports were the only cause of any significance of the deterioration in the condition of the domestic industry in 1997 and interim 1998...".¹²⁶ But it supports this by nothing more than an assumption that because a decline occurred, it must have been caused by increased imports. The United States theory of causation ignores other factors that caused a decline in the domestic industry and ignores the evidence that shows increased imports to be a *response* to a decline in domestic supply rather than the *cause* of domestic decline.

5.14 The USITC, and the United States in these proceedings, discount the impact of the removal of the Wool Act subsidy on the domestic industry. The United States argues, without evidence to substantiate its allegation, that the termination of the Wool Act payments did not have much influence on events after 1996 and in any event it was not paid to packers and breakers.¹²⁷ The latter argument is curious in light of the United States claim that there is vertical integration within the industry which means that prices affect growers/feeders and packers/breakers similarly and that their financial fortunes rise and fall together.¹²⁸ Neither does it fit with the argument made by the United States that the operations of packers and breakers would be highly affected by the supply and quality of the live lambs produced by growers and feeders.¹²⁹ In such circumstances one would expect that injury in one part of the industry would be passed on to the other part, and that a decline in the supply of live lambs would lead to a decline in the output of the lamb meat industry.

5.15 The United States attempt to minimise the importance of the termination of the Wool Act payments ignores the essential point of the New Zealand argument that increased imports *resulted from* the decline of the industry, they did not cause it. The Wool Act subsidy removal had a negative impact on growers and feeders and the production of live lambs. The Wool Act subsidies granted to the producers of live lambs totalled US\$125 million in 1993 and US\$69 million in 1994.¹³⁰ 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.¹³¹ 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,

¹²⁵ United States - Atlantic Salmon, para 554.

¹²⁶ United States Closing Statement at the First Panel Hearing, para 13. See also United States Opening Statement at the First Panel Hearing, para 17, and United States First Written Submission, para 108.

¹²⁷ United States First Written Submission, para 90.

¹²⁸ United States First Written Submission, para 67.

¹²⁹ United States First Written Submission, para 65, citing USITC Report, I-13.

¹³⁰ USITC Report, II-78, Table 45.

¹³¹ USITC Report, II-78.

and to 12.2 per cent in 1996. It fell even further to 5.5 per cent in interim 1998.¹³² This 20 per cent drop in revenue led to a decline in the number of producers of live lambs and in turn a reduction in supply of live lambs and therefore of lamb meat. This reduction in supply, which continued beyond 1996, resulted in an unfilled domestic demand that was then met by increased imports. Neither the USITC nor the United States have met this argument or contradicted what obviously flows from it: increased imports were a consequence of the decline in the domestic industry, not the cause of it.

5.16 In attempting to take a snap-shot of the situation occurring in 1997 and interim 1998, without regard to the industry situation in the years preceding, the United States is ignoring the very conclusions of the USITC. In discussing the remedy to be applied, the USITC Commissioners identified the termination of the Wool Act payments as a *significant* change in the market conditions under which the domestic industry must operate.¹³³ 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.¹³⁴

5.17 The United States also attempts to gloss over the USITC's conclusions based on the evidence of the competition from other meats. The United States points to the fact that the per capita consumption of lamb meat had remained relatively steady since 1995.¹³⁵ However, per capita consumption of lamb meat was around 1.1 pounds in 1995 to 1997, compared to an average per capita consumption of red meat of 120 pounds.¹³⁶ Actual consumption of pork was 60 times the consumption of lamb meat in interim 1998, while consumption of beef was more than 85 times that of lamb meat.¹³⁷ In light of the disparity between the size of the markets for lamb meat and other competing meats, the markets for those competing meats will clearly have an impact on the market for lamb meat.

5.18 Indeed, the USITC found that final demand for lamb meat was determined among other things by "prices of lamb meat and substitute products".¹³⁸ In comparing the retail price of lamb meat to that of other competing meats, it is clear that the price of lamb meat has been consistently priced higher than competing meats and that there was a significant fall in the prices of competing meats that occurred from mid-1997, at the same time as the fall in the price of lamb meat.¹³⁹ The USITC Report includes evidence that the lower price trends of potential substitutes may have resulted in some substitution away from lamb meat towards these other products.¹⁴⁰ The USITC Commissioners concluded that final consumers of lamb meat were somewhat sensitive to price.¹⁴¹

5.19 Although the USITC reached the conclusion that the price of competing meats was not a "more important cause" of threat of serious injury than increased imports, the evidence set out in the USITC Report shows that the competition from other meats was a factor strongly influencing the position of the domestic industry. There was a causal relationship between the difficulties of the domestic industry and the competing prices of other meats.

5.20 Other causes of the threat of serious injury were treated similarly by the USITC. For example, the USITC considered whether concentration in the packer segment of the industry and the failure of the industry to develop and implement an effective marketing programme were "more

¹³² USITC Report, II-26, Table 12.

¹³³ USITC Report, I-30.

¹³⁴ USITC Report, I-32.

¹³⁵ United States First Written Submission, para 91.

¹³⁶ USITC Report, II-69, Table 36.

¹³⁷ USITC Report, II-71, Table 37.

¹³⁸ USITC Report, II-66.

¹³⁹ New Zealand's First Written Submission, Figure 4, sourced from USITC Report, II-70, Figure 17.

¹⁴⁰ USITC Report, II-69.

¹⁴¹ USITC Report, I-31. Apparent consumption held steady and then actually increased at the end of the period of investigation, at the same time that prices fell.

important causes” of the threat of serious injury than increased imports. While it found that they were not “more important” causes, they were clearly identified by the USITC as causes.¹⁴² Indeed, the inference from the USITC report appears to be that the latter factor was even viewed by the USITC as a cause as important as increased imports. While the USITC concluded that concentration in the packer segment was a less important cause of the threat of serious injury, it interestingly refrained from stating the same with regard to the failure to develop and implement an effective marketing programme. While finding that the latter was not a “more important” cause than increased imports, the USITC also noted that this factor was likely to have “an important impact on the industry”.¹⁴³

5.21 The approach adopted by the USITC to causation in using its “substantial cause” test was to disregard other factors which may be causing serious injury by considering that they individually are not more important causes of serious injury than increased imports. Having determined that individually those other factors, including the effect of the termination of the Wool Act payments, the price competitiveness of other meats, and the failure to develop and implement an effective marketing programme for lamb meat, were not more important causes than increased imports of the threat of serious injury, it was assumed that the entire serious injury or threat thereof was caused by the increased imports. There was no attempt to avoid attributing injury caused by other factors to increased imports, in conformity with Article 4.2(b). The USITC and the United States thereby wrongly assumed that all the “serious injury” or threat thereof was caused by increased imports.

5.22 In its Oral Statement to the Panel, the United States began a new tack and started a process of reinterpretation of the USITC’s report in order to show that the USITC had regarded increased imports as in fact the sole cause of a threat of serious injury. In its response to the questions of the Panel, the United States continued this reinterpretation. The USITC is viewed, according to the United States new interpretation, as having considered all of the other potential causes of threat of serious injury in order to reject them and thus to comply with Article 4.2(b) and not attribute to increased imports injury caused by other factors. The fact that the USITC used language that would conform with its domestic statute should not, the United States claims, detract from the fact that in substance it was doing what the Safeguards Agreement requires.

5.23 Such an argument could have plausibility only if the actual words of the USITC are completely ignored; indeed, the USITC’s words have to be taken to mean precisely the opposite of what the USITC said. As New Zealand pointed out in its Oral Statement to the Panel, the USITC found that the termination of subsidies under the Wool Act was a cause; it found that competition from other meats was a cause; it found the lack of an effective marketing programme a cause; and it found that concentration in the packer segment was a cause.¹⁴⁴ It is too late for the United States now to claim that the USITC did not mean what it said.

5.24 Nor is the United States view consistent with the adjustment assistance package recommended by the USITC and that implemented by the President. Both of these included components to address the other causes of difficulties facing the domestic industry, including the lack of promotion and marketing, and lack of demand for lamb meat compared to other meats, which the United States now claims were *not* factors affecting the domestic industry.¹⁴⁵ The attempt by the United States in its responses to questions of the Panel to now claim that it is the “content of the USITC Report as a whole” rather than the actual words used which should be determinative¹⁴⁶, does not detract from the fact that the adjustment assistance package was implemented to address a factor

¹⁴² USITC Report, I-25 and I-26.

¹⁴³ USITC Report, I-26.

¹⁴⁴ New Zealand Oral Statement at the First Panel Hearing, paras 53 and 54.

¹⁴⁵ USDA “Domestic Adjustment Assistance Package”, December 1999 and related press articles, attached as Annex NZ-19.

¹⁴⁶ United States Responses to Questions by the Panel, para 86.

that the USITC said was not “a more important cause” of threat of serious injury than increased imports.¹⁴⁷

5.25 If the USITC really had eliminated all these factors as causes of a threat of serious injury as the United States now claims, on what basis was there any threat of serious injury within the meaning of Article 4.1(b) left?

5.26 Throughout its arguments the United States seeks to avoid content being given to the obligation to ensure that any threat of serious injury is caused by increased imports. In its response to the Panel’s questions, the United States challenges the idea of “precision in the evaluation of causal factors.”¹⁴⁸ Yet, as New Zealand pointed out in its Oral Statement to the Panel, and in the economic analysis it attached to that statement¹⁴⁹, a proper assessment and analysis *is* possible. It is possible through the use of simple economic analysis for distinctions to be made between injury caused by domestic factors and injury caused by increased imports. The USITC failed to employ any such analysis and thus it did not demonstrate the causal link between increased imports and the threat of serious injury that it claimed existed.

5.27 As a result, the United States has not made a determination in accordance with the terms of the Safeguards Agreement that a threat of serious injury has been caused by increased imports.

VI. NECESSITY

6.1 In its First Written Submission, New Zealand pointed out that the safeguard measure imposed by the United States was not applied to the extent “necessary” to prevent serious injury, nor to the extent “necessary” to facilitate adjustment, contrary to the obligations set out in Article 5.1 of the Safeguards Agreement.¹⁵⁰ In addition, the United States had not published any findings or reasoned conclusions on the matter and hence was in violation of Article 3.1 of the Safeguards Agreement.¹⁵¹

6.2 New Zealand argued in its First Written Submission that the obligation under Article 5.1 of the Safeguards Agreement to apply a measure “only to the extent necessary to prevent or remedy serious injury or to facilitate adjustment” is an obligation to choose the least trade restrictive measure that will achieve those objectives.¹⁵² The United States objected to this formulation, arguing in its First Written Submission that there is no basis for a “least trade restrictive” test in the context of Article 5.1 of the Safeguards Agreement.¹⁵³ This does not equate with what the United States Trade Representative, Charlene Barshefsky, told a Congressional Committee in June 1999, that in determining the safeguard remedy to be applied to imports of lamb meat, the United States was “weighing what we believe ... the most appropriate and least trade-restricting remedy would be.”¹⁵⁴ However, the United States does concede that in determining whether a measure complies with Article 5.1, it is necessary to determine whether the measure “in its totality, is more trade restrictive than required both to prevent serious injury from occurring and to assist the industry in adjusting to import competition.”¹⁵⁵

6.3 In New Zealand’s view, in the context of Article 5.1, a “least trade restrictive” test and a “no more restrictive of trade than required” test amount essentially to the same thing. The requirement in

¹⁴⁷ USITC Report, I-26.

¹⁴⁸ United States Responses to Questions by the Panel, para 90.

¹⁴⁹ Attached to New Zealand’s Oral Statement at the First Panel Hearing as Annex NZ-13.

¹⁵⁰ New Zealand’s First Written Submission, paras 7.97 to 7.109.

¹⁵¹ New Zealand’s First Written Submission, paras 7.110 and 7.111.

¹⁵² New Zealand’s First Written Submission, paras 7.98 to 7.101.

¹⁵³ United States First Written Submission, para 191.

¹⁵⁴ Transcript of House Agriculture Committee, 23 June 1999, attached as Annex NZ-20.

¹⁵⁵ United States First Written Submission, para 210.

Article 5.1 that a measure be applied only to the extent necessary to achieve the goals of that provision is a requirement that there must be some degree of proportionality between ends and means. The measure must be applied in a manner that will allow it to achieve the objectives of preventing or remedying serious injury and facilitating adjustment, but the limitation that it must be applied only to “the extent necessary” must have some substantive content. In the context of an agreement concerned with restrictions on trade for the purpose of preventing injury, that content can be discovered only by reference to the extent of the trade restrictiveness of the measure.

6.4 In other words, Article 5.1 requires some degree of proportionality between the end of preventing serious injury and facilitating adjustment and the trade restrictive means of achieving that goal. It places a limit on the trade restrictiveness of the measure that can be adopted. A measure that was more trade restrictive than necessary to achieve the goal of preventing serious injury or facilitating adjustment would undoubtedly not be a measure that was being applied only to the extent necessary to prevent serious injury or facilitate adjustment. In that sense, what is required is a measure that is the least trade restrictive of those measures that will achieve the objective.

6.5 Thus, whether the Article 5.1 requirement is expressed in terms of “least trade restrictive” or “no more restrictive of trade than required” or more generally as a requirement of proportionality, the end result is the same. In the present case, the measure chosen by the United States met none of these formulations.

6.6 In its response to the Panel’s questions, the United States seeks to avoid responsibility for demonstrating that the measure chosen by the United States meets the requirements of Article 5.1 by asserting that the burden rests with New Zealand to establish a *prima facie* case that Article 5.1 has been complied with.¹⁵⁶ However, New Zealand has discharged that burden. It has demonstrated that the remedy chosen by the United States is more trade restrictive than necessary to achieve the goal of preventing serious injury since the United States had available the less trade restrictive alternative proposed by the plurality of the USITC. However, the United States seeks to avoid the consequences of this argument by asserting that it cannot be assumed that the USITC proposed remedy “would be sufficient to prevent serious injury and facilitate adjustment.”¹⁵⁷ The plurality recommendation, the United States claims “should not be presumptively regarded as adequate.”¹⁵⁸

6.7 By this ingenious argument, the United States is seeking to place New Zealand and the Panel on the horns of a dilemma. On the one hand, the United States claims that the Panel cannot engage in a *de novo* review of the USITC’s investigation. On the other hand, it says that the Panel cannot presume that the USITC has met its obligation to propose a remedy that would be effective to prevent serious injury and facilitate adjustment. *Ergo*, New Zealand has not met the burden of proof of showing that the United States has not complied with its Article 5.1 obligations, and it cannot meet that burden as this would be an invitation to the Panel to engage in a *de novo* review.

6.8 In New Zealand’s view, the Panel should reject such sophistry. The USITC plurality proposed a remedy to prevent serious injury and to facilitate adjustment. According to the United States law this remedy finding is to be treated as the remedy finding of the USITC by the President.¹⁵⁹ The United States Administration adopted a different remedy. The Panel is entitled to compare those remedies. Thus, the United States must convince the Panel that the remedy chosen by the USITC does not meet the requirements of Article 5.1 to avoid a comparison being made between the Administration remedy and that recommended by the USITC for the purposes of determining whether the provisions of Article 5.1 have been complied with.

¹⁵⁶ United States Responses to Questions by the Panel, para 162.

¹⁵⁷ United States Responses to Questions by the Panel, para 111.

¹⁵⁸ United States Responses to Questions by the Panel, para 111.

¹⁵⁹ USITC Report, I-29.

6.9 The United States also seeks to argue that, in fact, the measure adopted by the United States was no more trade restrictive than that proposed by the USITC.¹⁶⁰ But close analysis shows that this is clearly incorrect. There are three levels of restrictions to be assessed in comparing the USITC recommended measure and the actual United States measure:¹⁶¹ quota levels, in-quota tariffs, and out-of-quota tariffs. The quota levels under both measures are roughly equivalent.¹⁶² The USITC recommended measure contained no in-quota tariff beyond the ordinary WTO bound rate of 0.8c per kg.¹⁶³ Accordingly, in-quota costs under the USITC recommended measure are 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 imposed¹⁶⁴, 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.

6.10 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.¹⁶⁵ The United States is patently 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.

6.11 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. Under the actual United States measure up to the quota level imposed estimated costs would be US\$7,125,000.¹⁶⁶ 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 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.

6.12 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 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 of the United States measure will be approximately US\$14.2 million more than the

¹⁶⁰ United States First Written Submission, paras 193 to 198, 201, and 202.

¹⁶¹ In assessing the relative restrictiveness of the measures the initial duration of the measures is irrelevant, as both the Safeguards Agreement and the United States legislation allow the extension of a measure up to a maximum duration of eight years.

¹⁶² Each measure allows for a small increase in the quota level after the first year of the measure.

¹⁶³ This is scheduled to drop to 0.7c per kg in 2001.

¹⁶⁴ Assuming that the measure had not been extended.

¹⁶⁵ United States First Written Submission, para 202.

¹⁶⁶ These estimated costs were calculated by computing the tariff that would be payable on imports at the quota level at a constant 1998 CIF price.

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.

6.13 In seeking to support the remedy it has chosen, the United States places great emphasis on the need to facilitate adjustment. Thus, in its response to questions from the Panel it argued that the remedy proposed by some of the Commissioners provided insufficient relief to facilitate adjustment.¹⁶⁷ In its First Written Submission, the United States objected to Australia and New Zealand's complaints about the remedy, claiming that the complainants wished "to leave the U.S. lamb industry in the deteriorated state in which the USITC found it."¹⁶⁸ By comparison, the remedy is designed to return the industry to profitability.¹⁶⁹

6.14 This focus away from preventing serious injury to facilitating adjustment is revealing. It emphasises that the problems facing the domestic industry are adjustment problems arising out of domestic factors, and not a response to a threat imposed by imports. Rather, controlling imports is the mechanism chosen for dealing with domestic adjustment problems.

6.15 In short, the failure of the United States in this case is to choose a remedy that is proportional to the alleged threat that has been found. Or, in other words, that is "applied only to the extent necessary to prevent serious injury and facilitate adjustment." Instead, the United States has sought to craft a remedy that will return the industry to profitability regardless of the nature of the threat. It seeks to improve the position of an industry that has not been found to be seriously injured. It is for that reason that the remedy does not limit itself to hold imports at the 1998 levels, the alleged level of the threat. Instead, the remedy has as its objective to recapture for the industry the losses it has suffered as a result of the removal of the Wool Act subsidies. And those losses are to be recaptured from imports of lamb meat. Indeed, in effect, what the United States is doing in this case is replacing a subsidy on wool with a tariff on imports of lamb meat.

VII. MFN

7.1 In its First Written Submission, New Zealand argued that the United States inclusion of the imports of certain countries in its injury determination, but its exclusion of those imports from the application of the safeguard measure, was contrary to its obligation under Article 2.2 of the Safeguards Agreement to apply a safeguard measure to imported products irrespective of source.¹⁷⁰ As a consequence, the United States was also in violation of its obligations under the GATT 1994.¹⁷¹ The United States response was that it was perfectly justified in failing to apply the measure to members of a free trade area, but that it did not in fact take the imports of Mexico, Canada and Israel into account in its determination of the threat of serious injury.¹⁷²

7.2 New Zealand does not take issue with the right of a member of a free trade area to exclude its free trade area partners from the application of safeguard measures. Indeed, New Zealand does so under its Closer Economic Relations Agreement with Australia. What New Zealand does object to is the *inclusion* of the products of a free trade area partner in making the injury determination and then the *exclusion* of those products from the application of the measure. The United States claims that the USITC did not do this. However, in doing so it cites the USITC's elimination of the imports of Canada and Israel from its causation analysis, and ignores the fact that those imports were included in the USITC's threat of serious injury determination.

¹⁶⁷ United States Responses to Questions by the Panel, para 126.

¹⁶⁸ United States First Written Submission, para 176.

¹⁶⁹ United States Responses to Questions by the Panel, para 134.

¹⁷⁰ New Zealand's First Written Submission, para 7.113.

¹⁷¹ New Zealand's First Written Submission, para 7.114.

¹⁷² United States First Written Submission, paras 247 and 254 to 257.

7.3 In short, the USITC did in this case precisely what the Appellate Body said in *Argentina – Footwear* should not be done. As the European Communities pointed out in its Oral Statement to the Panel, the “principle of parallelism” set out in *Argentina – Footwear* applies in this case as well. Imports that are included in a safeguards investigation for the purpose of determining serious injury or threat of serious injury must also be subjected to the safeguard measure that is ultimately adopted. In failing to do this, the United States is in violation of its obligations under Article 2.2 of the Safeguards Agreement and Article I of the GATT 1994.

VIII. CONCLUSION

8.1 New Zealand has established that the actions of the United States in imposing the safeguard measure on imports of lamb meat from New Zealand were not in accordance with the terms of the Safeguards Agreement or of the GATT 1994. The United States attempts to show that the USITC did in fact base its determination on the existence of unforeseen developments involves in effect writing the concept of unforeseen developments out of its WTO safeguards obligations. The United States definition of the “domestic industry” has no basis in WTO law and the United States attempts to establish that the USITC reached a reasoned determination that its domestic industry was threatened with serious injury constitute nothing more than a supposition that if imports increase the domestic industry will suffer. The United States did not demonstrate that any threat to its domestic industry was caused by imports. Furthermore, the United States attributed injury caused by other factors to increased imports, ignoring the obligation imposed by Article 4.2(b) of the Safeguards Agreement not to do this. Finally, the United States failed to apply a remedy only to the extent necessary to prevent serious injury and facilitate adjustment, and did not apply the remedy to all of the imports which allegedly contributed to the threat of serious injury facing its domestic industry.

8.2 There is a further issue that New Zealand wishes to advert to. In addition to the arguments the United States has made in an attempt to support the actions of the USITC, the United States argued in its Oral Statement to the Panel that if Members did not have confidence that they could take temporary action to assist their industries where import surges seriously injure or threaten to injure their domestic industries they would resort to “grey-area” measures, such as voluntary restraint arrangements.¹⁷³

8.3 But the real issue of confidence raised in this and in other WTO disputes is the confidence that all WTO Members should have that the rights and obligations provided for in the WTO Agreement will be effectively upheld, including through the mechanisms in place to call to account any Members who act inconsistently with such rights and obligations. Accordingly, the spectre the United States seeks to conjure up of unlawful “grey-area” measures being resorted to by Members whose desire to use safeguard measures that do not conform to their WTO obligations has been thwarted, should be ignored. The task of the Panel is clear. It is to apply the terms of the Safeguards Agreement in accordance with the well-established principles for the interpretation of the WTO agreements. The flexibility to which members are entitled in the imposition of safeguards is no more and no less than what is permitted under those agreements. Members are not entitled to have the agreements interpreted in a way that ignores the actual words used in order to validate approaches to safeguards that have existed traditionally in their laws and their practices. The fundamental integrity of the WTO safeguards system depends on Members complying with the obligations that they have agreed to under the Safeguards Agreement.

8.4 In light of the above, the United States is clearly in violation of its WTO obligations. Accordingly, New Zealand reaffirms its request to the Panel to recommend that the United States

¹⁷³ United States Oral Statement at the First Panel Hearing, paras 3 and 4.

bring its treatment of imports of lamb meat from New Zealand into conformity with its obligations under the Safeguards Agreement and the GATT 1994.

ANNEX 2-10

NEW ZEALAND'S ORAL STATEMENT AT SECOND PANEL HEARING

(26 July 2000)

1. In this Statement today, New Zealand will not attempt to repeat what we have said in our previous written and oral submissions to the Panel. Rather, we will set out the key issues before the Panel and identify where we see the differences between ourselves and the United States on these issues. In this way we hope we may focus the issues in dispute in order to assist the Panel in its deliberations.

2. Before dealing with the substantive issues, I would like to make several preliminary comments. The first relates to burden of proof. On several occasions in this case the United States has argued that New Zealand has failed to meet the burden of proof. As a matter of law, we do not believe that there is any disagreement on the question of burden of proof. The basic principle set out in the *Woolshirts*¹ case applies. The burden is on the complainants to establish a *prima facie* case. Once they have done so, it is then for the respondent to rebut that case.

3. Nor, in the present case, do we believe that there is any substantive issue at stake over the discharging of the burden of proof. New Zealand has established a *prima facie* case of the United States violation of its obligations under the Safeguards Agreement and under the GATT 1994. It is for the United States to rebut that case. Thus, in New Zealand's view there is no question for the Panel to resolve over the issue of burden of proof.

4. The second preliminary point I wish to make, Mr Chairman, relates to the interpretation of the Safeguards Agreement. A fundamental issue before the Panel in this case is whether the Safeguards Agreement is to be interpreted in accordance with the Vienna Convention on the Law of Treaties - that is, in accordance with the ordinary meaning of the words in their context and in the light of the object and purpose of the Agreement. Or, alternatively, should its provisions be interpreted in a way that ignores the terms of the Agreement but accords with practices adopted by one Member? This question is a pervasive one in the present case, arising in respect of many of the differences between New Zealand and the United States.

5. What the United States seeks to do in this case is to qualify the interpretation of the Safeguards Agreement by introducing subsequent practice and negotiating history in circumstances where the ordinary meaning of the words is clear. But, as the International Court of Justice has said, "If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter".² Equally, the United States in this case invites the Panel to ignore decisions of the Appellate Body and prior GATT jurisprudence. As New Zealand will point out in this Statement, none of this is justified.

6. In this case, the obligation on the Panel to interpret the terms of the Safeguards Agreement in accordance with the basic rules of interpretation set out in the Vienna Convention is qualified only by

¹ *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India* (WT/DS33/AB/R, 25 April 1997), pages 14 to 16.

² Advisory Opinion of 3 March 1950 on *Competence of the General Assembly for the Admission of a State to the United Nations* [1950] ICJ Reports p 4, at p 8. Quoted in the *Report of the International Law Commission on the Work of its Eighteenth Session*, Yearbook of the International Law Commission, 1966, vol II, p 221, attached to the United States Second Written Submission as US Exhibit 43.

what was said by the Appellate Body in *Argentina-Footwear*³ when it noted that a safeguard action is “extraordinary”. And, as the Appellate Body went on to say: “And when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account.”⁴ It is the Appellate Body’s ruling that is the appropriate guidepost for the interpretation of the Safeguards Agreement and not the claims of the United States, which would ignore both the ordinary meaning of the words and the object and purpose of the Agreement.

7. My third preliminary comment relates to the standard that must be met by a Member before applying a safeguard measure and the standard of review for a panel in reviewing a Member’s safeguard actions. In its Second Written Submission the United States claims that it has demonstrated that the findings and economic conclusions of the USITC were “carefully reasoned and amply articulated”.⁵ The standard of review for the Panel, as set out by the panel in *Korea - Dairy* is that:

“an objective assessment entails an examination of whether the [competent authority] had examined all facts in its possession ... (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 [Member’s] international obligations.”⁶

The USITC did not meet this standard. It did not examine all facts in its possession and it did not provide adequate and reasoned explanations of how the facts as a whole supported the determination made. The United States has attempted to construct reasoned conclusions for the USITC and to imply that analysis was done even though it was not. None of this alters the fact that the USITC did not do in this case what the panel in *Korea-Dairy* said must be done by a competent authority.

8. Throughout this case, the United States has sought to block proper review of the actions of the USITC by charges of *de novo* review. In its Second Written Submission the United States goes further and claims that “the fact that another finder of fact might reach a different conclusion does not establish that a country’s competent authority violated the Safeguards Agreement”.⁷ In making this statement, which expresses a concept similar to that contained in Article 17.6 of the Antidumping Agreement, the United States appears to be seeking to introduce into the Safeguards Agreement a standard of review that is unique to the Antidumping Agreement and which was not incorporated into the Safeguards Agreement. As the Appellate Body said in the *United States - Steel Products* case, the Article 17.6 standard applies only to the Antidumping Agreement and not to disputes arising under other covered agreements.⁸

9. Mr Chairman, in any challenge made to actions taken under the Safeguards Agreement, a panel has to be satisfied that the competent authority examined all the facts in its possession, undertook adequate analysis and provided reasoned conclusions of how the facts as a whole supported the determination made. A panel has to be able to undertake an investigation that will allow it to determine whether this has been done. It cannot be thwarted by claims of *de novo* review or spurious claims about the standard of review under the Safeguards Agreement.

³ *Argentina - Safeguards Measures on Imports of Footwear* (WT/DS121/AB/R, 14 December 1999), para 94.

⁴ Para 94.

⁵ United States Second Written Submission, para 1.

⁶ *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products* (WT/DS98/R, 21 June 1999), para 7.30.

⁷ United States Second Written Submission, para 31.

⁸ *United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (WT/DS138/AB/R, 10 May 2000), para 50.

10. My final preliminary point, Mr Chairman, is that the essence of this case is an attempt by the United States to find a scapegoat for economic declines in its live lamb and lamb meat industries. As the USITC recognised, these industries have been in a long-term decline, due to domestic market factors.⁹ They were then further affected by the removal of a considerable source of income that went to live lamb producers from subsidies under the Wool Act. That loss of income led to a significant number of producers leaving the industry with a resulting decline in production. A drop in domestic production had a flow-through effect. It meant a contraction in the supply to producers of lamb meat which obviously had a negative effect on their incomes. It also meant that unfulfilled domestic demand was taken up by imports and led to an increase in imports of lamb meat.

11. The fundamental issue in this case concerns the appropriate use of safeguard measures. Can a Member pass on to imports costs incurred by its domestic industry as a result of factors within its domestic market? Specifically, in this case, can a Member impose on imports the costs to the producers of live lambs resulting from the removal of the Wool Act subsidies? Or as we put it in our Second Written Submission, can the United States replace its subsidies on the production of wool with a tax on the importation of lamb meat?¹⁰ In this sense, as we have said, this case is about the integrity of the safeguards regime under the WTO agreements.¹¹

Unforeseen Developments

12. Mr Chairman, much has been said and written in this case about the issue of “unforeseen developments”, with the result that a simple and straightforward issue is becoming quite unnecessarily complicated. GATT Article XIX prefaches the right of a Member to take safeguard measures in the following way: “If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement...” and then goes on, products are being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury, then safeguard measures may be taken. Although the Safeguards Agreement makes no reference to “unforeseen developments”, the Appellate Body said in *Argentina - Footwear* that the existence of “unforeseen developments” was a “circumstance 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.”¹² The Appellate Body also made clear that it was for the competent authorities of the Member to make such a demonstration.¹³

13. The United States approach to this, as evidenced in its Second Written Submission, is to deny that there is any need to make a “finding” of the existence of unforeseen circumstances.¹⁴ In doing so, the United States appears to be making nothing more than the rather trivial point that there is a distinction between “finding” the existence of unforeseen developments and “demonstrating” the existence of unforeseen developments, which is what the Appellate Body has said must be done. If there is a point of substance here, it escapes us. For its part, New Zealand is quite happy with the Appellate Body’s formulation that the existence of unforeseen developments must be “demonstrated”. Hence, the United States arguments about the term “finding” simply have no point.

14. In demonstrating the existence of unforeseen developments, it is not necessary to show, in the words of the Appellate Body, that the developments be “unforeseeable” or “incapable of being foreseen or anticipated”.¹⁵ A Member does not have to prove that subjectively it could not have foreseen a given development occurring after it incurred obligations under the GATT 1994. Rather,

⁹ USITC Report, I-17.

¹⁰ New Zealand’s Second Written Submission, para 6.15.

¹¹ New Zealand’s Second Written Submission, para 8.3.

¹² Para 92 (emphasis in original).

¹³ Para 98.

¹⁴ United States Second Written Submission, paras 3 and 4.

¹⁵ *Argentina - Footwear*, para 91.

according to the Appellate Body, a Member has to demonstrate that the increased imports and the conditions under which they are imported are the result of unforeseen developments. In other words there has to be an *objective* demonstration that the developments were unforeseen or unexpected. Contrary to the United States claim that there is no need for any “finding”, this does not mean that the requirement of unforeseen developments need not be demonstrated.

15. The United States arguments also mask a more profound attack on the “unforeseen developments” requirement. In order to make this attack the United States finds it necessary to go into what it refers to as “subsequent practice” to aid in the interpretation of the requirement of “unforeseen developments”.¹⁶ However, when investigated, the subsequent practice on which the United States relies is practice before the conclusion of the WTO agreements, not really subsequent practice at all. Thus, it is not used in the way that subsequent practice is meant to be used, that is as explained by the International Law Commission, as *objective* evidence of the *understanding* of the parties as to the meaning of the treaty.¹⁷ Although the United States referred to this statement of the ILC in its Second Written Submission, it omitted the further discussion of the ILC which pointed to the use of subsequent practice to resolve ambiguities or to confirm a meaning.¹⁸ Nowhere did the ILC mandate the use of subsequent practice to contradict the ordinary meaning of words.

16. In any event, even on its own merits the “subsequent practice” referred to by the United States does not demonstrate what the United States claims. The alleged subsequent practice shows only that in making its notification of a safeguard measure, New Zealand did not make any reference to unforeseen developments.¹⁹ And, in any event, in the 1973 Note by the Secretariat cited by the United States in its Second Written Submission, the GATT Secretariat concludes in fact that unforeseen developments *must* be shown.²⁰

17. In fact, the arguments on “subsequent practice” made by the United States are nothing more than an attempt by the United States to contradict the decision of the Appellate Body in *Argentina-Footwear*. In short, the United States continues to fight a battle that it has already lost in the Appellate Body.

18. Two examples illustrate this. First, the United States refers to a statement by a United States negotiator of the ITO Charter and of the GATT 1947, who said: “Therefore, the reference to ‘unforeseen developments’ in GATT was meaningless as far as the United States obligations were concerned”.²¹ And second, the United States sums up its discussion of the requirement of unforeseen developments with the statement, “there is no reason to conclude that Article XIX should be interpreted in a manner today that would require an ‘unforeseen developments’ finding as a precondition for the imposition of a safeguard measure.”²²

19. Mr Chairman, in New Zealand’s view, these two statements by the United States effectively encapsulate the issue before the Panel on the question of unforeseen developments. Should the Panel do what the Appellate Body has stipulated and require that unforeseen developments be demonstrated in this case, or should it do what the United States wishes and make the requirement of unforeseen developments “meaningless as far as United States obligations are concerned”? In New Zealand’s view, the question answers itself.

¹⁶ United States Second Written Submission, paras 5 to 10.

¹⁷ *Report of the International Law Commission on the Work of its Eighteenth Session*, Yearbook of the International Law Commission, 1966, vol II, p 221, attached to the United States Second Written Submission as US Exhibit 43.

¹⁸ *Report of the International Law Commission on the Work of its Eighteenth Session*, Yearbook of the International Law Commission, 1966, vol II, p 222, attached as Annex NZ21.

¹⁹ United States Second Written Submission, paras 8 and 9.

²⁰ United States Second Written Submission, para 6.

²¹ United States Second Written Submission, para 10.

²² United States Second Written Submission, para 13.

20. As a fall-back position, the United States also argues that “unforeseen developments” can be found if one searches through the pages of the USITC Report and that it does not matter that the USITC did not demonstrate their existence.²³ As long as some unforeseen developments happen to be there, in the United States view, Article XIX has been complied with. But that is not what the Appellate Body said in *Argentina-Footwear*. It did not say that if a Panel can glean unforeseen circumstances from the facts before the competent authority of the Member taking the safeguard measure then Article XIX has been complied with, regardless of what the competent authority says or decides. The Appellate Body said that the existence of unforeseen circumstances must be *demonstrated*, and it made clear that it was for the competent authority to do that.²⁴

21. Indeed, the United States goes as far as saying that the USITC made “uncontested findings” on the existence of unforeseen developments, making all of its prior arguments about the lack of any legal requirement to make such findings irrelevant.²⁵ But, of course, those alleged findings are nothing more than findings about the existence of increased imports which the United States contorts in this case to be “uncontested findings” about “unforeseen developments”. As New Zealand has argued in earlier submissions, a finding of increased imports is a separate requirement from the demonstration of unforeseen developments.²⁶

22. The United States also argues that its contentions about the so-called unforeseen developments are not contested by New Zealand.²⁷ And, of course New Zealand does not contest that there were increased imports during the period of investigation. But to assert the existence of a factor that cannot in law constitute unforeseen developments, and then argue that the existence of unforeseen developments is not contested because that factor has not been denied is simply a pointless exercise. For the reasons set out in our Oral Statement at the First Panel Hearing and in our Second Written Submission, New Zealand contests the United States view that the alleged unforeseen developments can constitute unforeseen developments within the meaning of Article XIX of the GATT.²⁸ Thus, in its claims that facts have not been challenged, the United States has proved nothing.

23. On this aspect, then, there are two questions for the Panel. Can the failure of the competent authority to demonstrate the existence of unforeseen developments be remedied by the United States before this Panel by a reconstruction of the USITC’s report? And, if so, can a finding of increased imports be a substitute for a finding of unforeseen developments? As New Zealand has shown, the answer to both of these questions is “no”.

Domestic Industry

24. On the question of the “domestic industry” in this case, the issue is quite straightforward. Should the United States be required to apply the terms of the Safeguards Agreement in defining the domestic industry, or should it be permitted to adopt a definition of its own making, a definition which the United States itself admits it uses only in the case of agricultural products?²⁹ The United States would have the Panel write the words “continuous line of production” and “coincidence of economic interests” into the Safeguards Agreement. But there is no legal basis for doing so. The approach that the United States seeks to apply to the determination of domestic industry is one that

²³ United States First Written Submission, paras 50 to 60 and Second Written Submission, paras 14 to 19.

²⁴ *Argentina - Footwear*, paras 92 and 98.

²⁵ United States Second Written Submission, para 16.

²⁶ New Zealand’s Oral Statement at the First Panel Hearing, paras 19 and 20, and New Zealand’s Second Written Submission, para 2.11.

²⁷ United States Second Written Submission, paras 14 to 18.

²⁸ New Zealand’s Oral Statement at the First Panel Hearing, paras 19 and 20, and New Zealand’s Second Written Submission, para 2.11.

²⁹ United States Responses to Questions from the Panel, para 28.

has been consistently rejected by GATT panels. Furthermore, were we to resort to the United States approach of looking to the negotiating history, we would find a rejection of the idea that upstream and downstream producers be included in the concept of “domestic industry” for the purposes of the Safeguards Agreement.³⁰

25. Again, the United States seeks to bolster its position with *non sequiturs* and irrelevant arguments. New Zealand is said not to contest the factual basis of the United States argument relating to “continuous line of production” and “vertical integration” theories.³¹ But what is there to contest when there is simply no legal basis for asserting the relevance of these theories? As New Zealand has pointed out on several occasions, the terms of the Safeguards Agreement define the domestic industry by reference to the producers of like or directly competitive products.³² Growers and feeders produce live lambs, packers and breakers produce lamb meat. Live lambs and lamb meat are not like or directly competitive products. The United States does not even seek to deny that. Nor does it attempt to show that its approach to the determination of the domestic industry in the case of agricultural products fits within the terms of the Safeguards Agreement. In fact, the strongest argument it makes is that such an interpretation may be “permitted” by the Agreement.³³ However, it never tries to reconcile its approach with the actual terms of the Safeguards Agreement.

26. Furthermore, in its Second Written Submission, the United States overstates what New Zealand does not contest. For example, the United States says that New Zealand does not allege that there is no “vertical integration” throughout the four segments of the industry.³⁴ However, the United States argument on vertical integration shows linkages between growers and feeders and linkages between packers and breakers. Except for isolated examples, it does not show any integration between the producers of live lambs, that is, growers and feeders, and the producers of lamb meat, that is, packers and breakers - the two industries that the USITC has improperly linked in this case.

27. In short, there is simply no basis under the Safeguards Agreement on which the United States approach to the determination of domestic industry in this case can be upheld.

Threat of Serious Injury

28. Mr Chairman, it is important to remember that this is a case about threat of serious injury and not about serious injury itself. The error of the USITC was that it investigated the question of the existence of serious injury, then, having failed to find actual serious injury, it assumed that there must be a threat of serious injury. In that way it ignored Article 4.1(b) of the Safeguards Agreement, which provides that a threat determination must be based on serious injury that is *clearly imminent*, and that the determination must be based on facts and not on allegation, conjecture or remote possibility.

29. The substance of the United States argument on threat of serious injury is that an increase in imports at a time when the domestic industry was in decline meant that there was a threat of serious injury. In short, both the threat determination and the causation determination of the USITC were based on an assumption about causation.

30. This is illustrated in a number of ways. In seeking to support the USITC’s conclusions on threat, the United States focuses its analysis, in a way the USITC did not do, on the period 1997 and

³⁰ *Negotiating Group on Safeguards, Synopsis of Proposals, Note by the Secretariat*, MTN.GNG/NG9/W/21 (31 October 1998), Heading C, para 19.

³¹ United States Second Written Submission, para 22.

³² New Zealand’s First Written Submission, para 7.41 and New Zealand’s Second Written Submission, paras 3.1 to 3.12.

³³ United States First Written Submission, para 70.

³⁴ United States Second Written Submission, para 23.

interim 1998. But there was nothing remarkable about that period as far as the domestic industry was concerned. What the United States focuses on during that period was an increase in imports (although, as New Zealand has pointed out, the increase was not as significant as the United States claims),³⁵ and a decline in prices. This increase in imports becomes the basis for the United States argument that there was a threat of serious injury. But that, of course, assumes what had to be proved in respect of both the serious injury and the causation determinations - that there was a relationship between imports and domestic price declines, that an increase in imports would cause serious injury, and that such injury was clearly imminent.

31. The United States conflation of threat and causation is also evident in its discussion of Annex NZ13 attached to New Zealand's First Oral Statement. That annex showed that, contrary to the claims of the United States, economic analysis could be used to distinguish injury caused by domestic factors from injury caused by increased imports. The United States claims that the annex "fails as a challenge to the USITC's threat of injury determination".³⁶ But, of course, it was not introduced as a challenge to the USITC's threat of injury determination. The United States sees it as such a challenge because it does not distinguish causation from threat. Moreover, the United States linking of the analysis in Annex NZ13 with its arguments on the threat of serious injury is an implicit admission by the United States that if the USITC's assumption about causation cannot stand, then its conclusion on threat falls to the ground as well. That is, the USITC's determination on threat is based on nothing more than an assumption about causation.

32. I would like to make one additional comment at this stage. The United States objects to New Zealand's characterisation in Annex NZ13 and elsewhere that what occurred was nothing more than a normal fluctuation in agricultural trade, claiming that New Zealand is seeking to make safeguard measures unavailable for agricultural products.³⁷ That, of course, is not correct. But consider the implications of the United States claim. If a one-year period is sufficient to determine a trend on which to base a threat determination, then an industry which over a five-year period has experienced a strong positive price trend could have a safeguard measure imposed simply because of a short-term price drop in the sixth year. That cannot be the purpose of the safeguards disciplines under the WTO.

33. Mr Chairman, turning to the specific arguments made on the question of threat, the Panel is confronted with two quite separate views of what occurred in this case. On the one hand, you have the picture the United States paints of a "surge" in imports in 1997 and interim 1998 at the same time as a drop in domestic prices for lamb meat. According to this view, lamb meat consumption was stable in 1997 and interim 1998 and imported lamb meat, through increases in fresh and chilled product and its larger size, increasingly competed with domestic production. Under this theory, a continuation of imports at prices lower than domestic prices would lead to further depressed prices. On this basis, the United States claims that it can justify the USITC's determination of threat.

34. On the other hand, New Zealand has shown that what in fact occurred was quite different. The termination of the Wool Act payments led to a contraction in the supply of lamb meat and an increase in domestic prices; the lower supply encouraged imports onto the market; much of these imports went to supply new demand or went to meet latent demand in the market; there was little direct competition between domestic and imported product; the drop in domestic prices in 1997 and interim 1998 occurred as a result of the drop in prices in competing meats; domestic prices rose again in the last three months of the period of investigation at a time of higher imports; and consumption increased at the same time, absorbing the rise in imports.

³⁵ New Zealand's Oral Statement at the First Panel Hearing, para 38.

³⁶ United States Second Written Submission, para 45.

³⁷ United States Second Written Submission, para 58.

35. How can two accounts, each based on the same investigation of a competent authority, be so different? The answer lies, as we have suggested before, in the USITC Report itself. It also lies in a comparison between what the USITC actually found and what the United States now, in an attempt to reinterpret the USITC's Report, has said that the USITC found. New Zealand has previously referred to the inconsistencies between the United States description of the USITC Report and what was actually said in that Report.³⁸ In addition, the USITC Report itself also contains inherent inconsistencies.

36. For example, the USITC found evidence of the larger size of imported product.³⁹ At the same time, it found evidence of differences between imported and domestic product,⁴⁰ including considerable differences in size.⁴¹ Which is correct? The facts set out in the USITC Report show that it is the latter. Similarly, the USITC stated that in 1997 imports displaced domestic product.⁴² It also said that many imports supplied new demand.⁴³ The evidence before the USITC points clearly to the second statement being correct. Let me take another example. The USITC said that consumption of lamb meat was stable after 1996.⁴⁴ However, it also said that the market was somewhat sensitive to price.⁴⁵ The drop in the competing price of other meats at the same time as the decline in lamb prices supports the latter statement. The USITC also referred to prices remaining "depressed" to the end of the period of investigation.⁴⁶ But in contrast, the information collected by the USITC shows that interim 1998 prices were higher than those at the beginning of the period of investigation.⁴⁷ Finally, the USITC said that imported prices for several of the products surveyed were 20 percent or more below comparable quarters in 1996 and early 1997,⁴⁸ which was used by the United States to justify its allegations of 20 percent underselling of domestic product by imported product.⁴⁹ However, the actual evidence points to meaningful comparisons being possible for only three of the eight products surveyed, and in one of those the domestic product actually oversold the imported product.⁵⁰

37. Faced with such differences, both within the USITC Report and between what the USITC actually found and what it is alleged by the United States to have found, the task of the Panel is to determine whether the competent authority came to reasoned conclusions based on the evidence before it. As the United States itself admits in its Second Written Submission, the question before the Panel is the *adequacy* of the USITC's determination as it was made at the time.⁵¹ The Panel should examine the analysis performed by the competent authority on the basis of the determinations made by that authority and on the basis of the evidence it has collected or should have collected.

³⁸ New Zealand's Oral Statement at the First Panel Hearing, paras 6 to 9.

³⁹ USITC Report, I-22.

⁴⁰ USITC Report, I-23.

⁴¹ USITC Report, II-8. See also II-37, where the increase in size of Australian imported product noted by the USITC is shown to be a rise of only 2 pounds in average carcass weight over a period of three years.

⁴² USITC Report, I-24.

⁴³ USITC Report, I-32. In addition, Table 5 at II-17 shows that in interim 1998 the increase in imports was matched by a slight rise in domestic shipments, suggesting that there was no displacement of domestic product by imports.

⁴⁴ USITC Report, I-22.

⁴⁵ USITC Report, I-22.

⁴⁶ USITC Report, I-20.

⁴⁷ USITC Report, II-55. The USITC also noted that interim 1998 prices were above the average for the full period of investigation.

⁴⁸ USITC Report, I-20. The footnote to this statement refers to frozen product categories and carcasses for which there are very limited domestic sales.

⁴⁹ United States First Written Submission, para 87.

⁵⁰ United States Exhibit 41, Tables 38 to 43, attached to the United States Responses to Questions from the Panel.

⁵¹ United States Second Written Submission, para 48.

38. Such an examination will show that if a short period of just over one year was used in order to determine that a threat of serious injury was clearly imminent, then no proper analysis of threat could have been undertaken. A determination of a threat of serious injury depends upon a prediction of future trends based on an analysis of past trends. There has to be an *analysis* of past trends, and not just a “snap-shot” of what occurred on a particular occasion. The United States tries to justify its approach on the basis of the Appellate Body’s focus in *Argentina-Footwear* on the most recent period.⁵² But, of course, *Argentina-Footwear* was a case involving actual serious injury, and looking at the most recent period is appropriate if the enquiry is to determine whether the industry in question is suffering actual injury. But, how can one predict what will happen in the future on the basis of only a brief period in the past? Analysis of trends over a representative period *is* a basis for determining what will happen in the future. Glancing at a brief occurrence is not.

39. In addition, even during that short unrepresentative period on which the United States now focuses, nothing happened that did not happen during the longer period of investigation. Prices had risen and fallen during the period of investigation, and they had risen in the beginning of 1997 and then fallen again during the course of that year. Imports had increased during the period of investigation, and they had increased in 1997 and 1998. What the United States seeks to do is to make an assumption that that increase in imports was linked to the falling prices. The United States determination of threat is, therefore, a determination based on an assumption of causation, that is, an assumption that if imports continued to increase, there would be serious injury. As New Zealand has said, a safeguard determination must be based on a threat of serious injury, not on a threat of increased imports.⁵³

40. The United States approach illustrates precisely why it is a mistake to base future prediction on short-term occurrences rather than on longer-term trends. The assumption of a relationship between the fall in prices in 1997 and an increase in imports ignores the fact that prior to 1997 there had been a fall in domestic production due to growers, who had been rendered uneconomic as a result of the loss of the wool subsidy, leaving the industry. Imports increased in response to a resulting unfulfilled domestic demand. At the same time growers remaining in the industry needed increased prices in order to try to recoup losses resulting from the termination of the Wool Act subsidy. But by mid-1997, given the downward trend in competing meat prices, a correction had to take place and consequently lamb prices fell.

41. Thus, by focusing only on the period from mid-1997 and in interim 1998, the United States is able to make assumptions that are unwarranted and to reach conclusions about causation and threat that are neither reasoned nor founded on analysis. The “snap-shot” approach to determining threat advocated by the United States is totally at variance with the requirement of the Safeguards Agreement that threat determinations are not to be based on conjecture or remote possibility.

42. The new United States argument that a determination of threat can be made on the basis of packers and breakers alone also cannot be sustained.⁵⁴ The United States cannot justify a decision of its competent authority on a basis that was not even considered by that competent authority. Nor can it seek to support a decision of the competent authority on the basis of claims that are contrary to the facts as found by that authority. As New Zealand demonstrated in its Second Written Submission, the facts before the USITC showed that far from being faced with a clearly imminent threat of serious injury, packers and breakers saw improved economic conditions over the period of investigation.⁵⁵ There is simply nothing to this rather desperate attempt by the United States to support the decision of the USITC on threat of serious injury.

⁵² United States Second Written Submission, para 32.

⁵³ New Zealand’s Second Written Submission, para 4.2.

⁵⁴ United States Oral Statement at the First Panel Hearing, para 16.

⁵⁵ New Zealand’s Second Written Submission, paras 4.20 to 4.26.

43. Thus, Mr Chairman, the issue before the Panel on the question of threat of serious injury is whether the competent authority of a Member is required to make a determination of the existence of a threat of serious injury on the basis of facts and on a reasoned determination that significant overall impairment is clearly imminent as required by Article 4.1(b) of the Safeguards Agreement, or whether it is entitled to base such a determination on a “snap-shot” of events and to conclude that serious injury is threatened on the basis of an assumption of causation. Again, in New Zealand’s view, the answer is clear.

Causation

44. Mr Chairman, as in the case of the issue of “unforeseen developments”, the question of causation is becoming mired in obfuscation. The words of the Safeguards Agreement on causation are clear. They revolve around two propositions. First, a safeguard measure can be applied only if the alleged threat of serious injury was caused by imports.⁵⁶ Second, where factors other than increased imports are causing injury to the industry in question, that injury shall not be attributed to increased imports.⁵⁷ There is a simple corollary from these two propositions. If, when the threat of injury from these other factors is excluded, there is no threat of serious injury, then there is no threat of serious injury to attribute to imports. In those circumstances, there is no basis for taking a safeguard measure.

45. The United States seeks to avoid the consequences of these propositions in a number of ways. For example, it embarks on an excursus into the concept of “sole cause”.⁵⁸ But its argument on this point is simply irrelevant. Of course there can be many causes of injury or of threat. Article 4.2(b) itself recognises that. But that does not justify attributing to increased imports the injury or threat caused by other factors. Article 4.2(b) specifically proscribes that. A competent authority cannot attribute serious injury to increased imports where increased imports cause only injury, but increased imports together with other factors cause serious injury.

46. Equally, the United States theory of the prohibition of “import isolation”, to the extent that it has any meaning at all, seems to suggest that it is permissible to attribute to increased imports injury caused by other factors.⁵⁹ However, this is clearly not correct.

47. In its Second Written Submission, the United States has sought to support its position by extensive reference to the negotiating history of the Safeguards Agreement.⁶⁰ However, this is a curious use of negotiating history. Article 32 of the Vienna Convention on the Law of Treaties permits recourse to negotiating history as a supplementary means of interpretation in order to confirm a meaning already reached by the application of the basic rule of interpretation set out in Article 31 or where there is ambiguity. As the International Court of Justice has said: “there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself.”⁶¹ The United States has not argued that there is any ambiguity, thus its recourse to negotiating history must be to confirm an existing meaning. But that is not what the United States is doing at all. Rather, the United States is seeking to use negotiating history to contradict the ordinary meaning of the words of the Safeguards Agreement. This is exactly what Article 32 of the Vienna Convention on the Law of Treaties does not permit.

⁵⁶ Safeguards Agreement, Article 2.1.

⁵⁷ Safeguards Agreement, Article 4.2(b).

⁵⁸ United States Second Written Submission, paras 63 to 86.

⁵⁹ United States Second Written Submission, paras 87 to 89.

⁶⁰ United States Second Written Submission, paras 64 to 80.

⁶¹ Advisory Opinion of 28 May 1948 on *Admission of a State to the United Nations* [1948] ICJ Reports, p 57 at p 63. Quoted in the *Report of the International Law Commission on the Work of its Eighteenth Session*, Yearbook of the International Law Commission, 1966, vol II, p 223, attached as Annex NZ21.

48. In any event, in its setting out of the negotiating history of the Safeguards Agreement, at most the United States has succeeded in showing that there were varying views amongst the negotiators as to the meaning of the words they were using. That is to be expected, and it is precisely why a treaty interpreter is required by the Vienna Convention to search for intent in the words finally used in the treaty and not to seek intent from the expressions of differing motives and intent of the parties during their negotiations. The United States arguments in this case demonstrate the wisdom of that rule. Moreover, it is an irony of the United States reference to the negotiating history in respect of the test for causation that the one thing that does become clear from that history and from the final text agreed on is that, having been discussed and considered, the “substantial cause” test advocated by the United States in this case, was rejected by the Safeguards Negotiating Group.⁶²

49. Throughout its arguments about “sole cause” and “import isolation”, and its recourse to negotiating history, the United States leaves one thing completely obscure. That is, what is the meaning of the second sentence of Article 4.2(b)? In its First Written Submission, the United States came close to admitting that the sentence means precisely what it says – in other words, its ordinary meaning. It said that the second sentence of Article 4.2(b) “instructs Members not to blame increased imports for any injury caused by other factors.”⁶³ In its Second Written Submission, the United States again leans towards this approach, stating that the sentence “requires Members to ensure that they distinguish between different causes of injury rather than simply making the assumption that increased imports are responsible for all of the injury that the industry has experienced.”⁶⁴ We agree.

50. However, as if it then realised the implications of this statement, the United States restated its position in a way that bears no relationship to what was just said and appears even to contradict it. “Stated otherwise,” the United States says, “the second sentence instructs Members that they should not jump from the establishment of the ‘causal link’ between increased imports and serious injury to the conclusion that the sole source of the industry’s injury is attributable to those imports.”⁶⁵ But, Mr Chairman, if increased imports have in themselves caused serious injury, it does not matter whether there are other causes as well. In those circumstances, the admonition that the United States reads into the second sentence of Article 4.2(b), not to jump from a conclusion of causation to a conclusion of sole causation, is simply meaningless. And if that is all that the second sentence of Article 4.2(b) means, then the United States has effectively written it out of the Safeguards Agreement.

51. At the end of the day, the United States cannot escape from the simple, ordinary, literal meaning of the second sentence of Article 4.2(b). In determining whether the threat of serious injury that it had found was attributable to increased imports, the United States could not attribute to increased imports injury caused by other factors. However, that is exactly what the USITC did. It determined that its domestic industry was being threatened with injury from a variety of factors. Collectively, this amounted, in the USITC’s view, to a threat of serious injury. And, since none of the factors causing the threat of injury was a greater cause than increased imports, then the collective serious injury was attributed by the USITC to increased imports. As a result, a determination of causation was made by attributing to increased imports injury caused by other factors – which is precisely what the second sentence of Article 4.2(b) says cannot be done.

52. Mr Chairman, I would now like to turn very briefly to Annex NZ13.⁶⁶ The United States has raised a number of objections about its admissibility. They argue that it constitutes an invitation to undertake a *de novo* review.⁶⁷ They argue that it would be admissible only if it had been originally

⁶² As illustrated by the *Negotiating Group on Safeguards, Draft Text*, MTN.GNG/NG9/W/25/Rev.3, 31 October 1990.

⁶³ United States First Written Submission, para 119.

⁶⁴ United States Second Written Submission, para 79.

⁶⁵ United States Second Written Submission, para 79.

⁶⁶ Attached to New Zealand’s Oral Statement at the First Panel Hearing.

⁶⁷ United States Second Written Submission, para 79.

placed before the USITC.⁶⁸ But these United States arguments avoid the issue. Annex NZ13 was not presented as evidence of how the USITC should have decided the case. It was not presented in order to invite the Panel to engage in a *de novo* review. It was presented in response to the contention of the United States that causation could not be demonstrated with any degree of precision - that in a sense, causation can be nothing more than an impressionistic response to circumstances by experienced Commissioners on the USITC.

53. Annex NZ13 shows that the question of whether injury or threat is caused by increased imports or by domestic factors *is* capable of being determined on the basis of objective analysis – that it is possible to demonstrate the causal link between increased imports and the threat of serious injury on the basis of objective evidence as Article 4.2(b) of the Safeguards Agreement requires. Equally, Annex NZ13 shows that it is possible to determine when factors other than increased imports cause the threat of serious injury in question. The United States objections to Annex NZ13 do not deny that point.

54. Moreover, all of the United States arguments criticising Annex NZ13 fail to undermine its essential point. That is, in order to be able to argue that serious injury threatening lamb meat producers was caused by imports, it would have to be shown that domestic prices on the United States market were declining and that they were being forced down by lower-priced imports. This was not shown by the USITC, nor could it be.

55. Furthermore, the basic conclusion of Annex NZ13 would not have altered had there been a breakdown between frozen and chilled lamb meat as the United States alleges.⁶⁹ The price of frozen lamb meat increased significantly over the period 1993 to 1998.⁷⁰ Thus the increase in the aggregate price of imports was not just the result of the increase in the proportion of chilled lamb meat as the United States would have the Panel believe.⁷¹

56. Therefore, in relation to causation, Mr Chairman, the issue for the Panel is whether the second sentence of Article 4.2(b), which requires that injury caused by other factors not be attributed to increased imports, should be given any content. New Zealand has demonstrated not only that the ordinary meaning of the second sentence of Article 4.2(b) provides that content, but also that the distinctions required by the application of that provision can be drawn. The United States, by contrast, wishes to have the freedom to attribute to increased imports injury that is caused by other factors, and in doing so, to deny any content to Article 4.2(b). Such an approach cannot be justified under the Safeguards Agreement.

Necessity

57. Mr Chairman, the essential question in respect of Article 5.1 of the Safeguards Agreement is: what is the nature of the obligation that is cast upon a Member in applying a safeguard measure? Article 5.1 provides that the measure is to be applied “only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment”. New Zealand has argued this means that in choosing a remedy, a Member must choose one that is proportionate to the objective sought to be achieved; it must be the least trade restrictive of those remedies that are capable of achieving the objectives of preventing serious injury and facilitating adjustment. And, since the plurality of the USITC Commissioners proposed a remedy that is less trade restrictive than that applied by the United States Administration, then it is incumbent on the United States to explain why it is not in violation of Article 5.1.

⁶⁸ United States Second Written Submission, paras 46, 51 and 52.

⁶⁹ United States Second Written Submission, paras 53 to 56.

⁷⁰ Meat and Livestock Australia’s Pre-injury Hearing Submission, Exhibits 8 and 12, attached to the Australian First Written Submission as Exhibit AUS-28.

⁷¹ United States Second Written Submission, para 55.

58. The United States continues to challenge the use of the term “least trade restrictive”.⁷² Apparently the representatives of the United States in this case have not had the opportunity to speak with the United States Trade Representative who, as we pointed out in our Second Written Submission, agrees that the objective in choosing a safeguard measure is to choose the measure that is least trade restrictive.⁷³

59. Nor do the United States arguments based on the interpretative provisions of the Vienna Convention afford it any support. It claims that words are being imported from other areas,⁷⁴ and ignores that the interpretative function is to give meaning to the words in the treaty. For this is precisely where the United States arguments fall down. It objects to the New Zealand interpretation of Article 5.1, but fails to offer any alternative interpretation of that provision. What obligation, according to the United States, does Article 5.1 impose on a Member in taking a safeguard measure?

60. The United States comes close to offering its views on Article 5.1 when it says that the provision “calls for an examination of whether the measure a Member has chosen to apply is appropriately gauged to the specific injury and causation findings that the competent authorities have made”.⁷⁵ But this leaves the central question unanswered. How does one determine whether a measure is “appropriately gauged”? Rather than throwing light on the issue, the United States approach simply turns the enquiry right back to the debate over the meaning of “only to the extent necessary”.

61. Some impression of the real approach of the United States can be gleaned from its criticisms of New Zealand’s views in its Second Written Submission.⁷⁶ It says of its characterisation of the New Zealand approach that “That degree of scientific perfection is simply unachievable”, and goes on to say that “identifying an appropriate safeguard measure is an inherently uncertain enterprise.”⁷⁷ In these two statements, the United States reveals an approach that is found in its arguments on other aspects of this case: there cannot be disciplines placed on Members taking safeguard measures - the whole area is to be left to the subjectivities of each Member. In effect, Article 5.1 should not be given any content.

62. In this regard, the United States arguments on burden of proof are simply a smokescreen to cover the fact that the United States wishes to avoid articulating a standard under Article 5.1 and showing how it meets that standard. It posits a burden that could never be met. And, of course, it does so in order to prevent any comparison being made between the USITC plurality recommendation and the measure that the Administration adopted, because it cannot demonstrate that its chosen measure is applied only to the extent necessary to prevent serious injury and to facilitate adjustment. As New Zealand has pointed out, in many respects that measure goes well beyond the prevention of any threat or the facilitation of any necessary adjustment.

63. To this end, the United States resorts to arguments such as claiming that a three year measure is *ipso facto* less trade restrictive than a four year measure *regardless of the content of that measure*.⁷⁸ That simply does not make sense. It is rivalled only by the claim that a 40 per cent out of quota tariff is equivalent to a 20 per cent out of quota tariff!⁷⁹ These, Mr Chairman, are the arguments of the desperate. Furthermore, an analysis of the United States past safeguard practice reveals that 80 per

⁷² United States Second Written Submission, paras 98 to 101.

⁷³ New Zealand’s Second Written Submission, para 6.2.

⁷⁴ United States Second Written Submission, para 100.

⁷⁵ United States Second Written Submission, para 110.

⁷⁶ United States Second Written Submission, paras 102 to 110.

⁷⁷ United States Second Written Submission, para 105.

⁷⁸ United States Second Written Submission, fn 90.

⁷⁹ United States Second Written Submission, fn 90.

cent of United States safeguard measures were for a duration of four years or more.⁸⁰ This makes a nonsense of United States arguments that the likelihood of the safeguard in this case being extended “is conjectural at best”.⁸¹

64. New Zealand has clearly demonstrated that the measure adopted by the United States does not meet the requirements of Article 5.1. First, no serious injury was found at existing levels of imports, yet the in and out of quota tariff rates were set at levels designed to *reduce* imports to levels below those in 1998. Thus, the measure was applied to an extent greater than necessary to prevent a threat of serious injury. It was, as the United States itself claims, designed to *improve* the position of the domestic industry.⁸² It was not designed to *prevent* serious injury to that industry. Second, in its causation findings, the USITC found other factors to be causing injury and the measure imposed addresses these elements of the USITC’s findings. Indeed, specific measures were adopted to address these other causation factors. Clearly, therefore, the safeguard measure adopted by the United States goes beyond the extent necessary to prevent the serious injury or facilitate adjustment resulting from the threat of serious injury attributable to increased imports.

MFN

65. Mr Chairman, the issue surrounding the United States violation of Article I of the GATT 1994 and Article 2.2 of the Safeguards Agreement is quite simple. The USITC included the imports of certain countries, notably Canada, Mexico and Israel, in its determination of threat, but excluded the imports of those countries from the application of its safeguard measure.

66. In its First Written Submission, the United States sought to argue that this had not occurred.⁸³ In its Second Written Submission the United States appeared to concede that it had occurred and argued that it was entitled, indeed obliged, to do this.⁸⁴ Neither argument can be sustained. What the United States is seeking to do in this case is have the Panel incorporate a special causation rule into the Safeguards Agreement for dealing with free trade areas. However, the principle of “parallelism” set out in *Argentina-Footwear* stands in the way of the United States arguments in this case.⁸⁵ In New Zealand’s view the *Argentina-Footwear* principle clearly applies.

Conclusion

67. By way of conclusion, Mr Chairman, I would like to make the following brief comments. In this case the Panel is faced with a stark choice. Should it apply the provisions of the Safeguards Agreement and the GATT 1994 in accordance with their terms, or should it rewrite the relevant provisions of those agreements along the lines advocated by the United States? In New Zealand’s view, to follow the United States approach would be wrong both as a matter of policy and as a matter of legal interpretation.

68. As a matter of policy, what the United States is essentially advocating is that little more than a one year price drop for a given agricultural product should be sufficient to take safeguard action. If that is so, then a large part of world agricultural trade could time and again be blocked by safeguard measures. Clearly, the option of using safeguards must be available for agricultural products. However, a determination of a threat of serious injury triggering safeguard action cannot result from

⁸⁰ *Guide to GATT Law and Practice*, (1995) vol I, pages 539 to 559 (Analytical Index). An examination of the Analytical Index discloses that the average length of time for United States safeguard measures is six years.

⁸¹ United States Second Written Submission, fn 90.

⁸² United States First Written Submission, para 175, 198, and 204.

⁸³ United States First Written Submission, paras 254 to 257.

⁸⁴ United States Second Written Submission, paras 118 to 123.

⁸⁵ *Argentina - Footwear*, para 113.

changes in market conditions that are no more than price fluctuations that are to be expected in agricultural trade. The Safeguards Agreement cannot be applied in a way that would obliterate any distinction between measures taken under the Safeguards Agreement and measures taken under the special safeguards provisions of the Agreement on Agriculture.

69. As a matter of policy, too, the causation requirement of the Safeguards Agreement cannot be applied so as to ignore any distinction between injury or threat caused by increased imports and injury or threat caused by domestic factors. Members cannot be permitted to place on imports the burden of economic decline due to domestic factors.

70. As a matter of legal interpretation, as we have shown, the United States arguments cannot be supported. They involve denuding the concept of "unforeseen developments" of any content; rewriting the concept of domestic industry to exclude the defining factor of "like or directly competitive products" and replacing it with concepts of "continuous line of production" and "coincidence of economic interests"; eliminating the requirement that a determination of a threat of serious injury be based on facts and not on allegation, conjecture or remote possibility; permitting the attribution to increased imports of injury caused by other factors; and eviscerating the requirement that a measure be applied only to the extent necessary to prevent injury and to facilitate adjustment of any procedural or substantive content. Finally, the United States is asking the Panel to provide a new rule for the application of safeguard measures to free trade areas.

71. In New Zealand's view, Mr Chairman, all of this has to be rejected.

72. I would like finally to reaffirm all of the arguments made by New Zealand in our earlier written and oral pleadings, and to respectfully request the Panel to find the United States in violation of its obligations under the Safeguards Agreement and the GATT 1994 and to recommend that the United States bring its treatment of imports of lamb meat from New Zealand into conformity with its obligations under those agreements.

ANNEX 3-1

LETTER FROM THE UNITED STATES REQUESTING PRELIMINARY RULINGS

(5 May 2000)

Pursuant to paragraph 13 of the Panel's Working Procedures, and having reviewed the submissions of Australia and New Zealand in the present dispute, the United States hereby requests preliminary rulings on the following issues.

A. Insufficiency of Panel Request

1. The panel requests of Australia and New Zealand were insufficient as a matter of law to satisfy the requirement of Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") that such requests "shall identify the specific measures at issue and provide a brief summary of the legal basis for the complaint sufficient to present the problem clearly." The complaining parties failed to provide any indication of the legal basis for their claims. Australia's panel request and corrigendum in document WT/DS178/4 and WT/DS178/4/Corr.1 merely provide one paragraph identifying the US safeguard measure on lamb, note that consultations took place, and state that:

Australia considers that the measure, and associated actions and decisions taken by the USA, are inconsistent with the obligations of the USA under the Agreement on Safeguards and GATT 1994, in particular:

Articles 2, 3, 4, 5, 8, 11, and 12 of the Agreement on Safeguards, and Articles I, II, and XIX of GATT 1994.

Similarly, in its panel request in document WT/DS177/4, New Zealand provides one paragraph identifying the US safeguard measure on lamb, states that

New Zealand considers that this measure is inconsistent with the obligations of the United States of America under the following provisions:

Articles 2, 3, 4, 5, 11 and 12 of the Agreement on Safeguards; and Articles I, II and XIX of the GATT 1994.

and then notes that consultations took place. Nothing in either of these panel requests provides any other information that would in itself further clarify exactly which of the obligations in these named articles is alleged to be infringed.

2. In the recent appellate proceeding on *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, the Appellate Body examined a panel request by the EC closely resembling the panel requests in the present dispute. The Appellate Body noted its earlier decision in the *Bananas* case that "it was sufficient for the Complainant Parties to list the provisions alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements." (*Bananas* at fn. 13, ¶141). However, the Appellate Body then clarified that in the *Bananas* case it first had restated the reasons why precision is necessary in a request for a panel; then had stressed that claims, not detailed arguments, are what need to be set out with sufficient clarity; and third, had found that the listing of articles in

that case satisfied the *minimum* requirements of the DSU, and the EC had not been misled as to what claims were in fact being asserted against it. (*Korea-Dairy*, ¶123).

3. The Appellate Body then noted that “[i]dentification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint claim is to be presented at all.” The Appellate Body went on to note that there would be circumstances where the “simple listing of the articles of the agreement or agreements involved” would be sufficient to meet the standard of *clarity* in the legal basis of the complaint, and there would be situations when such a listing would *not* satisfy the standard of Article 6.2, “for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2.” (*Id.* at ¶124) The Appellate Body then found that this issue must be examined on a case-by-case basis, taking 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 the provisions claimed to have been violated.” (*Id.* at ¶127.)

4. The Appellate Body then went on to examine the EC panel request in the *Korea Dairy* case. It found that GATT Article XIX and Articles 2, 4, 5 and 12 of the Agreement on Safeguards (“Agreement”) – all of which are at issue in this dispute – each have multiple paragraphs, most of which have at least one distinct obligation. (*Id.*, at ¶129) It found that the *Korea Dairy* panel’s “perfunctory” examination of the DSU Article 6.2 issue raised by the EC was not satisfactory. (*Id.* at ¶130) It determined that the EC panel request - which contained exactly the same elements as the panel requests in the present case - should have been more detailed. The Appellate Body denied Korea’s appeal solely because Korea failed to demonstrate to the Appellate Body that the mere listing of the articles had prejudiced its ability to defend itself in the course of the panel proceedings. While Korea had asserted it had sustained prejudice, Korea had not offered any supporting particulars. (*Id.* at ¶131) The Appellate Body noted the desirability of resolving such issues through preliminary rulings. The United States seeks such a preliminary ruling.

5. Every legal provision cited in both Australia and New Zealand’s panel requests contains multiple obligations, yet neither request identifies the specific obligations at issue. Neither the listing of articles nor any other material in the panel requests clarifies which of the multiple obligations potentially at issue is actually implicated. Thus, these requests are insufficient under DSU Article 6.2.

6. The United States does not assert substantial prejudice to the United States with respect to the claims of the complainants under Articles I, II and XIX of the GATT 1994 and Articles 5, 11 and 12 of the Agreement, as it was possible for us to discern those subprovisions that would be implicated on the basis of the context of this proceeding. However, the mere listing of Articles 2, 3 and 4 of the Agreement, without any elucidation of the actual claims at issue, fails to meet the standard of DSU Article 6.2 and has substantially prejudiced the United States by compromising its ability to respond to the claims of the complaining parties.

7. Both the Australia and New Zealand submissions raise multiple claims under each of the cited articles of the Agreement, in particular Article 4 of the Agreement, that were not and could not have been known to the United States based on the panel requests and corrigendum. For example, with respect to the obligations listed in Article 4 of the Safeguards Agreement, it was unclear whether Australia and/or New Zealand were stating a claim with respect to the United States’ finding with respect to (1) threat of serious injury as that term is defined in Article 4.1(b); (2) domestic industry as that term is defined in Article 4.1(c); (3) any or all of the economic factors to be evaluated that are set out in Article 4.2(a), each of which represents an independent obligation; (4) causation (Article 4.2(b)); or (5) the published analysis of the case required by Article 4.2(c). Even the complainants’ submissions are unclear in many instances as to which provisions are claimed to be violated and why,

for instance concerning the injury determination under Article 3. 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.

8. Because of the inadequacy of the panel requests, it was not until Australia and New Zealand filed their first written submissions that the United States was able to know their actual legal claims. Yet, while both complaining parties have had a number of months to prepare their legal arguments, the United States was given only three weeks to respond. Moreover, notwithstanding the long period of time Australia and New Zealand had to prepare their first written submissions, both complaining parties, during the organizational process for this panel proceeding, requested and were given *even more time*, six more days, to prepare their submissions than had been proposed in the draft timetable. Yet the United States was only provided one additional day in which to respond.

9. The insufficiency of the Panel requests has seriously prejudiced the United States in the preparation of its defense. It prevented the United States from knowing the true nature of the claims being made against the US measure and placed the United States in the position of merely guessing which of the many obligations in these several articles might be at issue in this review. This severely limited the ability of the United States to begin the task of preparing its defense. The dispute resolution process is intended to be a relatively speedy process. Central to such a speedy process is the requirement that claims be clearly stated at the required time. The failure of a complaining party to do so prejudices the responding party and undercuts the fairness of the entire process. It effectively stacks the deck against the responding party.

10. The failure of the complainants to comply with Article 6.2 has also compromised the ability of other Members to know what issues are at stake in this proceeding so that they could determine whether to intervene as interested third parties concerning their interest in those issues. The true scope of this case will only be apparent to other Members after the panel report is circulated, at which point it will be too late to reserve third party rights. The failure to comply with the transparency and due process obligations expressed in Article 6.2 therefore nullifies important values in the WTO dispute settlement system. This prejudice to the rights of third parties cannot be cured by merely adjusting the timetable of this proceeding.

11. Accordingly, the United States requests that the Panel rule that the panel requests fail to comply with Article 6.2. Because a valid panel request is a legal prerequisite for a panel proceeding under the DSU, to the extent that the panel requests fail to meet Article 6.2, this panel proceeding lacks a legal basis and cannot go forward.

12. As the Appellate Body has noted (*Bananas* fn. 13 at ¶144; *Korea Dairy* fn. 81 at ¶130), provision of preliminary rulings by panels provides a means of dealing with Article 6.2 compliance problems without causing prejudice or unfairness to any party or third party. Indeed, the United States seeks a preliminary ruling in this instance to prevent such prejudice and unfairness. If the Panel rules that these panel requests fail to comply with Article 6.2, Australia and New Zealand can cure this problem by seeking panel establishment anew on the basis of new panel requests. This would provide the notice, transparency and due process required by the DSU, and permit all Members to know whether they should reserve rights as third parties in this case. Such expeditious action by the Panel would also facilitate resolution of this dispute with the least time added to the entire process. In the case of *Guatemala - Cement*, Mexico's failure to comply with procedural prerequisites led to the Appellate Body finding that the panel in that case never should have considered Mexico's complaint. After sustaining a reversal in the Appellate Body, Mexico has pursued the same measure on the basis of an amended panel request, but with the loss of substantial time and resources for the parties and for the WTO dispute settlement system. It would have been better for all concerned if the panel in that case had resolved the same issue by a preliminary ruling.

13. Although the United States considers that dismissal of this proceeding in its entirety is the most appropriate remedy, if the Panel decides not to do so, the United States requests that the Panel rule that the panel requests fail to comply with Article 6.2 in respect of the claims made under Articles 2, 3 and 4 of the Agreement on Safeguards. If the Panel so rules, then because those claims do not have a legal basis under Article 6.2, they cannot be considered in a proceeding based on the panel requests at issue. Australia and New Zealand can then each decide whether to go forward with the present panel proceeding or whether to expeditiously start again with a legally proper panel request.

14. If the Panel decides to proceed and to consider the claims made under Articles 2, 3 and/or 4 of the Agreement on Safeguards notwithstanding the inadequacy of the panel requests, the United States requests that the Panel extend the time given to the United States to respond to the claims and arguments based thereon set out in the First Written Submissions of Australia and New Zealand. While an extension of time will not cure the defects in the panel request, additional time will mitigate in part the prejudice to the United States resulting from the inadequate request. The United States requests that the Panel grant the United States at least two extra weeks to file its first written submission.

15. The United States further requests an immediate ruling from the Panel postponing the deadline for the first written submission of the United States until it has ruled on the above requests.

B. Exclusion of US Statute from Panel Terms of Reference

16. In their respective panel requests, neither Australia nor New Zealand raises the claim that the US safeguard statute, on its face, is inconsistent with US obligations under the *Agreement on Safeguards*. However, New Zealand, but not Australia, makes that allegation in its First Written Submission. (*New Zealand First Submission* at ¶¶ 7.73 - 7.76)

17. It is the United States' view that the consistency of the US statute is not within the Panel's terms of reference, which merely authorize the Panel:

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

The panel requests identify the United States measure as follows.

18. Australia in WT/DS178/5 and /Corr.1 refers to "the definitive safeguard measure imposed by the United States of America (USA) on imports of lamb meat", referencing documents G/SN/10/USA/3-G/SN/11/USA/3, and G/SN/10/USA/3/Suppl.1-G/SN/11/USA/3/Suppl.1 and the relevant tariff items, and states that:

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" by the President of the United States of America, published in the Federal Register Vol. 64, No. 131, pp. 37389-37392 on 9 July 1999 and the Federal Register Vol. 64, No. 132, pp. 37393-37394 on 12 July 1999 respectively, the United States of America introduced a definitive safeguard measure in the form of a tariff-rate quota on imports of lamb meat effective as of 22 July 1999.³

3 Subsequently modified by the "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.

There is no reference to the US statute.

19. New Zealand in WT/DS177/4 states that

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" by the President of the United States of America, published in the Federal Register Vol. 64, No. 131, pp. 37389 to 37392 on 9 July 1999 and the Federal Register Vol. 64, No. 132, pp. 37393 to 37394 on 12 July 1999 respectively, the United States of America imposed a definitive safeguard measure in the form of a tariff-rate quota on imports of fresh, chilled, or frozen lamb meat¹ effective as of 22 July 1999.²

1 As 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 Harmonised Tariff Schedule of the United States.

2 Some of this information has also been contained in the United States Article 12.1(c) Notification to the Committee on Safeguards (G/SN/10/USA/3, G/SN/10/USA/3/Suppl.1, G/SN/11/USA/3 and G/SN/11/USA/3/Suppl.1).

Again, there is no reference to the US statute.

20. The United States therefore requests that the Panel rule that the consistency of the US statute with US obligations under the *Agreement on Safeguards* is not within the Panel's terms of reference and is thus outside the scope of this dispute.

C. Business Confidential Information (BCI)

21. The complaining parties have requested that the United States provide information that the US International Trade Commission ("USITC") has designated as business confidential information ("BCI"). This information was submitted to the USITC by both foreign and domestic producers under strict assurances of non-disclosure. The USITC is prohibited from disclosing the information absent consent from the submitting companies under Article 3.2 of the *Agreement on Safeguards*. That article, and section 202(a)(8) of the US Trade Act of 1974 (19 U.S.C. 2252(a)(8)), which is the provision of US law that implements Article 3.2, prohibit the USITC from disclosing BCI it receives in the course of a safeguard investigation without permission from the submitting parties.

22. We anticipate that the complainants will ask the Panel to seek this information from the United States. If so, Australia and New Zealand should be asked to specify what BCI they seek and why that information is relevant to the claims, if any, they have properly made within the Panel's terms of reference. Once that is known, the United States can then help the Panel develop procedures that will help persuade the firms that provided the BCI to the USITC to authorize disclosure of the BCI. Based on prior experience the United States believes that domestic producers are unlikely to provide such consent unless they are informed of the specific information requested, who will have access to the information, and the procedures that will be established to protect the information. The Panel should be aware that purchasers are not necessarily beneficiaries of the safeguard action and may not find it in their interest to respond promptly or to provide their consent.

23. Finally, with respect to BCI information provided to the USITC by New Zealand and Australian producers, the United States believes that the complaining parties are in the best position to obtain the necessary consent of these producers. Accordingly, if the Panel requests such information, we anticipate that Australia and New Zealand will aid the United States in obtaining consent from those producers.

ANNEX 3-2

FIRST WRITTEN SUBMISSION OF THE UNITED STATES

(15 May 2000)

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I. INTRODUCTION

1. In October 1998, the United States lamb meat industry petitioned the United States International Trade Commission ("USITC") to investigate whether a surge in lamb meat imports from Australia and New Zealand had depressed prices in the US market and eroded industry sales and profits to the point that the industry's financial health had been seriously compromised. The industry pointed to a dramatic increase in lamb meat imports beginning in 1996, which had continued to climb in 1997 and over the first nine months of 1998. The surge in imports, the industry claimed, had resulted in widespread commercial damage to US lamb meat producers and injury was continuing to accrue.

2. The USITC promptly launched an investigation, both to determine whether the US industry was seriously injured, or threatened with serious injury, as it claimed and, if so, whether increased lamb meat imports were responsible for the industry's condition. In the course of its investigation, the USITC held extensive hearings and solicited written views and commercial data from US, Australian, and New Zealand lamb meat producers, as well as US importers and consumers.

3. Based on their investigation, and as carefully detailed in a lengthy report they prepared, the six USITC Commissioners unanimously concluded that the US lamb meat industry: (1) was facing imminent serious injury; and (2) the threat of serious injury was due to a surge in highly competitive fresh and chilled lamb meat imports from Australia and New Zealand. During the course of its investigation the USITC closely examined other possible reasons for the industry's sudden downturn, but concluded that no explanation other than the major jump in lamb meat shipments from Australia and New Zealand was plausible.

4. As US law requires, the USITC then made recommendations to the President of the United States on an appropriate remedy. Here, the six USITC Commissioners could not agree, ultimately forwarding to the President three different recommendations. There were two common elements in each of these recommendations, however. All of the Commissioners suggested that the President impose four years of import relief and that he accompany that relief with a set of financial and other adjustment assistance measures.

5. In early July 1999, after careful deliberation, the President implemented a relief package aimed at the specific injury indicators that the USITC had reported. The relief -- which took the form of a "tariff-rate quota" (TRQ) -- was designed to return the US lamb meat industry to a minimal level of profitability for a temporary period and thus place the industry in a position to make needed investments and improve its competitiveness.

6. The relief package contained a substantial financial assistance element, as the USITC Commissioners had recommended. But the import relief the President imposed was limited to three years and one day, rather than the four years the USITC had proposed, reflecting a desire to limit the trade impact of the relief to the degree possible. At Australia's and New Zealand's request, the President: (1) allocated the TRQ between those two countries; (2) delayed implementation of the TRQ so that it would not apply to Australian or New Zealand lamb meat shipments in transit to the United States; and (3) agreed to implement the TRQ through an export licensing scheme that allows those Members to meter and control lamb meat exports to the United States.

7. The short period of limited import relief that the United States has provided to its lamb meat industry is just the sort of "safeguard" measure contemplated by Article XIX of the *GATT 1994* ("GATT 1994") and the WTO Agreement on Safeguards ("Safeguards Agreement"). Having undertaken a thorough, transparent, and public investigation, having determined that increased lamb meat imports had left US producers threatened with serious injury, and having amply explained the reasons for its findings on all pertinent issues of fact and law, the United States was fully entitled to give its lamb meat industry a brief respite from competitive import pressure sufficient to assist them in regaining competitiveness.

8. Australia and New Zealand have raised a long list of objections challenging both the USITC's investigation and its threat of serious injury determination, and the nature of the safeguard measure that the United States has imposed, and a series of purported procedural infirmities. As the United States explains in the following pages, each one of those many objections is unfounded.

II. PROCEDURAL BACKGROUND

9. On 16 July and 23 July 1999, respectively, New Zealand and Australia requested consultations with the United States pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII:1 of the *GATT 1994*, and Article 14 of the Safeguards Agreement. New Zealand's consultation request alleged that the US safeguard measure – embodied in Proclamation 7208, with an accompanying memorandum from the President – was inconsistent with Articles 2, 4, 5, 11 and 12 of the Safeguard Agreement, and Articles I and XIX of the *GATT 1994*. Australia considered that the US measure was inconsistent with Articles 2, 3, 4, 5, 8, 11 and 12 of the Safeguards Agreement, and Articles I, II and XIX of the *GATT 1994*.

10. By letter dated 23 July 1999, Australia asserted a substantial commercial interest in lamb meat, and it sought to be joined in the consultations requested by New Zealand. Similarly, on 2 August 1999, New Zealand requested to be joined in the consultations with Australia. The United States acceded to both requests.

11. Consultations were held in Geneva on 26 August 1999, but failed to settle the dispute.

12. On 14 October 1999, New Zealand requested the establishment of a panel pursuant to Article 6 of the DSU and Article 14 of the Safeguards Agreement to examine the US measure with the standard terms of reference as set out in Article 7 of the DSU. In identifying the legal claims under dispute, New Zealand merely listed the same articles of the Safeguards Agreement and the *GATT 1994* that it had identified in its consultation request without providing any elaboration as to the specific legal obligations at issue.

13. Australia also requested the establishment of a panel on 14 October 1999, pursuant to Article XXIII of the *GATT 1994*, Articles 4 and 6 of the DSU, and Article 14 of the Safeguards Agreement. Australia's panel request, like New Zealand's, listed the relevant articles of the Safeguards Agreement and the *GATT 1994* without specifying the specific provisions in dispute.

14. The Dispute Settlement Body established a single panel to review both Australia's and New Zealand's allegations on 19 November 1999. Australia (in respect of New Zealand's complaint) and New Zealand (in respect of Australia's complaint) reserved third party rights, as did Canada, the European Communities, Iceland, and Japan.

III. STATEMENT OF FACTS

15. Following the filing of a petition on 7 October 1998, by representatives of the domestic lamb meat industry, the USITC, after extensive investigation, found that the industry was threatened with serious injury due to increased imports. The USITC collected copious information through a variety of methods -- including questionnaires sent to foreign and domestic producers, purchasers and importers; official statistics; other public sources; briefs from parties, including foreign and domestic producers; and hearings on injury and remedy. All of the business confidential information the USITC collected from these entities was made available under "protective order" (a legally binding limitation on further disclosure) to representatives of interested parties participating in the proceeding.

16. On 5 April 1999, the USITC transmitted to the President a report containing its findings and conclusions and recommending that the President provide relief to the US lamb meat industry.

17. The USITC report explains findings and conclusions at length and describes the investigation that it conducted. Those findings address each factor enumerated in Article 4 of the Safeguards Agreement and survey other factors affecting the US lamb meat industry. The following discussion summarizes some key facets of the USITC report, particularly those that the First Submissions of Australia and New Zealand ("complainants") tended to obscure.

18. The USITC found the relevant domestic industry to consist of the firms that are part of the continuous line of lamb meat production.¹ As the USITC found, growers and feeders contribute approximately 88 per cent of the wholesale cost of lamb meat. Packers, who slaughter the lambs, and breakers, who cut whole carcasses into smaller parts, act as "finishers" of lamb meat products. Many operations are vertically integrated, and finishers are heavily dependent on growers and feeders for the volume and condition of the lambs they purchase. As the USITC determined, firms in the various segments of the lamb meat industry have interdependent economic interests evidenced by the congruent impact of low prices on all sectors.²

19. The USITC found the lamb meat industry to be threatened with serious injury and established the causal link to increased imports in keeping with Article 4.2 of the Safeguards Agreement. The USITC obtained information on the developments in the industry by examining an extended period, 1993 through the first nine months of 1998 ("interim 1998"). Its threat finding was based in large measure on a significant, and unforeseen, change that occurred in the latter part of the period. The USITC found that before 1996 the US industry was affected by two major adverse factors -- the phasing out, largely during 1994 and 1995, of Wool Act payments to growers and feeders, and falling demand. While it considered that the effects of withdrawal of the wool support programme had diminished but not entirely disappeared by 1997, the USITC concluded that the industry had experienced some recovery since the programme terminated in 1996.³ Similarly, the USITC concluded that demand for lamb meat, which had been falling over an extended period, had begun to stabilize at about the same time.⁴

¹ USITC Report at I-13.

² USITC Report at I-13-14.

³ USITC Report at I-24-25.

⁴ USITC Report at I-22.

20. The year 1997, however, turned out to be the zenith of the industry's recovery, as low-priced imports soared and the indices of the industry's financial health began to deteriorate.⁵ Prior to 1996, the volume of imports had been relatively constant, falling from 41.0 million pounds in 1993 to 38.7 million pounds in 1994, and then increasing to 43.3 million pounds in 1995. Thereafter, however, imports rose, increasing to 50.7 million pounds in 1996 and 60.4 million pounds in 1997. Comparing the first nine months of 1997 with the same period of 1998, imports jumped from 46.1 million pounds to 55.1 million pounds.⁶

21. The USITC found that this rise corresponded to a change in the nature of imports. Between 1995 and 1997, imports changed substantially. Historically, almost all US lamb meat had been sold in fresh or chilled form, while almost all imported lamb meat was shipped in a frozen state.⁷ The volume of imported lamb in chilled form increased by more than 100 per cent from 1995 to 1997, while imports of frozen lamb meat rose by only 11 per cent. In addition, the USITC found that imported lamb meat was increasingly being sold in larger cuts, putting it in more direct competition with US product.⁸

22. The USITC found that as these changes in the character of imports put them increasingly in head-to-head competition with domestic lamb meat products, imports captured substantial market share from US firms. That conclusion was supported by the fact that the 9.7 million pound growth in imports in 1997 was mirrored by an 8.4 million pound decrease in US shipments.⁹ As the USITC found, during the end-of-period surge in imports the unit value of US, Australian and New Zealand lamb meat all fell, reflecting the effects of increased supply on domestic prices.¹⁰

23. During 1997 and interim 1998, all segments of the domestic industry suffered deteriorating financial performance. Operating income for most packers and processors reached its lowest point in that period. After having operated at a profit in 1995 and 1996, feeders operated at a loss in 1997 and at a sharper loss in interim 1998. While net sales value enjoyed by growers trended upward during 1993-97, it fell by 19 per cent in interim 1998. The USITC found grower profits at a diminished level in 1997.¹¹

24. The USITC determined that increases in import volume were likely to have further negative effects on the domestic industry's prices, shipment volumes, and financial condition in the imminent future.¹² It found that Australian and New Zealand producers projected that their shipments to the United States in 1999 would be 21 per cent over 1998 levels, with the major proportion in the form of fresh and chilled lamb meat.¹³ Because growers and feeders cannot reduce production in the short run, increased imports had already caused a decline in prices and any further increases would cause additional downward price pressure in the US market.¹⁴ Since imports in 1997 had already captured market share directly from the US industry, the USITC found that additional increased imports, in the form in which the US industry markets its product, would likely have a negative impact on the industry's shipments.¹⁵ The USITC determined that these negative effects would adversely impact the US industry's already damaged financial performance.¹⁶ After examining each other cause of injury

⁵ USITC Report at I-18.

⁶ USITC Report at I-15.

⁷ USITC Report at I-22.

⁸ USITC Report at I-22-23.

⁹ USITC Report at I-22.

¹⁰ USITC Report at I-22.

¹¹ USITC Report at I-19-20

¹² USITC Report at I-23.

¹³ USITC Report at I-23.

¹⁴ USITC Report at I-24.

¹⁵ USITC Report at I-24-25.

¹⁶ USITC Report at I-24.

proposed by Australian and New Zealand producers and US lamb meat importers (“respondents”), the USITC reaffirmed that there was a high degree of likelihood that increased imports would have a substantial negative effect on volume or prices, or both, of the US industry’s lamb meat sales.¹⁷

25. Under United States law, when the USITC makes an affirmative determination, USITC Commissioners provide recommendations to the President on appropriate remedies. In this case, the six USITC Commissioners made three different recommendations, each recommending four years of import relief and a package of adjustment assistance measures. The recommendations differed substantially in other respects. Although the safeguard measure applied by the President drew on certain elements of these suggestions, the President did not adopt any recommendation completely.

26. On 7 July 1999, to address the threat of injury found by the USITC, the President proclaimed¹⁸ a TRQ on imported lamb meat for three years and one day, with the quota threshold set at 31,851,151 kilograms in the first year (the level of US lamb meat imports during calendar year 1998), increasing by an additional 857,342 kilograms in each of the two succeeding years. Above-quota imports were made subject to tariffs of 40 per cent, 32 per cent, and 24 per cent *ad valorem* over the successive years of the measure. Below-quota imports were made subject to additional duties of nine, six and three per cent *ad valorem* over the same period. The President also provided US\$100 million in funding for various adjustment assistance measures to, among other things, assist the industry with market promotion, productivity and product improvements and scientific research.

27. The President concurred with the USITC finding that imports of lamb meat produced in Canada and Mexico did not account for a substantial share of total US imports of lamb meat and were not contributing importantly to the threat of serious injury. The USITC had found that imports from these sources during its period of investigation were negligible. As required by statute in such situations, the President excluded lamb meat from Canada and Mexico from the safeguard measure. The President also did not apply the TRQ to imports of lamb meat from Israel, beneficiary countries under the Caribbean Basin Economic Recovery Act and the Andean Trade Preference Act, and from other developing countries that accounted for a minor share of lamb meat imports.

IV. NOTIFICATIONS AND CONSULTATIONS

28. The United States has complied with the procedural requirements set out in Article 12 of the Safeguards Agreement in respect of the USITC’s lamb meat investigation and the application of a safeguard measure on lamb meat imports. Pursuant to Article 12.1(a), the United States notified the Safeguards Committee on 30 October 1998 of the investigation the USITC had initiated to examine the domestic industry’s serious injury claim.¹⁹

29. On 9 February 1999, the USITC voted unanimously that lamb meat was being imported into the United States in such increased quantities as to be a substantial cause of threat of serious injury to the domestic industry. The United States provided a 12.1(b) notification on 17 February 1999 informing the Committee on Safeguards and WTO Members of the unanimous vote.²⁰ The USITC published its report and remedy recommendation on 5 April 1999, and the United States provided a copy of the report to the Committee, as part of the United States revised Article 12.1(b) notification, on 13 April 1999.²¹

¹⁷ USITC Report at I-26.

¹⁸ Proclamation 7208 of 7 July 1999, To Facilitate Positive Adjustment to Competition from Imports of Lamb Meat (“Proclamation”), attached hereto as US Exhibit 2.

¹⁹ G/SG/N/6/USA/5 (circulated 5 November 1998). Attached hereto as US Exhibit 3.

²⁰ G/SG/N/8/USA/3 (circulated 18 February 1999); G/SG/N/8/USA/3/Corr.1 (circulated 22 February 1999); G/SG/N/8/USA/3/Corr.2 (circulated 25 February 1999). Attached hereto as US Exhibit 4.

²¹ G/SG/N/8/USA/3/Rev.1 (circulated 15 April 1999). Attached hereto as US Exhibit 5.

30. The United States applied a safeguard measure with respect to lamb meat exported on or after 22 July 1999, and provided notification to the Committee on 9 July 1999, and 13 August 1999, pursuant to Article 12.1(c) and Article 9 of the Safeguards Agreement.²²

31. The United States also satisfied its consultation obligations under the Safeguards Agreement. On 28 April 1999 and 4 May 1999, respectively, the United States consulted with Australia and New Zealand in Geneva regarding the USITC lamb meat report. On 14 July 1999, the United States again consulted with both parties in Washington, D.C. regarding the proposed US lamb meat safeguard measure..²³

V. LEGAL ARGUMENT

32. Australia and New Zealand raise legal claims under both the Safeguards Agreement and the *GATT 1994*. The United States respectfully submits that both Members' claims are unfounded that, accordingly, the Panel should reject them.

33. The United States' submission begins with a discussion of certain general legal issues arising from the other parties' submissions.²⁴ First, the United States articulates the burden of proof that complainants must meet. Second, the United States sets forth the applicable standard of review. Third, the United States describes how the safeguards action it adopted was a valid response to "unforeseen developments," which were fully examined and addressed in the USITC report and were clearly demonstrated as a matter of fact consistent with Article XIX of *GATT 1994*.

34. Next, the United States addresses the complainants' specific legal claims under the Safeguards Agreement. First, the United States demonstrates that Australia's and New Zealand's claims under Articles 2 and 4 are without merit because the USITC investigation and report satisfy the requirements of the Safeguards Agreement. Second, the United States addresses Australia's and New Zealand's erroneous claims that the US safeguard measure is inconsistent with Article 5.1. Third, the United States explains that its safeguard measure did not need to be justified under Article 3.1. Fourth, the United States explains why its remedy properly excluded imports from Canada, Mexico, Israel, and developing countries. Fifth, the United States describes how the actions it has taken fulfill the requirements of Articles 8 and 12.

35. Finally, the United States explains that the safeguard measure is not inconsistent with US obligations under Article II of the *GATT 1994* or Article 2.2 of the Safeguards Agreement.

A. THE BURDEN OF PROOF IN DISPUTES UNDER THE SAFEGUARDS AGREEMENT

36. Australia and New Zealand fail to meet their burden of making a *prima facie* case with respect to their asserted claims. Instead, in large measure Australia and New Zealand rely on unfounded assertions advanced without supporting evidence or legal grounding.

²² G/SG/N/10/USA/3, G/SG/N/11/USA/3 (circulated 12 July 1999). Attached hereto as US Exhibit 6. The United States issued a supplemental notification informing the Safeguards Committee that the measure would become effective with respect to goods *exported* on or after 22 July 1999. See G/SG/N/10/8SA/3/Suppl. 1, G/SG/N/11/USA/3/Suppl. 1. Attached hereto as US Exhibit 7.

²³ See US Article 12.5 notification. G/L/313,G/SG/19 (circulated 23 July 1999). Attached hereto as US Exhibit 8.

²⁴ In its submission of May 5, 2000, the United States presented the Panel with its objections to the panel requests by both complainants, as well as its response to complainants' requests for confidential information.

37. In *United States -- Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, the Appellate Body noted that “a party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim.”²⁵ The *Korea--Dairy* panel also had occasion to address questions on the burden of proof, and it found that “[a]s a matter of law the burden of proof rests with the European Communities, as complainant, and does not shift during the panel process.”²⁶

38. Moreover, the *Dairy* Panel noted that it was for the EC, as the complainant, to submit a *prima facie* case of violation of the Safeguards Agreement.²⁷ The *Dairy* Panel interpreted this to mean that it was for Korea – as the defending party – to rebut the EC’s evidence and arguments, once the EC had made its *prima facie* case, by submitting its own evidence and arguments in support of its assertion that it had respected the requirements of the Safeguards Agreement at the time of its determination.²⁸ The *Dairy* Panel then concluded that “[a]t the end of this process, it is for the Panel to weigh and assess the evidence and arguments submitted by both parties in order to reach conclusions on whether the EC claims are well-founded.”²⁹ The Appellate Body affirmed the Panel’s application of the burden of proof.³⁰

39. As will be discussed below, Australia and New Zealand fail to offer legally sufficient evidence and arguments to establish their *prima facie* case. To the extent that the complainants offer any claims that are both legally germane and accompanied by sufficient argumentation, the United States rebuts those claims.

B. THE STANDARD OF REVIEW TO BE APPLIED IN THIS DISPUTE

40. The standard of review to be applied in safeguards cases is well-established. In the two previously decided safeguards cases, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* (“*Korea -- Dairy*”) and *Argentina -- Safeguard Measures on Imports of Footwear* (“*Argentina -- Footwear*”), the panels specifically rejected the notion that panels may review *de novo* the determination made by the domestic investigating authority.³¹ Rather, as articulated by the panel in *Argentina – Footwear*,

our review will be limited to an objective assessment, pursuant to Article 11 of the DSU, of whether the domestic authority has considered all relevant facts, including an examination of each factor listed in Article 4.2(a), of whether the published report on the investigation contains adequate explanation of how the facts support the determination made, and consequently of whether the determination made is consistent with Argentina’s obligations under the Safeguards Agreement.³²

²⁵ *United States -- Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, Report of the Appellate Body adopted 25 April 1997, at ¶ IV (“US -- Woven Wool Shirts”).

²⁶ *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, 21 June 1999, at ¶ 7.24 (“Korea -- Dairy”).

²⁷ *Korea -- Dairy* at ¶ 7.24. As the Appellate Body has noted, a *prima facie* case is “one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case.” *European Communities -- Measures Concerning Meat and Meat Products*, WT/DS26 and 48/AB/R, Report of the Appellate Body adopted 13 February 1998, at ¶ 104.

²⁸ *Korea – Dairy* at ¶ 7.24.

²⁹ *Korea – Dairy* at ¶ 7.24.

³⁰ *Korea -- Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, Report of the Appellate Body adopted 14 December 1999, at ¶ 150 (Appellate Body Report, *Korea-Dairy*).

³¹ *Korea – Dairy* at ¶ 7.30 (“Korea -- Dairy ”); *Argentina -- Safeguard Measures on Imports of Footwear*, WT/DS121/R, 25 June 1999, at ¶ 8.117 (“Argentina -- Footwear”).

³² *Argentina -- Footwear* at ¶ 8.124. Similarly, the *Korea – Dairy* Panel (at ¶ 7.30) concluded that:

the Panel’s function is to assess objectively the review conducted by the national investigating authority, . . . an objective assessment entails an examination of whether the [Korean national authority] had

41. In *Argentina–Footwear*, the Appellate Body reviewed the panel's articulation of the standard of review and concluded that the panel had stated the standard "correctly." As the Appellate Body explained,

Article 11 of the DSU, and, in particular, its requirement that ". . . 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", sets forth the appropriate standard of review for examining the consistency of a safeguard measure with the provisions of the *Agreement on Safeguards*.³³

42. The United States respectfully submits that the above-quoted standard is the appropriate standard of review to be applied under Article XIX and the relevant provisions of the Safeguards Agreement in this dispute. As to the determinations to be made by the competent authority pursuant to Articles 3 and 4 of the Safeguards Agreement, the nature of the Panel's review is delineated by the obligations under those articles. Specifically, Article 3 requires "reasoned conclusions on all pertinent issues of fact and law," and Article 4 requires "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined." Accordingly, the authority's conclusions satisfy the Agreement if they are reasoned conclusions based on the information obtained in the investigation and if the authority's analysis demonstrates the relevance of the factors it examined. That a Panel might have reasoned to different conclusions if viewing the evidence *de novo* does not establish a violation of the Agreement if the authority's conclusions are reasoned and based on demonstratively relevant factors. As to other determinations to be made on the basis of the competent authority's report, the question is whether the report reasonably demonstrates the facts to be examined even where a specific legal conclusion is not required.

43. The Appellate Body's admonition that panels must avoid conducting a *de novo* review of the evidence applies equally to a panel's examination of whether a Member has applied safeguard measures only to the extent necessary to prevent or remedy serious injury and facilitate adjustment in conformity with Article 5.1. The United States has set out at ¶ 210 below the sort of inquiry that it considers would be appropriate under Article 5.1. Such an inquiry would be based on an examination of the relationship between the serious injury, or threat of serious injury, identified by the Member's competent authority, on the one hand, and the nature, duration and extent of the safeguard measures the Member applied, on the other.

44. To a substantial degree, New Zealand's and Australia's arguments in this proceeding are inconsistent with the standard of review articulated above. As will be discussed at length below, a great deal of their argumentation simply seeks to present another view of the facts, rather than show that the findings made by the authorities in any way violated the Agreements. Such argumentation improperly seeks to have the Panel make its own *de novo* interpretation of the record.

45. Moreover, in at least three instances, New Zealand and Australia appear to go further and present to the Panel evidence that was not before the USITC in order to seek to refute the USITC's findings. In ¶¶ 7.85 and 7.86 of its first written submission, New Zealand presents "Figure 5: Indexes of real import and domestic wholesale US lamb prices" and "Figure 6: Indexes of real (CPI deflated)

examined all facts in its possession or which it should have obtained in accordance with Article 4 of the Safeguards Agreement (including facts which might detract from an affirmative determination in accordance with the last sentence of Article 4.2 of the Safeguards Agreement), 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.

³³ *Argentina -- Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, Report of the Appellate Body adopted 14 December 1999, at ¶120 (Appellate Body Report, *Argentina -- Footwear*).

prices for lamb on US market.” The sources of both indexes are said to include the *USDA/AMS Red Meat Yearbook: “Livestock, Dairy and Poultry” 1997-1999*. New Zealand does not show how the *Yearbook* was part of the USITC’s record at the time it made its threat determination. Similarly, in ¶ 48 of its first written submission, Australia presents a graph entitled “US Lamb Price” and gives as its source the USDA. Australia does not state where in the USITC’s record this information can be found or even allege that it was part of the USITC’s record at the time the USITC made its threat determination. To the extent these documents were not part of the USITC’s record, Australia and New Zealand are trying to persuade this Panel to engage in a *de novo* review of the underlying facts and to substitute its judgment for that of the national investigating authority. By urging this approach, Australia and New Zealand effectively repudiate the standard of review they claim to endorse.

46. The *Korea - Dairy* Panel emphasized 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 has collected.”³⁴ The Panel should strike any new evidence that Australia and New Zealand seek to put before it, along with arguments based on that evidence.

C. THE USITC REPORT DOES NOT FAIL TO DEMONSTRATE THE EXISTENCE OF “UNFORESEEN DEVELOPMENTS”

47. Australia and New Zealand both claim that the US safeguard measure fails to comply with Article XIX of *GATT 1994* because it allegedly was not a response to “unforeseen developments.” For the following reasons, Australia’s and New Zealand’s arguments are without merit and should be rejected.

48. As the Appellate Body recognized in *Argentina--Footwear*, Article XIX of the *GATT 1994* does not establish “independent conditions” for the application of a safeguard measure, but rather “describes certain circumstances which must be demonstrated as a matter of fact in order for a safeguard measure to be applied.”³⁵ In *Argentina--Footwear*, the Appellate Body held that the “unforeseen developments” requirement of Article XIX remains in force despite the fact that it was not included in the Safeguards Agreement. The USITC’s report amply demonstrated the existence of such developments.

49. The introductory language in Article XIX was intended to ensure that any increase in imports that may result in serious injury or threat of serious injury to a domestic industry is not simply the result of (1) negotiated tariff reductions; or (2) factors of which the negotiating WTO Member was unaware at the time of the tariff concession. Thus, unforeseen developments would include significant, unexpected changes in the marketplace as compared to the situation that pertained at the time of the tariff concession. The developments summarized below, which resulted in a surge of low-priced lamb meat into the United States after 1995, were not foreseen by the United States at the time the tariff concession on lamb was negotiated as part of the Uruguay Round.³⁶

50. The USITC lamb meat report concluded that “[t]he conditions of competition in both the domestic and world lamb markets have changed in several important respects during the past several years. As a result of these changes . . . processors will have to adjust to a market with increased competition from imported fresh lamb meat.”³⁷ These changes in market conditions could not have been anticipated from prior market conditions. The report fully describes prior market conditions. It

³⁴ *Korea-Dairy*, at ¶ 7.55.

³⁵ Appellate Body Report, *Argentina -- Footwear*, at ¶ 92.

³⁶ The United States submitted its first tariff reduction offer on lamb meat on March 5, 1992. Substantive tariff negotiations ended on 15 December 1993. The transmittal letter for the US offer is attached hereto as US Exhibit 9.

³⁷ USITC Report at I-32.

describes how, in a 1981 countervailing duty investigation involving *Lamb Meat from New Zealand*, the USITC found the same like product but acknowledged that, unlike today, "most imported lamb at that time was shipped frozen and virtually all domestic lamb was fresh or chilled."³⁸

51. Similarly, in a 1995 study of competitive conditions affecting US and foreign lamb industries, the USITC had found that imports did little to displace US-produced lamb or to suppress its price, and that imports were imperfect substitutes.³⁹

52. The study reported US Commerce Department statistics that showed from 1990 to 1994 the proportion of imports consisting of fresh or chilled lamb meat never exceeded 31 per cent and declined to only 20 per cent in 1994.⁴⁰ Thus, the historical pattern of importation and trends up to 1994 gave the United States no reason to foresee a relative increase in imports in fresh or chilled form.

53. By the time of the USITC's 1999 determination, it found that, while most US lamb meat traditionally had been sold as fresh or chilled and imported lamb meat was sold frozen, imported lamb meat was increasingly entering the United States in fresh or chilled form.⁴¹ By 1998, foreign exporters as a whole anticipated that the majority of their 1999 increase would be fresh and chilled lamb meat.⁴²

54. In short, the pattern of competition that pertained up to 1995 reversed abruptly thereafter.

55. The USITC record shows that imported and domestic products in fact became more similar during the period of investigation.⁴³ Not only did New Zealand and Australian imports increasingly shift from frozen to fresh or chilled products, but imported cuts became larger in size and more comparable to domestic cuts.⁴⁴

56. The USITC recounts, in detail, how the US market for lamb meat suddenly and unexpectedly changed after 1995. Between 1993 and 1994 imports of lamb meat from Australia and New Zealand declined.⁴⁵ In contrast, imports of lamb meat from New Zealand and Australia rose dramatically over the latter half of the period of investigation.⁴⁶ As the USITC found, between 1995 and 1997 in particular, imports of fresh or chilled lamb meat increased 101 per cent, while imports of frozen lamb meat increased only by 11 per cent during this same period.⁴⁷ The USITC also found the overall increase in lamb meat imports since 1997 resulted in a higher market share for importers.⁴⁸ Moreover, foreign exporters projected that the major portion of their 1999 increase would be in the form of fresh and chilled lamb meat.⁴⁹

³⁸ USITC Report at I-10.

³⁹ USITC Report at II-72, citing at n.173, *USITC, Lamb Meat: Competitive Conditions Affecting the US and Foreign Lamb Industries*, USITC Inv. No. 332-357, Pub. 2915, Aug. 1995, at 5-42-43, attached hereto as US Exhibit 10.

⁴⁰ *Id.*, Table 2-14 at 2-51.

⁴¹ USITC Report at I-11.

⁴² USITC Report at I-22.

⁴³ USITC Report at I-22.

⁴⁴ USITC Report at I-23, n.114.

⁴⁵ USITC Report at II-19, Table 6.

⁴⁶ The period of investigation ran from 1 January 1993 through 30 September 1998. USITC Report at I-7 and II-18-19. During 1993-1997, the quantity of imports of lamb meat increased by 47 per cent while the value of such imports increased by 131 per cent. The quantity and value of imports from interim 1997 to interim 1998 increased by 19 per cent and 8 per cent, respectively. USITC Report at II-18.

⁴⁷ USITC Report at I-31.

⁴⁸ USITC Report at I-31.

⁴⁹ USITC Report at I-22, n. 113, *citing*, Tables 24-25, 29-30, II-40, II-47-48.

57. This dramatic change in the pattern of importation is reflected in the USITC data on Australian and New Zealand imports. The USITC specifically found that “[u]p through 1995, the majority of lamb meat imported from Australia was frozen. Since 1996, however, about half of the imports from Australia had been fresh lamb meat.”⁵⁰ The USITC found that fresh or chilled bone-in cuts from Australia increased from 4.6 million pounds in 1993 to 8.6 million pounds in 1997, and fresh or chilled boneless cuts rose sharply from 674,000 pounds in 1993 to 6.2 million pounds in 1997.⁵¹ Exports of fresh or chilled Australian lamb meat to the United States increased between 1993 and 1997 and were projected to increase by 27 per cent in 1998 and by 16 per cent in 1999.⁵²

58. Similarly, New Zealand’s exports of lamb meat to the United States increased from 17 million pounds in 1993 to 26 million pounds in 1997⁵³, and the USITC concluded that “an increasing share of US lamb meat imports from New Zealand consists of fresh product.”⁵⁴ Fresh or chilled bone-in cuts accounted for 19 per cent of the quantity imported in 1997, up from 10 per cent in 1993.⁵⁵ Fresh or chilled boneless cuts increased as a share of total imports from 5 per cent in 1993 to 11 per cent in 1997.⁵⁶ Conversely, imports of frozen bone-in cuts declined from 64 per cent to 58 per cent during the period and imports of frozen boneless cuts dropped from 19 per cent to 10 per cent.⁵⁷

59. In sum, the USITC studies up to 1995 showed that lamb meat imported up to that time competed only to a limited extent with US products. The USITC’s 1999 safeguards report recognizes that conditions changed significantly, and unexpectedly, after 1995. The changing nature of lamb meat imports indicates they are coming increasingly into competition with US product and eroding US industry market share. That development will only worsen in the imminent future.⁵⁸

60. The USITC’s findings demonstrate, as a matter of fact, circumstances constituting unforeseen developments, and Australia’s and New Zealand’s claims that the US safeguard measure fails to comply with the “unforeseen developments” provision of Article XIX:1(a) therefore are groundless.

D. AUSTRALIA’S AND NEW ZEALAND’S CLAIMS UNDER THE SAFEGUARDS AGREEMENT

1. The USITC properly found the domestic industry to consist of firms with mutual economic interests in a continuous line of production

(a) The Complainant’s arguments misconstrue the basis for the USITC’s definition of the domestic industry

61. Australia and New Zealand are incorrect in arguing that the USITC improperly found that the domestic industry producing lamb meat includes growers and feeders of live lambs, as well as packers and processors (“breakers”) of lamb meat.⁵⁹ First, a majority of USITC Commissioners defined the “like” product to be lamb meat. Although two USITC Commissioners found the like or directly

⁵⁰ USITC Report at I-31 and I-32.

⁵¹ USITC Report at II-20.

⁵² USITC Report at II-40, n. 124, *citing* the October 1998 issue of *Australian Meat & Livestock Review*, which stated: “The last three months have been spectacular for lamb imports to the United States. During September, 1,683 tons of lamb were exported, the highest monthly export figure on record.” . . . The November 1998 issue of *Australian Meat and Livestock Review* reported that Australia’s exports of lamb to North America “were up a stunning 41.4 per cent over the level of October 1997.”

⁵³ USITC Report at II-43, n. 138, *citing* official US Commerce Department statistics.

⁵⁴ USITC Report at II-43.

⁵⁵ USITC Report at II-43.

⁵⁶ USITC Report at II-43.

⁵⁷ USITC Report at II-43, *citing* US Commerce Department statistics.

⁵⁸ USITC Report at I-22.

⁵⁹ USITC Report at I-13.

competitive product to include live lambs, the majority's industry definition – which is the subject of the complainants' objections – was not based on such a finding. Thus, Australia's and New Zealand's extensive arguments that live lambs are not "like or directly competitive" with lamb meat⁶⁰ are simply inapposite.

62. The USITC majority considered whether to include live lamb growers and feeders as part of the industry based on the traditional USITC approach in defining industries that produce processed products such as lamb meat. That approach is to examine whether (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.⁶¹ In this case, the majority found that the domestic lamb meat industry included growers and feeders of live lambs as well as packers and breakers of lamb meat.⁶²

63. Thus, the relevant issue is not whether live lambs are "like or directly competitive" with lamb meat, but whether the USITC majority correctly found that growers, feeders, packers and breakers constitute the US industry that produces lamb meat. Before addressing the legal question of whether the USITC correctly identified the various segments of the lamb industry ("producers as a whole" as Article 4.1(c) puts it), it is worth examining the Commissioners' factual analysis, which complainants' arguments obscure.

64. The evidence clearly established a continuous line of production from a raw product, live lambs, to the processed product, lamb meat.⁶³ Notably, in the United States, "most" sheep and lambs are meat-type animals kept primarily for the production of lambs for meat.⁶⁴ "Most," as will be discussed further below, was a considerable understatement. The USITC found that, except for lambs held for breeding purposes, virtually all meat-type lambs are shipped to feeders in the fall, who feed them for between 30 and 120 days and then ship them to lamb packers for slaughter.⁶⁵ Packers then either further process the lamb into primal, subprimal or retail cuts, or ship the carcasses to breakers who perform a similar processing function.⁶⁶ The cuts are then sold to nonbreaker wholesalers or retail outlets.⁶⁷ The Commission explicitly noted that this line of production yields only one principal end-product, lamb meat.⁶⁸

65. In determining the domestic industry, the USITC also found evidence of a coincidence of economic interests between lamb growers and processors. The value-added by lamb growers and feeders (*i.e.*, the value of slaughter-ready live lambs) accounted for nearly 88 per cent of the ultimate wholesale cost of lamb meat.⁶⁹ Consequently, packers and breakers could be viewed largely as finishers of products for which the vast majority of value had already been created by growers and feeders. Packers' and breakers' operations therefore would be highly affected by the supply and quality of the live lambs produced by growers and feeders.⁷⁰

66. The USITC found that the vertical integration of the industry also supported a finding of a coincidence of economic interests between different industry segments.⁷¹ For example, there are

⁶⁰ New Zealand's First Written Submission at ¶¶ 7.41-52; Australia's First Written Submission at ¶¶ 108-118.

⁶¹ USITC Report at I-12.

⁶² USITC Report at I-13.

⁶³ USITC Report at I-13.

⁶⁴ USITC Report at II-4.

⁶⁵ USITC Report at I-13.

⁶⁶ USITC Report at I-13 and II-14.

⁶⁷ USITC Report at I-13 and II-15.

⁶⁸ USITC Report at I-13 n. 44 and II-15.

⁶⁹ USITC Report at I-8, I-9 and II-12.

⁷⁰ USITC Report at I-13.

⁷¹ USITC Report at I-13.

growers who process lamb meat. These growers both feed and slaughter lambs.⁷² In addition, one major lamb packer also owns a lamb feeder.⁷³ In addition, some lamb producers retain title to their lambs in feedlots, by having them be fed for a fee or having some type of partnership with the feedlot owner.⁷⁴ Thus, lamb producers have a direct interest in slaughter operations as estimates indicate that 70 to 80 per cent of lambs slaughtered are in feedlots.⁷⁵ No representatives in any of the four industry segments testified before the USITC that the economic interests of packers and breakers diverged from those of growers and feeders.⁷⁶ Moreover, the price of lamb meat affects all four industry segments similarly.⁷⁷

67. The USITC found this to mean that, when processors did well, growers and feeders also benefitted, but when processors confronted lower prices, they passed the lower prices back to feeders and then growers, and all suffered to some extent.⁷⁸ Price changes at retail are transmitted back down the production chain⁷⁹, and the price of lamb meat affects all four industry segments similarly.⁸⁰ In this case, all four segments were negatively impacted financially, and all experienced significant declines in the unit value of their sales at the end of the period.⁸¹ For example, one rancher testified before the Commission that lower import prices forced processors to reduce prices for the carcasses they bought from the packers, who in turn had to reduce the prices they paid to feedlots for live lambs.⁸² This rancher stated that because feedlot operators sold their lambs in the spring of 1998 for less than they paid for them in the fall of 1997, they had to reduce the price they could pay for lambs in the fall of 1998. Thus, lower import prices "forced the entire US lamb meat industry in successive waves to substantially reduce the prices they could pay for their lamb."⁸³

(b) A definition of "Producer" that encompasses those firms with consistent economic interests along a continuous line of production is in keeping with the safeguards

68. The United States submits that, when the product at issue is a processed product, the undefined term "producer" as used in Article 4.1(c) of the Safeguards Agreement may be properly read to include growers/feeders where there is such a continuous line of production and coincidence of interest. The Safeguards Agreement, Art. 4.1(c) states:

in determining injury or threat thereof, 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.

69. Where such an integral relationship exists between growers of a raw product and the finishers of that product, it is in keeping with both the context of this provision and the object and purpose of the Safeguards Agreement to regard both as producers of the finished product.⁸⁴ Article 4's definition

⁷² USITC Report at II-12.

⁷³ USITC Report at I-14.

⁷⁴ USITC Report at II-12.

⁷⁵ USITC Report at II-24.

⁷⁶ USITC Report at I-14.

⁷⁷ USITC Report at I-14.

⁷⁸ USITC Report at I-14.

⁷⁹ USITC Report at II-66.

⁸⁰ USITC Report at I-13.

⁸¹ USITC Report at I-14.

⁸² USITC Report at I-14 n. 50.

⁸³ USITC Report at I-14 n. 50.

⁸⁴ See Argentina -- Footwear at ¶ 93 (interpreting the term "increased imports" in view of the use of the term "emergency" in the title of Article XIX).

of “producer” provides a basis for the injury analysis contemplated by that article. The term “producer” must therefore be understood within the context within which the required injury analysis may be performed. The Agreement presupposes that an authority will be able to consider “all relevant factors” bearing on the situation of an industry.⁸⁵ Limiting the definition of “producer” to those who contribute only limited value-added toward the final stages of a process that operates as a continuous line of production would create an artificially defined “domestic industry” and necessarily impede such analysis. This is particularly so when, as here, extensive integration exists between firms at different stages in that continuous line of production.

70. Moreover, not including those with consistent interests in a continuous line of production would defeat the Agreement’s express purposes of facilitating adjustment and assuring that safeguard measures do not escape control of the multilateral regime. When such integration and unity of interest exists, the full impact of imports will be felt at all levels of the line of production and measures benefitting the finishers of the product also will benefit those at the earlier stages of production. To permit such benefits to accrue to firms at earlier stages without including their operations in the injury analysis would both allow Members to use safeguard measures to facilitate adjustment outside the control of the Safeguards Agreement and artificially delimit the actual effects of increases in imports. Conversely, remedial measures that addressed only the effects of imports on one aspect of a continuous line of production would be inadequate to “prevent or remedy serious injury and to facilitate adjustment” under Article 5.1, since adjustments made by only one segment of the line of production would not insulate it from the effects of increased imports on other segments. While the United States does not claim that the Agreement necessarily requires such an analysis, it submits that such an analysis is certainly permitted by the Agreement’s use of the undefined term “producer.”

71. The USITC’s determination of the domestic industry is also consistent with GATT precedent. The determination of domestic industry under Article VI of the *General Agreement on Tariffs and Trade* was the subject of a *GATT* panel report in *New Zealand -- Imports of Electrical Transformers from Finland*.⁸⁶ In that report, the Panel rejected New Zealand’s argument that the domestic industry consisted of four distinguishable ranges of transformers which, for purposes of the injury determination, should be considered separately.⁸⁷ The Panel concluded, to the contrary, that this was an invalid argument and “it was the overall state of the health of the New Zealand transformer industry which must provide the basis for a judgement whether injury was caused by dumped imports.”⁸⁸ The definition of industry in the Safeguards Agreement may be interpreted similarly as being applicable to the type of vertical relationships that exists among the four industry sectors that together produce US lamb meat. Particularly persuasive to the Panel in *New Zealand -- Electrical Transformers* was that “each segment of the industry’s operation made a contribution to the overall viability and profitability of a producer of transformers.”⁸⁹ The same analysis applies in this case, since the USITC explicitly found a continuous line of production in the lamb industry from the raw to the processed product, each segment of which made a contribution to the principal end-product, lamb meat.⁹⁰ The Panel found that, to decide otherwise, would:

allow the possibility to grant relief through antidumping duties to individual lines of production of a particular industry or company -- a notion which could clearly be at variance with the concept of industry in Article VI in a case like the present one where both the

⁸⁵ Safeguards Agreement, Art. 4.2(a).

⁸⁶ New Zealand - Imports of Electrical Transformers from Finland, L/5814, BISD 32S/55 (adopted 18 July 1985) (“New Zealand -- Electrical Transformers”).

⁸⁷ New Zealand -- Electrical Transformers at ¶ 4:6.

⁸⁸ New Zealand -- Electrical Transformers at ¶ 4:6.

⁸⁹ New Zealand -- Electrical Transformers at ¶ 4:6.

⁹⁰ USITC Report at I-13 n. 44 and II-15.

Finnish exporter and the New Zealand industry were engaged in the manufacture and distribution of power transformers.⁹¹

72. The unadopted GATT Panel Report in *Canada -- Imposition of Countervailing Duties on Imports of Manufacturing Beef From the EEC* on which New Zealand relies is inapposite because it was never adopted by the Contracting Parties and thus cannot be regarded as part of the body of case law which the Members of the WTO contemplated would be considered in proceedings under the DSU.⁹² Moreover, the factors considered by the *Canada-Manufacturing Beef* panel stand in sharp contrast to those present here. The Panel found :

In Canada there is little vertical integration between suppliers of cattle and the firms which perform slaughterhouse and boning operations. Processing operations are sometimes performed by integrated firms while in other cases the slaughtering and boning operations are performed by separate firms. The Canadian firms engaged in processing operations were not parties to the countervailing duty proceeding and took no position on the question of material injury.⁹³

73. In contrast, firms representing all four segments of the domestic industry joined in the petition and supported the request for relief in the safeguards investigation. Moreover, the US lamb meat industry is vertically integrated in such a way that it is virtually impossible to analyze each segment of the domestic industry producing lamb meat by focusing on only one, discrete sector. For example, growers engage in more than one sheep producing activity, such as feeding and sometimes slaughtering lambs.⁹⁴ A major US packer also owns both a breaker operation and Superior Farms, which is a lamb feeder.⁹⁵ Some lamb producers retain title to their lambs in feedlots by having them fed for a fee or having some type of partnership with the feedlot owner.⁹⁶ As a result, grower/feeder operations could not be separately categorized as either one.⁹⁷ These facts show the industry is so highly integrated it is not possible to focus on only one respective sector of the production process. The inability to disaggregate the respective sectors producing the like product, lamb meat, requires that the definition of the domestic industry include all four of the sectors contributing to the production of the like product.

74. New Zealand's reliance on *United States -- Definition of Industry Concerning Wine and Grape Products*⁹⁸, which involved an examination of the definition of domestic industry under the Article 6:5 of the Subsidies Code, is similarly misplaced. In that case, the Panel found that wine and grapes were not "like" products, and that producers of grapes were not part of the same domestic industry as producers of wine. The Panel considered that, even if there was a close relationship between grape and wine production, there were in fact two separate industries existing in the United States.⁹⁹ The Panel relied on the fact that in a previous countervailing duty investigation on wine imports, the USITC had found it inappropriate to include grape growers within the scope of the

⁹¹ New Zealand -- Electrical Transformers at ¶ 4:6.

⁹² *Japan -- Taxes on Alcoholic Beverages*, WT/DS8/DS10/DS11/R, 11 July 1996, at ¶ 6.18. The Panel noted that an unadopted Panel report need not be taken into account; it does not constitute "subsequent practice."

⁹³ *Canada-Manufacturing Beef* at ¶ 2.6.

⁹⁴ USITC Report at I-14 n. 46 and II-12.

⁹⁵ USITC Report at I-14 n. 47.

⁹⁶ USITC Report at II-12.

⁹⁷ USITC Report at II-29, n. 89.

⁹⁸ United States -- Definition of Industry Concerning Wine and Grape Products, BISD 39S/436 (adopted 28 April 1992) ("Wine-Grape").

⁹⁹ *Wine-Grape* at ¶ 4.3.

domestic industry.¹⁰⁰ The USITC had declined to include the growers because only 42-55 per cent of wine grapes were used in the production of wine, and there were other major markets for wine grapes (e.g., table grapes and raisins).¹⁰¹ In contrast, meat-type lambs are almost wholly devoted to the production of lamb meat¹⁰², which remains substantially the same during processing and is never transformed into a different article.

75. As the USITC found, although some dual-use breeds are kept for both the production of wool and meat, lambs are overwhelmingly raised for meat rather than for wool.¹⁰³ In 1997, the ratio of net sales/revenue for slaughter and feeder lambs in comparison to net sales/revenues obtained by US lamb growers from any other item including wool was 84.6 per cent in 1997; 86.8 per cent in interim 1997; and 88.9 per cent in interim 1998.¹⁰⁴ Such ratios indicate that, in contrast to the situation that obtained in *Wine-Grape*, the US lamb industry is almost completely devoted to the production of lambs for meat.

76. In short, the facts found not to be present in *Canada-Manufacturing Beef* and *Wine-Grape* are precisely those present in the current case. The USITC's industry definition is based on pertinent factors and provides for a realistic definition of the pertinent industry consistent with the express purpose of the Safeguards Agreement and prior cases.

2. The USITC's threat of serious injury determination fully accords with the requirements of Article 4 of the Safeguards Agreement

(a) Because they do not address the USITC's findings, complainants fail to make a *prima facie* showing that the USITC's determination violated any WTO requirements

77. In keeping with Article 4.2(a) of the Agreement, the USITC evaluated "all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry." Its determination clearly demonstrates why the USITC found, in keeping with Article 4.2(b), "on the basis of objective evidence, the existence of a causal link between increased imports of the product concerned and [threat of] serious injury." In their arguments concerning that conclusion, however, New Zealand and Australia fail to make out a *prima facie* case for finding that the USITC's determination violated these provisions. They ignore the findings that the USITC actually made and ignore the Appellate Body's decisions about the necessary elements of an injury analysis under the Safeguards Agreement.

78. Unlike the briefs of the complaining Members, the findings of the competent authority here are consistent with the recent Appellate Body holding in *Argentina – Footwear*, that recent data are the most probative of the question of whether a product "is being imported" in such increased quantities as to cause or threaten serious injury.¹⁰⁵ The essence of the USITC's threat determination rests on evidence in the USITC record supporting four principal findings:

79. First, imports of lamb meat from Australia and New Zealand surged late in the period of investigation and this surge was projected to continue past the period of investigation into 1999.

80. Second, the mix of such lamb meat imports shifted during the investigation, from frozen lamb meat to fresh/chilled lamb meat and from smaller cuts to larger cuts, the form and cut size of lamb

¹⁰⁰ *Wine-Grape* at ¶ 4.4.

¹⁰¹ *Certain Table Wine From France and Italy*, Inv. Nos. 701-TA-210 and 211 (Preliminary) USITC Pub. No. 1502 (March 1984), at 9, attached hereto as US Exhibit 11.

¹⁰² USITC Report at II-4.

¹⁰³ USITC Report at II-4.

¹⁰⁴ USITC Report at II-26.

¹⁰⁵ *Argentina – Footwear* at ¶ 130-131.

meat most similar to that produced and marketed by domestic lamb meat producers. This trend, which placed imports in increasingly direct competition with domestic production, was projected to continue into 1999.

81. Third, this surge in imports, and the change in mix of the imported product, led to falling domestic prices for lamb meat. The fact that US demand for lamb had stabilized since 1996 and domestic growers and producers were unable in the short run to reduce production meant that increased supply caused prices to fall in the short run. Lamb meat prices fell sharply in 1997 and interim 1998 and, as the USITC found, these trends would continue into the future.

82. Fourth, economic indicators relating to the health of the domestic industry had stabilized by 1996 after termination of the US Wool Act. However, those indicators sharply deteriorated in 1997 and 1998, when imports surged, and this deterioration was projected to continue into 1999. In particular, industry profitability fell sharply in 1997 and interim 1998.

83. The written submissions of Australia and New Zealand leave this core account unchallenged. These findings led the USITC to conclude that the domestic lamb meat industry was threatened with serious injury caused by increased imports, and that serious injury was imminent. As this summary shows, although the USITC examined imports and the condition of the domestic industry during the period 1993-97 and the interim period January-September 1998, its determination focused on the most recent data, data for 1997 and interim 1998. The arguments of the complaining Members focus instead on what they regard was the primary reason for the industry's troubles in the whole period, 1993 to interim 1998, and leave unmentioned the changes in import effects on which the USITC relied. Such an analysis, if adopted by an administering authority, might well be impermissible under the Agreement, in view of the *Argentina -- Footwear Appellate Body* decision's admonition that an injury analysis must examine sudden, recent developments. In any event, the alternative analyses that New Zealand and Australia propose can hardly be required.

84. The data of record showed, as the USITC found, a surge in imports in 1997 and interim 1998, relative to the earlier years in the period of investigation. The USITC found that imports increased by 19 per cent in 1997 from the same period a year earlier, and found imports increased by 19 per cent in the first nine months of 1998, as compared with the year earlier period.¹⁰⁶ The increases in 1997 and 1998 were in marked contrast to import levels in 1993-95 when import levels were relatively steady. Imports in fact declined between 1993 and 1994.¹⁰⁷ The USITC found that the share of the domestic market held by imports more than doubled during the period of investigation, with most of this increase occurring in 1997 and 1998.¹⁰⁸ The share of the US market held by imports (measured in quantity) ranged between 11.2 per cent and 16.6 per cent during 1993-96, and then increased sharply to 19.7 per cent in 1997 and 23.3 per cent in interim 1998.¹⁰⁹ Thus, imports of lamb meat into the United States and the share of the US market held by imports increased sharply in 1997, by 19 per cent, and again, in interim 1998, also by 19 per cent (as compared with interim 1997). Australian and New Zealand firms projected that their export surges to the US would continue through 1999 and their exports of lamb meat to the United States in 1999 would exceed the 1998 level by 21 per cent¹¹⁰, a level nearly twice the level entered in 1995. Australia and New Zealand contest none of these findings.

85. Although they seek to portray a marketplace in which their producers serve a customer base different from that of the domestic producers, Australia and New Zealand likewise do not contest the findings that led the USITC to find an increasing convergence in the US market of domestic and

¹⁰⁶ USITC Report at I-15, I-23.

¹⁰⁷ USITC Report at I-15.

¹⁰⁸ USITC Report at I-24.

¹⁰⁹ USITC Report at I-18.

¹¹⁰ USITC Report at I-23.

imported products. As the USITC found, traditionally, virtually all domestic lamb meat sold in the US market was fresh or chilled, and most imported lamb meat was frozen.¹¹¹ However, the USITC found that the mix of imported lamb meat changed during the period of investigation, from frozen to fresh or chilled lamb, and to larger cuts, with the result that imported and domestic lamb meat products became more similar.¹¹² The USITC found that much of the increase in imports between 1995 and 1997 was in fresh or chilled lamb meat, which increased by 101 per cent during that period, as compared to 11 per cent for imports of frozen lamb meat.¹¹³ The USITC report showed that since 1996, the majority of lamb meat imported from Australia has been fresh or chilled¹¹⁴; it also showed that an increasing share of imports of lamb meat from New Zealand were fresh or chilled.¹¹⁵ Moreover, foreign exporters told the USITC that the major portion of their 1999 increase would be in fresh or chilled lamb meat.¹¹⁶ In addition, the USITC found that, whereas domestic lamb carcasses and the cuts derived from them were typically larger than imported cuts¹¹⁷, imported lamb meat cuts became larger in size and more comparable to domestic cuts during the period of investigation.¹¹⁸

86. Australia and New Zealand likewise leave almost unmentioned the USITC's findings concerning the recent and likely price depressing effects of imports. Although they contend that the US industry has been in a long-term decline due to falling demand for lamb meat, they do not contest the USITC's finding that demand has leveled off since 1996. They likewise do not disagree that in the short term domestic growers and feeders cannot reduce production. This condition of competition reflects characteristics specific to the lamb industry – in particular, that the relatively long growth cycle of lambs limits the ability of domestic growers and feeders to reduce production in the short run; that meat-type lambs have one principal use, meat production, and cannot be diverted to other uses; and that a lamb must go to slaughter within a short time after reaching maturity regardless of market price.¹¹⁹ Australia and New Zealand do not dispute the premise that in these conditions increases in supply are likely to put downward pressure on US prices.

87. Australia and New Zealand confirm¹²⁰, rather than dispute, that prices fell in the period of import surge. The USITC found that prices for various lamb meat products declined sharply beginning in mid-1997. During the second half of 1997 and during interim 1998, prices for several products were 20 per cent or more below comparable quarters in 1996 and early 1997.¹²¹ The USITC determination also made apparent the correlation between this fall in prices and the price pressure from increased imports. As the USITC found, even though the cuts of imported lamb meat grew in size and were shipped increasingly as fresh or chilled meat, the unit values as well as price of New Zealand and Australian imports fell from interim 1997 to interim 1998. Unit values and prices for domestic products fell as well.¹²² Pricing data gathered by the USITC for individual cuts showed that imports undersold the domestic products by wide margins in most quarters, often by more than 20 per cent.¹²³

¹¹¹ USITC Report at I-22.

¹¹² USITC Report at I-22.

¹¹³ USITC Report at I-22.

¹¹⁴ USITC Report at II-16.

¹¹⁵ USITC Report at II-43.

¹¹⁶ USITC Report at I-22.

¹¹⁷ USITC Report at II-8.

¹¹⁸ USITC Report at I-22-23.

¹¹⁹ USITC Report at I-22.

¹²⁰ New Zealand's First Written Submission at ¶ 7.87 ("In 1998 both domestic wholesale and import lamb meat prices declined.") Import prices declined by 12 per cent between 1997 and 1998. See also Australia's First Written Submission at ¶ 48 and Graph 2.

¹²¹ USITC Report at I-20.

¹²² USITC Report at I-24.

¹²³ USITC Report at II-74-76.

88. 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.¹²⁴ It found that the operating income for most packers and breakers fell to the lowest point of the period of investigation in 1997 and interim 1998.¹²⁵ It found that feeders, after having operated at a profit in 1995 and 1996, operated at a loss in 1997 and at a substantial loss in the first nine months of 1998.¹²⁶ It found that growers as a whole operated at a diminished level of profitability in 1997 and interim 1998, and that a significant number of individual growers operated at a loss during that period.¹²⁷

89. Consistent with the worsening condition of the domestic industry, the USITC noted that a number of firms in the industry reported difficulties in generating adequate capital to finance plant and equipment modernization. Firms in the packer and breaker segments reported difficulties in recouping new investments in plant and equipment and in repaying loans.¹²⁸ Growers and feeders reported cancellation or rejection of expansion plans, reductions in the size of capital investments, bank rejection of loans, reduced credit ratings, and difficulty in repaying loans.¹²⁹ Australia and New Zealand do not appear to contest that these conditions existed, but instead assert that decisions to go forward with investments undercut the argument that the industry was threatened with serious injury, since the investments must have been made with the expectation of financial returns. At some points, the complainants' criticisms reflect a puzzlement that the USITC did not find the industry not already to be suffering some injury.

90. Although Australia and New Zealand would have the Panel give great weight to the effects of the termination of Wool Act support payments to lamb growers and feeders, they do not contest the USITC's basis for not finding the termination of those payments to have much influence on events after 1996. The USITC found that the support payments were phased out principally in 1994 and 1995, and terminated in 1996.¹³⁰ *before* the surge in imports and sharp deterioration in the condition of the domestic lamb meat industry in 1997 and interim 1998. 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.*¹³¹ In addition, the USITC found that in the intervening period between the phase out of the payments and the surge in imports the grower and feeder segments of the industry had experienced recovery and that any lingering residual effect of termination of the payments after 1996 was receding by the month.¹³² In short, the USITC found that the termination of Wool Act payments could not explain the rapid deterioration in the industry in 1997 and interim 1998 and threat of serious injury at the time of the USITC's injury determination. Thus, the complainants' extensive arguments about the effects of the termination of Wool Act payments over the entire period 1993 - interim 1998 are both irrelevant, since they do not address the period of import surge and the USITC's finding of serious injury in the imminent future, and misleading, since they ignore the fact that the payments were not made to the packer and breaker segments of the domestic industry.

91. The USITC found no evidence that any other alleged factors, including competition from other meat products such as beef, pork, and poultry, might have significantly affected the condition of the domestic industry in 1997 and interim 1998. For example, with respect to competition from other meat products, the USITC specifically noted that per capita US consumption of lamb meat had

¹²⁴ USITC Report at I-20.

¹²⁵ USITC Report at I-19.

¹²⁶ USITC Report at I-19.

¹²⁷ USITC Report at I-20.

¹²⁸ USITC Report at I-21.

¹²⁹ USITC Report at I-21.

¹³⁰ USITC Report at I-24.

¹³¹ USITC Report at I-25.

¹³² USITC Report at I-24-25.

remained relatively steady since 1995.¹³³ Although complainants argue that the USITC should have examined further the effect of competition from other meat products on the lamb meat market, they neither contest this finding on the evidence nor explain why it is not a sufficient finding under the Agreement.

(b) The fact that complainants can point to other factors that in the long run have adversely affected the US industry is irrelevant to whether the industry is threatened with serious injury caused by increased imports

92. Much of complainants' briefs is devoted to drawing alternative pictures of what has been happening to the US lamb meat industry other than the view that the USITC adopted. Most of those arguments, as will be seen, are not supported by the record evidence or are not relevant to the analysis required by the Safeguards Agreement. However, even if the complainants' alternative views were permissible interpretations of the record, the possibility of those alternatives would not establish a violation of the Safeguards Agreement. As has been discussed previously, the standard of review does not ask the Panel to decide whether it would have come to the same conclusion as the USITC.

(i) *New Zealand's long-run analysis of the effect of imports ignores the significant change in trends that occurred after 1996*

93. Because they simply miss the point of the competent authority's determination, none of the factual arguments that complainants have made are capable of raising a *prima facie* case that the determination violated the Safeguards Agreement. For example, New Zealand's claim¹³⁴ that increased imports could not have caused the threat of serious injury because, over the period of the USITC's investigation, imports increased less than domestic production declined ignores the USITC's focus on the recent period of import surge and invites the kind of long-term analysis that the Appellate Body in *Argentina – Footwear* sought to discourage. As has been seen, the USITC based its finding on what occurred in 1997 and interim 1998, when imports of lamb meat surged, and what was likely to occur in the imminent future, not on what happened in the four years prior to the surge in imports. The USITC found that the 1997 increase in imports of 9.7 million pounds was mirrored by a decline in US lamb shipments of 8.4 million pounds.¹³⁵

94. New Zealand is correct that the USITC report shows that domestic production also fell in earlier years. New Zealand neglects to mention, however, that the USITC report also shows that domestic consumption of lamb meat fell by almost the same amount during those years but did not fall in 1997-98.¹³⁶ Moreover, contrary to what happened in 1997 and interim 1998, increasing imports were not a factor during this earlier period. Imports were relatively steady, falling in 1994 and then rising modestly in 1995 and 1996.¹³⁷ In short, New Zealand's focus on long-term trends obscures, rather than clarifies, the question of what will occur in the imminent future.

95. In particular, New Zealand overlooks the very significant fact that domestic production and consumption trends *diverged for the first time during the period of investigation in 1997*, the year in which the surge in low priced imports began.¹³⁸ Consumption rose for the first time in 1997, yet domestic shipments continued to fall in 1997 and remained at the lower 1997 level (on an annualized

¹³³ USITC Report at I-25.

¹³⁴ New Zealand's First Written Submission at ¶ 7.79.

¹³⁵ USITC Report at I-24.

¹³⁶ USITC Report at II-17.

¹³⁷ USITC Report at II-17.

¹³⁸ USITC Report at II-17.

basis) in interim 1998.¹³⁹ On the other hand, imports rose by 19 per cent (in quantity) in 1997, and by a further 19 per cent in interim 1998.¹⁴⁰

96. New Zealand also fails to mention, and does not contest, that the mix in imported products shifted during the period of investigation, particularly in 1997 and interim 1998, from frozen lamb meat to fresh or chilled lamb meat, and to larger cuts. Thus, over the period of investigation, the mix of imported products became more similar to those produced by the US industry and hence more likely to displace domestic lamb meat in the domestic market.

97. The complainants' submissions before this Panel, and their nationals' submissions before the USITC, in fact, leave no doubt that imports have displaced domestic lamb meat. Australia conceded¹⁴¹ that about one third of the increase in lamb meat imports over the whole period of the investigation displaced domestic lamb meat. Since, as the USITC report reflected, such displacement tended to increase toward the end of the period, Australia's estimate reinforces the conclusion that in 1997-interim 1998 significant displacement occurred. During the USITC investigation, Australian and New Zealand respondents made a similar concession. In their update of a 1995 USITC model analysis that they furnished to the USITC during the investigation, Meat and Livestock Australia and Meat New Zealand conceded that "imports displace some amount of domestic lamb meat" in the domestic market. This statement is likely to have substantially understated conditions existing in 1997 and interim 1998 because the update was based on imports during the period 1961-1997, when the great majority of imported lamb meat was in frozen form.

(ii) *Complainants' efforts to blame the industry's troubles on the termination of the Wool Act Support Payments ignores the USITC's findings that the industry had largely recovered from that termination by 1997*

98. Like New Zealand's arguments about whether imports displaced domestic production, Australia's argument about the effects of termination of the Wool Act payments focuses on what happened long before the surge in imports in 1997 and interim 1998. For example, in ¶47 of its First Written Submission Australia cites to a long-term decline in the US sheep population since 1961. Most of this analysis is irrelevant and not probative of the issue at hand. What occurred before the mid-1990's has little if any relevance to what happened in 1997 and interim 1998, when the surge in imports occurred. The Wool Act and the downsizing that occurred during the long period preceding the import surge in 1997 were all past history. The competent authority, as has been seen, found that even those domestic producers who received the support payments had experienced some recovery by 1997, a finding Australia does not address. Australia does not contest the finding that in the imminent future any lingering effects of the termination of Wool Act payments will have an ever decreasing effect and thus could not explain the imminent worsening of the domestic industry's position that the authority foresaw.

99. Similarly, the fact that a higher percentage of the reporting growers said that they operated at a profit in 1998 than in 1993, or that live lamb slaughter prices were higher in 1997 and 1998 than in 1993, does not mean, as New Zealand claims¹⁴², that the domestic industry could not have been threatened with serious injury in 1998. What the USITC found at the time of its decision was that, based on the surge in imports in 1997 and interim 1998 and the coinciding deterioration in the condition of the domestic industry, lamb meat "is being imported" in such increased quantities as to threaten to cause serious injury to the domestic industry. This is fully consistent with the Appellate Body's decision in *Argentina – Footwear* that the competent authority focus on the most recent

¹³⁹ USITC Report at II-17.

¹⁴⁰ USITC Report at II-17.

¹⁴¹ Australia's First Written Submission at ¶ 146.

¹⁴² New Zealand's First Written Submission at ¶¶7.59 and 7.62.

period. The USITC found that the domestic industry had largely adjusted by 1996 to conditions, such as the termination of the Wool Act, that may have earlier affected profitability.

100. The gravamen of such arguments appears to be that an industry that has, as Australia puts it, endured a “long-term secular decline” (¶62) cannot be threatened with serious injury by imports. Complainants, however, make no legal argument to support this implicit proposition, quite apart from failing to address the findings of the USITC that suggest that, apart from the effects of imports, the prior decline had largely come to an end by 1997. They quite rightly do not cite any support in the Safeguards Agreement for this premise, because no such support exists.

101. Nothing in the Safeguards Agreement says that a competent authority cannot find that increased imports are causing or threatening to cause serious injury just because the industry may have been injured at some earlier point in time by some other factor. All that the Agreement requires, and as was made clear by the Appellate Body in *Argentina – Footwear*, is that the competent authority find, at the time of its decision, that a product “is being imported” in such increased quantities as to threaten to cause serious injury to the domestic industry.

102. The definition of “serious injury” in Article 4.1(a) does not exclude the possibility that an industry may also be adversely affected by causes other than imports. It requires only “a significant overall impairment in the position of the domestic industry,” meaning it only requires that the position of the industry, whatever it otherwise may be, be impaired.

103. Complainants’ position seems to be that a man who has cancer may not suffer significant overall impairment if run over by a car. Nothing in the Agreement requires that conclusion. Indeed, Article 4.2(b) expressly assumes the opposite. It provides, “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.”¹⁴³ This provision thus takes into account that the industry may be suffering from other causes of injury at the same time. It simply requires that an authority not attribute what those other factors caused to the increased imports.¹⁴⁴ It does not require that relief be denied if other factors caused injury prior to the increase in imports.

104. Moreover, on the facts, both Australia’s and New Zealand’s characterizations of pricing in the market seem to be contrary to their picture of the US industry as in a long-term, inexorable decline that would render shorter term effects a nullity. For example, Australia asserts that “[t]he subsequent cyclical drop in prices to the levels prevailing before the removal of the subsidies was a normal cycle.”¹⁴⁵ Similarly, the only reason for the 1998 price decline offered by New Zealand is that prices had risen in earlier years and that “agriculture prices fluctuate.”¹⁴⁶ Both of these statements are consistent with the view that prices in this market can fluctuate with changes in supply and demand. Neither Member contests the finding that demand -- contrary to the earlier long-term trend -- was stable after 1996. Thus, their characterizations of the market are consistent with the USITC’s conclusion that a 19 per cent increase in imports in 1997 and a further increase of 19 per cent in interim 1998 over the interim 1997 level would cause price declines. The record before the USITC established that imports had declined in price and in most cases substantially undersold US product.

¹⁴³ (Emphasis added).

¹⁴⁴ See United States -- Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, ADP87, 30 November 1992 (interpreting parallel provision of Tokyo Round Antidumping Code).

¹⁴⁵ Australia’s First Written Submission at ¶62.

¹⁴⁶ New Zealand’s First Written Submission at ¶7.87.

3. The terms in which the USITC expressed its conclusions are entirely consistent with the Safeguards Agreement

- (a) New Zealand's theoretical attack on the US Statute provides no basis for challenging the determination at issue in this proceeding

105. As has been seen, the USITC found that other posited causes of injury to the US industry would be of negligible or diminishing importance in the imminent future. The termination of Wool Act payments has already been discussed. While the USITC found that other meat products, such as beef, pork, and poultry, appear to compete with lamb to a certain extent, it found that per capita domestic consumption of lamb meat had been relatively constant since 1995. Accordingly, it found no reason to believe that there would be a shift in demand in the imminent future.¹⁴⁷

106. Likewise, the USITC found that there was no significant increase in input costs that explained the sharp decline in industry profits. It found that expenses for growers rose at a moderate rate and then fell in interim 1998, that expenses for feeders rose at a faster but not dramatic rate, and that expenses of packers and breakers rose moderately in line with production. No increase was predicted for the imminent future.¹⁴⁸ The USITC found that US Department of Agriculture data showed that the fat content of domestic lambs was lower in 1997 than in earlier years, and that "fat" lambs could have accounted for, at most, no more than a small percentage of domestic production.

107. With regard to packer concentration, the USITC noted information indicating that concentration had actually decreased, rather than increased. The USITC also found that packers, like other segments of the industry, experienced deteriorating profits, and found that an undue level of concentration would have suggested a greater ability to pass through lower prices to feeders and growers.¹⁴⁹ Similarly, while the USITC found that an effective marketing plan could have had an important impact on the industry, it did not find that the failure to implement such a plan was a more important cause of the threat of serious injury.¹⁵⁰

108. It is clear from the USITC's findings that the USITC found that none of these other possible causes had a significant impact on the deterioration in the condition of the domestic industry that occurred in 1997 and interim 1998 or posed a threat of serious injury in the imminent future. Thus, the USITC found only one possible cause of a threat of serious injury – increased imports. The USITC's finding was clearly consistent with the requirement of Article 4.2(b) that injury caused by other factors not be attributed to increased imports. The USITC did not attribute the threat of serious injury to factors other than increased imports. Indeed, it could not have, since it did not find that there were any factors of significance, other than increased imports, that threatened to cause serious injury.

109. New Zealand (notably not joined by Australia) contends, however, that the USITC acted inconsistently with the Safeguards Agreement because it expressed its conclusions about the threat posed by increased imports in terms required by the US statute. The USITC concluded that increased imports of lamb meat were a "substantial cause" of threat of serious injury to the domestic industry. Under the US safeguard statute, "substantial cause" means "a cause that is important and not less than any other cause."¹⁵¹

110. New Zealand argues that the USITC's "substantial cause" analysis was inappropriate because, in New Zealand's view, it could lead the Commission impermissibly to "weigh" causation factors and to blame increased imports for causing a threat of serious injury that was in fact attributable to other

¹⁴⁷ USITC Report at I-22.

¹⁴⁸ USITC Report at I-25.

¹⁴⁹ USITC Report at I-25.

¹⁵⁰ USITC Report at I-26.

¹⁵¹ Section 202(b)(1)(B) of the Trade Act of 1974, as amended, attached hereto as US Exhibit 12.

factors. To the contrary, US law requires that the USITC be particularly diligent about not attributing injury from other factors to increased imports. US law expressly requires that the USITC examine factors other than imports which may be a cause of serious injury or threat of serious injury to the domestic industry.¹⁵² As has been shown, the USITC found that factors other than increased imports played no significant role in causing the threat of injury that the Commission found. The USITC did not find increased imports to be one among several causes of lower prices and domestic industry sales volumes.¹⁵³ Thus, the question of whether it is permissible to weigh causation factors is a moot issue in this case, since increased imports were not one of a multiple number of causation factors and the USITC did not engage in weighing.

111. Thus, even if New Zealand's objections to the use of a "substantial cause" analysis are correct – which the United States disputes – they are irrelevant for purposes of this case. They cannot provide a basis for concluding that the USITC's threat of serious injury determination was inadequate. It is thus unnecessary for purposes of deciding this case for the Panel to address New Zealand's complaint on this subject.¹⁵⁴

(b) The USITC satisfied the causation requirements of the Safeguards Agreement

112. In any event, New Zealand's objection to the "substantial cause" analysis is baseless. The "substantial cause" test has been embodied in US safeguards legislation for over 25 years. Similar language was included in US safeguards statutes dating back to 1955.¹⁵⁵

113. New Zealand apparently considers that Article 2.1 can only be satisfied when increased imports are the exclusive cause of the injury or threat of injury that the industry has sustained, since it asserts that: "[T]here can be no serious injury attributable to imports at all if that serious injury is in fact attributable to other causes."¹⁵⁶ However, nothing in Article 2.1 suggests that is the case.

Article 2.1 provides:

1. 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.

¹⁵² Section 202(c)(2)(B) of the Trade Act of 1974, as amended, attached hereto as US Exhibit 13.

¹⁵³ See USITC Report at I-26.

¹⁵⁴ See *United States -- Shirts and Blouses from India*, WT/DS33/AB/R, Report of the Appellate Body adopted 25 April 1997, at VI ("Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to 'make law' by interpreting existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. A panel need only address those claims that must be addressed in order to resolve the matter in issue in the dispute.") Moreover, New Zealand's contention amounts to an attack on the US statute itself, which as the United States pointed out in its letter of May 5, 2000, is beyond the Panel's terms of reference.

¹⁵⁵ For example, Section 6(a) of the Trade Agreements Extension Act of 1955 provided that: "Increased imports, either actual or relative, shall be considered as the cause or threat of serious injury to the domestic industry producing like or directly competitive products when the Commission finds that such increased imports have contributed substantially towards causing or threatening serious injury to such industry." (emphasis added.) [Ch. 169, Pub. L. 86], attached hereto as US Exhibit 14.

¹⁵⁶ New Zealand's First Written Submission at ¶7.75.

114. While Article 2.1 plainly establishes a causation requirement, nothing in that provision specifies the *degree* of cause required before a safeguard measure can be imposed.¹⁵⁷ Neither GATT Article XIX:1 nor Article 2.1 of the Safeguards Agreement specifies that increased imports must be the exclusive cause of injury, or threat of injury, that the domestic industry has sustained. New Zealand argues otherwise, but points to Article 4.2 for the proposition that this limitation should be read into Article 2.1.

115. It is worth noting that Article 2.1 directs Members to make their injury and causation determinations “pursuant to the provisions set out below”. Those provisions include Article 4.2, which addresses injury causation in detail. In considering the meaning of the causation language in Article 2.1, it is thus appropriate to look to the more specific language of Article 4.2(b).

116. Article 4.2(b), second sentence, suggests that increased imports may be understood to “cause” serious injury, or threat of serious injury, even when the injury that the industry has sustained is being caused by other factors as well. Article 4.2(b), second sentence, 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.

117. This sentence addresses situations in which injury to a domestic industry is attributable both to increased imports and other sources. By its own terms, the sentence recognizes that factors other than increased imports may be “causing” injury at the same time as increased imports.

118. If increased imports and other factors can be “causing” injury at the same time for purposes of Article 4.2(b), second sentence, New Zealand cannot be correct in asserting that Article 2.1 – which uses the nearly identical expression “to cause” – should be interpreted to require that increased imports must be the sole cause of serious injury or threat of injury. Moreover, if increased imports and other factors may be “causing” injury or threat of injury at the same time, a competent authority may appropriately consider the relative importance of those causes through the application of a “substantial cause” or similar causation standard.

119. Contrary to New Zealand’s view, Article 4.2(b), second sentence, does not preclude Members from attributing serious injury, or threat of serious injury, to increased imports where other factors have also contributed to the conditions leading to the injury or threat. Rather, it instructs Members not to blame increased imports for any injury caused by other factors. The USITC fully complied with that requirement, as has been shown.

120. New Zealand is also wrong in its claim in ¶¶ 7.73-7.76 of its First Written Submission that the causation test in US law is a “less stringent” test than that required by the Agreement. If anything, the US law in fact embodies a *more stringent* test. Nothing on the face of the Agreement requires an authority to compare the extent of damage caused by different factors affecting an industry. Thus, the United States statute calls on its authority to make a more detailed analysis than the Agreement requires.

121. Likewise, New Zealand is wrong in its claim that the US test can be met even when increased imports “are one of many causes” of the serious injury or threat of serious injury.

¹⁵⁷ See John Jackson, “The General Agreement on Tariffs and Trade,” in *A Lawyer’s Guide to International Business Transactions*, Pt. I, Surrey and Wallace, eds., 2d ed. 1977, at 66, attached hereto as US Exhibit 15. “Unlike US legislation, which generally has been more specific about the degree or quantity of cause required for the link between increased imports and serious injury before escape clause relief can be invoked, the GATT escape clause is very general. Arguably, any degree of cause between increased imports and serious injury to domestic producers will suffice.” (footnote omitted)

Section 202(b)(1)(B) of the US Trade Act of 1974 defines the term “substantial cause” to mean “a cause which is important and not less than other cause.” Thus, increased imports must be both an “important” cause of the serious injury or threat, and “not less than any other cause.” The legislative history of the US provision makes it clear that a cause of injury would not be an “important” cause of injury, and thus not a “substantial” cause, when it was one of many such causes, even if it was equal to or greater than any other cause. The US Senate committee that drafted this particular provision stated “The [USITC] Commissioners will have to assure themselves that imports represent a substantial cause or threat of injury, and not just one of a multitude of equal causes or threats of injury.”¹⁵⁸

122. In sum, the “substantial cause” test represents a long established and well considered approach that fully implements the requirements of Article XIX and the Safeguards Agreement. In this case, it has led to a detailed analysis as to which New Zealand has no basis for complaint.

4. The alternative methodologies that complainants propose for evaluating the data are not required by the Safeguards Agreement

(a) The USITC determination concerned the industry as a whole and included each segment

123. In making its determination, the USITC considered all of the evidence with respect to each of the factors and concluded that the domestic industry, as defined to include growers, feeders, packers, and breakers, was threatened with serious injury. 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. Nevertheless, as is shown above, the USITC found that many factors, including financial performance, deteriorated for all industry segments.

124. The data that the USITC obtained on each of the segments were sufficient to allow the USITC to make a determination that the industry as a whole was threatened with serious injury caused by increased imports. To the extent practical, the USITC obtained data on each of the economic factors for all four segments of the industry. The USITC viewed this as the most appropriate way to examine data to avoid double counting or the combining of data expressed in different forms (e.g., shipments vs. production).¹⁵⁹ This also provided the USITC with a safety check on data, because it gave the USITC the ability to compare trends in data for the various factors for each of the sectors, so as to determine whether the trends were similar and, if not, probe the reasons for any differences. In particular, it enhanced the USITC’s ability to probe the validity of the data compiled from grower questionnaires, which reflected a much smaller sampling of producers than the data for other segments. The fact that the grower data showed trends that were for the most part similar to the data compiled for other industry segments, and that differences were explainable, suggested that they were objective and valid, even though the sample was small.

125. Australia argues¹⁶⁰ that, as a consequence of its definition of domestic industry, the USITC was obliged to prove that there would be a significant overall impairment in the position of the producers in each of the industry segments. In support, Australia cites generally to Article 4 of the Safeguards Agreement, but not to any specific paragraph or clause therein.

¹⁵⁸ *Trade Reform Act of 1974, Report of the Committee on Finance . . . on H.R. 10710*, S. Rept. No. 93-1298, 93rd Cong., 2d Sess. 120-21 (1974), attached hereto as US Exhibit 16.

¹⁵⁹ USITC Report at I-16, note 61. In the two instances in which the collection of data was not practical (e.g., capacity and capacity utilization data for growers and feeders), the USITC explained why it was not practical to collect such data (e.g., no practical way to measure range capacity, varying time that lambs are kept in feedlots). USITC Report at I-20 n.96.

¹⁶⁰ Australia’s First Written Submission at ¶157.

126. Australia does not find any specific support for its claim in Article 4 because none exists. Moreover, what Australia argues is contrary to the basic concepts in Article 4. Article 4.1(a) defines serious injury to mean “a significant impairment in the position of a *domestic industry*” (emphasis added). Article 4.1(c) defines domestic industry to mean “the producers *as a whole* of the like or directly products . . .” (emphasis added). Thus, Article 4 directs a competent authority to examine the condition of the producers as a whole, as opposed to different groups of producers. While this does not mean that a competent authority could not separately examine data with respect to producers in different segments of the industry, the finding must be made with respect to the condition of the domestic industry as a whole.

127. The USITC found that financial performance declined in all four segments in 1997 and interim 1998, during the period when the surge in imports occurred. Australia seeks to discount the significance of the decline in financial performance by arguing that some of the firms were still profitable, or that only a few more firms in a particular segment operated at a loss in 1998 than in 1997, or that the loss for feeders in interim 1998 was due to the \$21.26 fall in the price per lamb of slaughter lambs, as compared to the fall of only \$6.70 in the price per feeder lamb.¹⁶¹

128. As stated earlier, nothing in the Safeguards Agreement requires a finding that all firms in the industry are operating at a loss, or that the industry as a whole is operating at a loss. Indeed, the list of factors in Article 4.2(a) of the Agreement includes “*profits and losses*,” which indicates that an industry may be seriously injured or threatened with serious injury even though the industry as a whole or individual firms are profitable. What is key in a threat case is that the economic position of the domestic industry is likely to deteriorate seriously as a result of increased imports. The USITC clearly found this to be the case as to the industry as a whole and as to each of its component sectors.

129. Moreover, the decline in slaughter and feeder prices that Australia references precisely illustrates what was happening in the domestic market and supports the USITC’s finding. Imports of lamb meat compete head to head with domestically produced lamb meat. When low-priced imports increase and drive down the price of domestic lamb meat at the wholesale level, the price decline is then passed through to feeders and eventually to growers. The surge in imports should first adversely affect the price of slaughter lambs and then the price of feeder lambs. Australia refers to this as “a short run phenomenon, which would be expected to be corrected in future periods.”¹⁶² The “correction” that Australia refers to is that the lower prices caused by imports will be passed through to growers, a process that was clearly in progress in early 1999 when the USITC found that the domestic industry was threatened with serious injury. As the USITC noted, the growing of lambs is a relatively long process, and growers and feeders are unable to reduce production in the short run. When a lamb is mature, it must go to market, regardless of the market price. As Australia implicitly recognizes, this process means that lamb growers cannot in the short run protect themselves from effects of imports on lamb meat sales. In short, while the evidence showed that not all sectors would be impacted identically, all would suffer serious deterioration in their positions due to increased imports.

(b) The USITC properly considered each factor required by the Agreement and was not required to conduct an econometric analysis

130. The USITC conducted the appropriate analysis in determining that imports of lamb meat were in such increased quantities as to cause the threat of serious injury. The USITC considered the evidence with respect to each of the factors required by the Agreement and made its determination based on that evidence.

¹⁶¹ Australia’s First Written Submission at ¶¶153-164.

¹⁶² Australia’s First Written Submission at ¶160.

131. New Zealand claims¹⁶³, without citing any basis in the Agreement, that the USITC should have performed an econometric analysis regarding the factors causing the threat of serious injury, since in 1995 the USITC performed a vector autoregression model analysis of the lamb meat market. This claim is without basis for two principal reasons. First, the Agreement does not require that a competent authority perform such an analysis. In fact, the Agreement does not prescribe *any specific methodology* that a competent authority must employ in demonstrating the link between increased imports and serious injury or the threat of serious injury. Second, because such analyses typically rely on relatively long data series, such analyses generally are not helpful in explaining what happened in the most recent period or in projecting what will happen in the imminent future. Because such models are more useful in showing the long-term trends, reliance on such analyses might well be inconsistent with the holding of the Appellate Body in *Argentina – Footwear*, that recent data are the most probative of whether a product “is being imported” in such increased quantities as to cause or threaten serious injury.

132. The USITC’s 1995 model¹⁶⁴ was not developed for use in a safeguard investigation, but rather for use in a fact-finding investigation conducted under a different statutory authority. The model focused on competitive conditions characterizing the US *sheep markets at the farm level*, as opposed to the effects of imports of lamb meat on the lamb meat industry. Second, it assumed that the mix of imported and domestic lamb meat products would remain steady. Third, it covered the period 1961-1994, when the Wool Act was in effect. The update of this model provided by Australian and New Zealand respondents during the USITC investigation presented many of the same problems as the 1995 model. While it included three additional years of data (1995-97), it also covered the period back to 1961 and did not include the most recent period (interim 1998). Thus, both models focused on the *sheep markets at the farm level*, not the lamb market. Second, neither of the models considered the most recent data on which the USITC in part relied – data for interim 1998. Even the updated model presents average dynamic patterns for 1961-97 with which the variables have historically interacted. Third, the assumptions in both models for the product mix of imported lamb meat are in direct conflict with the USITC’s finding in the 1999 safeguards case – that the mix of imported lamb meat products had shifted during 1997 and interim 1998 and, based on projections supplied by Australian and New Zealand producers, this shift would continue through 1999. Thus, the assumptions and results of the 1995 model run and the updated run were not valid for purposes of the 1999 safeguards investigation. Accordingly, the USITC did not rely on either of the model runs in making its determination in the safeguards investigation.

133. Contrary to New Zealand’s implication, the USITC does not perform econometric analyses of the kind urged by New Zealand during the course of a safeguards investigation. Rather, consistent with Article 4.2, the USITC 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 evaluation. New Zealand’s insistence upon the value of such an analysis reflects its misconceived position, contrary to *Argentina – Footwear*, that a safeguards investigation should concern long-term trends, rather than a detailed analysis of the very recent developments that can create emergency conditions.

¹⁶³ New Zealand’s First Written Submission at ¶7.83.

¹⁶⁴ The model was included in a USITC fact finding report on conditions affecting the US and foreign lamb industries completed in 1995. The report consisted mostly of information about the domestic and foreign lamb industries and product trade. The model was not the focus of the report. The report was prepared by the USITC at the request of the US Trade Representative. See USITC, *Lamb Meat: Competitive Conditions Affecting the US and Foreign Lamb Industries, Investigation No. 332-357*, USITC Publication 2915, Aug. 1995, at 5-36 *et seq.* Attached hereto as US Exhibit 10.

(c) The USITC properly drew inferences about the imminent future from recent trends in industry indicators

134. Consistent with the Appellate Body decision in *Argentina – Footwear*, in making its determination the USITC focused on the most recent available data, data for full year 1997 and interim year 1998. The USITC also considered the level of imports and the shift in the mix of imports for that period and projections for full year 1998 and 1999 provided by Australian and New Zealand producers. It also considered the nature of the industry, including the inability of domestic growers and feeders to adjust their production in the short term. On the basis of these data, and the trends therein, the USITC drew inferences and concluded that serious injury was imminent. Consistent with the definition of “threat of serious injury” in Article 4.1(b), the USITC finding was “based on facts and not merely on allegation, conjecture, or remote possibility.”

135. Accordingly, the USITC considered evidence of recent trends in industry performance to provide the most reliable basis for making inferences about the imminent future. The record provided no basis for concluding that such trends were not probative of the near term, and Australia provides no basis for believing that they were not. Australia¹⁶⁵ nevertheless contends that this was not enough, and claims that the USITC should have performed a “prospective analysis” for the industry. To assist itself in performing this analysis, Australia contends that the USITC should have gathered “forward looking data ” from growers.¹⁶⁶ Australia does not state what kind of additional data the USITC should have gathered or define what such an analysis would entail, or explain why the analysis used by the USITC violates the Safeguards Agreement.

136. The USITC relied on projections provided by lamb meat producers in Australia and New Zealand about projected export levels and the mix of exports to the United States for full year 1998 and for 1999. 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.¹⁶⁷ The USITC also concluded that, in the short run, domestic growers and feeders would be unable to reduce production, demand would be unlikely to shift, and costs were not predicted to change significantly.¹⁶⁸ The USITC’s findings therefore provided a sound, objective reason for concluding that recent trends in the effects of imports on the domestic industry would provide sound guidance for predicting the imminent future. As a result of this analysis, the USITC concluded that there was a “high” degree of likelihood that “the increased imports will have a substantial negative effect on the volume or prices, or both, of the US industry’s lamb meat sales.”¹⁶⁹ Australia again has not articulated a basis for finding a violation of the Agreement.

(d) Complainants Arguments that the USITC should have put more weight on certain evidence do not detract from the adequacy of the determination it reached

(i) *The USITC accurately and objectively characterized the evidence on profitability*

137. New Zealand’s arguments concerning profitability evidence simply ask the Panel to recharacterize the evidence. New Zealand claims¹⁷⁰ that the USITC’s statement that a significant portion of individual growers reported that they had operated at a loss was “misleading.” Instead, New Zealand argues, the USITC should have said that a significant portion operated at a profit. This makes no sense. First, the USITC statement was absolutely true, and New Zealand’s suggested

¹⁶⁵ See, e.g., Australia’s First Written Submission at ¶139.

¹⁶⁶ Australia’s First Written Submission at ¶133.

¹⁶⁷ USITC Report at I-23 n.23.

¹⁶⁸ USITC Report at I-22-24.

¹⁶⁹ USITC Report at I-26.

¹⁷⁰ New Zealand’s First Written Submission at ¶7.59.

rephrasing of the statement clearly concedes that it was true. Second, and more importantly, the Safeguards Agreement nowhere requires that a competent authority find the domestic industry as a whole or every producer in the industry to be operating at a loss in order for the industry to be seriously injured or threatened with serious injury. What it does require is that the competent authority find that increased imports are causing or threatening serious injury to the domestic industry. This the USITC did in fact find, and the fact that a significant portion of growers reported that they had operated at a loss in the most recent period, at the time when imports were surging, was one of the facts supporting this finding.

138. New Zealand again complains¹⁷¹ that the USITC was selective in its use of profitability data for feeders in that it drew conclusions based on data reported by different numbers of feeders – nine feeders for the full years 1993-97, seven feeders for interim 1997, and six feeders for interim 1998. There was nothing selective in what the USITC did. The USITC had a fully uniform data series for the five full years 1993-97, covering the same nine firms. The interim year data are most useful for comparing the most recent interim period with the previous interim period, as opposed to previous full year periods. At the USITC explained on page II-29 of its report, one of the feeder firms that reported data for interim 1997 went out of business in interim 1998. The USITC report stated that this contributed to the reduction in net sales quantity and value and total expenses when compared to interim 1997.¹⁷² The USITC's findings accurately and objectively characterize the evidence concerning profitability.

(ii) *The USITC reasonably did not place weight on growths in packer and breaker capacity in preference to other evidence of the industry's position*

139. While not denying that the factors on which the USITC relied were relevant under Article 4.2 of the Agreement, Australia and New Zealand insist that the authority should have placed greater weight on other factors. These arguments do not make out a violation of the Agreement and invite the Panel to violate the standard of review by reweighing the evidence. Article 4.2(a) requires competent authorities to "evaluate" all relevant factors. It does not require that an authority give weight to each factor in each investigation, nor does it require that an authority find that each factor provide evidence that supports the conclusion it reached.

140. Thus, Australia's assertion¹⁷³ that the increase in capacity of US packers and breakers during the investigation does not support a finding of threat of serious injury does not state a proposition contrary to the conclusion that the USITC reached. The USITC did not rely on capacity information in making its affirmative finding of threat of serious injury. Rather, the USITC found such factors as worsening financial performance, declining sales, falling prices, and falling market share due to increased imports more indicative of whether the industry's position would deteriorate.¹⁷⁴

141. Moreover, the reasons why the authority found such trends more probative are evident on the face of its determination. As the authority found, firms in the packer and breaker segments reported difficulties in recouping new investments in plant and equipment and in repaying loans.¹⁷⁵ Thus, the fact of past investment did not, as Australia posits, necessarily provide evidence of an expectation of profits in the future, when firms were having difficulty recouping that investment. Indeed, their failure to recoup investment was consistent with the effects of falling sales and market share due to increased imports.

¹⁷¹ New Zealand's First Written Submission at ¶7.60.

¹⁷² USITC Report at II-29.

¹⁷³ Australia's First Written Submission at ¶¶151-152.

¹⁷⁴ USITC Report at I-24.

¹⁷⁵ USITC Report at I-21.

(iii) *The USITC reasonably discounted the relevance of inventory data when the product at issue generally is not inventoried for long periods of time*

142. Although the USITC found that inventories reported by US packers rose slightly over the period, the USITC did not give weight to that evidence as an indication of threat of injury. The USITC explained that inventory data are “not particularly relevant” because fresh lamb meat is perishable and can be inventoried for only a limited time.¹⁷⁶ This conclusion reflects that the authority did not simply accept every negative trend as suggestive of an affirmative determination, but rather carefully evaluated the value of each piece of evidence.

143. New Zealand does not explain why the USITC, having found inventories irrelevant, violated the Agreement when it did not make a specific finding about the decrease in inventories in interim 1998.¹⁷⁷ Under Article 4.2(c) of the Agreement, the authority was required to make a detailed analysis of the case and a demonstration of the relevance of the factors examined. By giving a precise explanation of the irrelevance of inventories, the USITC explained the reason why it found other factors more important and why a detailed analysis of the case did not require further findings on inventories.

144. Indeed, the USITC decision elsewhere gives yet another reason for not finding the interim 1998 fall in inventories particularly relevant. As the authority found, production fell in interim 1998.¹⁷⁸ In the circumstances, a decline in inventories is not necessarily indicative of a positive trend.

(e) Australia's other criticisms of the methodology of the USITC's decision make incorrect assumptions about the USITC's determination and fail to allege any violation of the Agreement

145. Contrary to Australia's claim, the USITC made no finding that the domestic industry was not experiencing serious injury.¹⁷⁹ In this case, the USITC found that lamb meat was being imported in such increased quantities as to cause a threat of serious injury to the domestic industry. It did not make a negative finding of present serious injury. Under Article 2.1 of the Agreement, a Member may impose a safeguard measure if it finds that the requisite conditions either cause or threaten to cause serious injury. The Agreement nowhere states that an authority in making such a determination must find that the other possible ground for taking a measure does not exist. Australia does not contend that the USITC should first have made a determination as to whether increased imports cause current serious injury, and that issue is not before this Panel.

146. Australia seems to further criticize the USITC for finding that the domestic industry was threatened with serious injury before it looked at causation issues¹⁸⁰, but cites no reason such an analysis is contrary to the Safeguards Agreement. In their written views, the USITC Commissioners addressed in sequential sections their reasons for concluding that the domestic industry was threatened with serious injury and their reasons for concluding that increased imports of lamb meat were causing the threat of serious injury. The Commissioners could, as they have in past determinations, found that the industry was threatened with serious injury, but that such a threat was not caused by increased imports. Thus, the fact that the Commissioners made a finding about whether the industry was in a threatened state in no way biased their consideration of causation.

147. Indeed, while the United States does not claim that such a division of findings is required by the Agreement, it notes that Article 4.2(b) requires a demonstration of “the existence of the causal link

¹⁷⁶ USITC Report at I-20.

¹⁷⁷ New Zealand's First Written Submission at ¶7.61.

¹⁷⁸ USITC Report at I-18.

¹⁷⁹ Australia's First Written Submission at ¶187.

¹⁸⁰ Australia's First Written Submission at ¶188.

between increased imports of the product concerned and serious injury or threat thereof.” This provision certainly suggests that the demonstration of a causal link may be a distinct conclusion from the establishment of a threat of serious injury.

5. The USITC based its determination on objective evidence in keeping with Article 4.2 of the Safeguards Agreement

148. Complainants’ challenges to the objectivity of the evidence on which the USITC relied have no support in the Agreement or are based on prejudicial mischaracterizations of what the authority in fact did. As the United States shows herein, the United States examined all facts in its possession or which it should have obtained in accordance with Article 4.2 of the Safeguards Agreement, including facts that may have detracted from an affirmative determination.

149. The complaining Members’ complaints about the data on which the USITC relied is similarly misplaced. The USITC conducted a massive investigation, which provided an objective basis for making the analysis required by the Safeguards Agreement. There is simply no merit to their claims¹⁸¹ that the USITC was selective in its use of data in order to reach a particular result.

(a) In evaluating information on growers and feeders, the USITC conducted an objective evaluation by use of both official and questionnaire data

150. In evaluating the condition of the domestic industry, the USITC relied on data obtained from responses to USITC questionnaires and from the US Department of Agriculture (“USDA”). As the USITC noted, the USDA annually collects and publishes data on domestic lamb slaughter and the number of lamb-growing establishments, and such data were more comprehensive than those that it could develop in the course of its investigation. 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. Accordingly, in evaluating the various factors, the USITC relied on the more comprehensive USDA data when possible. In evaluating factors, such as financial conditions, for which there were no USDA data, the USITC relied on questionnaire response data.¹⁸² Complainants have not suggested any reason why this approach constituted anything less than an objective evaluation of the evidence.

151. To obtain financial and other data on grower operations, the USITC sent questionnaires to 110 firms and individuals believed to be among the larger growers of lambs. It received data from 57 firms or individuals accounting for an estimated 6 per cent of domestic lamb production. In view of the relatively small coverage of these responses, the USITC did not place decisive weight on questionnaire data received from growers. Nevertheless, the USITC found it appropriate to take these data into account along with other data obtained in the investigation in evaluating the condition of the industry. The USITC drew three conclusions from its evaluation of the grower responses: First, that a comparison of the questionnaire data and USDA data suggested that questionnaire responses from domestic growers, if anything, reflected that those who responded were doing better than the industry as a whole; second, that the overall trends in grower questionnaire data did not differ markedly from the trends in the questionnaire data obtained from feeders, packers, and breakers, for which questionnaire coverage was significantly higher; and third, that none of the respondents argued that the data were biased, or that they inaccurately portrayed the condition of growers.¹⁸³

152. The USITC identified the sources of the data on which it relied and carefully explained its reasons for doing so. The USITC relied on what it considered to be the most objective and

¹⁸¹ New Zealand’s First Written Submission at ¶7.58; Australia’s First Written Submission at ¶122.

¹⁸² USITC Report at I-16-17.

¹⁸³ USITC Report at I-17.

comprehensive data. Finally, the USITC was completely candid in noting any limitations in a particular data series and the weight that it was giving to such data.

153. For those factors for which the USITC was able to obtain data from both questionnaire responses and the USDA, the USITC carefully compared the respective data series for differences and sought to determine the reasons for any differences. For example, the USITC noted that USITC questionnaire data on production and shipments from all industry segments generally showed much more positive trends than USDA data. The USITC also noted that USDA data showed a loss of nearly 20,000 lamb-growing establishments over the period of investigation, while the questionnaire data show a slight increase in shipments, employment, and net sales over the period. Based on its evaluation of these data, the USITC concluded that the questionnaire data likely represented a set of entities that are performing better than the lamb meat industry as a whole. The USITC found that the main reason for this was that the questionnaire data had a “survivorship bias” in that the USITC did not obtain responses from the establishments that exited the market.¹⁸⁴ Thus, the USITC reasonably concluded that the USDA data were more representative of the industry as a whole.

154. Despite these extensive efforts and the care that the USITC took not to overstate the probative character of its evidence, Australia and New Zealand contend, in effect, that *no* conclusion could be drawn from the evidence gathered. Australia objects that the existence of a survivorship bias¹⁸⁵ in the questionnaire data should not have led the USITC to rely on USDA data on the issue of threat.¹⁸⁶ Australia’s position on this question is somewhat puzzling, since it also seems to have argued that the USITC questionnaire data were so flawed that the USITC should not have relied on it at all. Australia’s argument appears to amount to a contention that the USITC could neither rely on official data, because it included producers who had gone out of business, nor on questionnaire data, because the USITC was unable in the course of its investigation to conduct further questionnaire samples.

155. These arguments do not set forth a cogent reason why the USITC did not properly rely on USDA data. That data was, as no one contests, more comprehensive than any data the USITC would be able to collect during its investigation and, unlike the questionnaire data, unaffected by a survivorship bias. The fact that the USDA data included data from firms that had gone out of business did not make it less representative of the industry in the imminent future. The industry included firms that were both likely to survive in the future and likely to perish. Analyzing data that was representative of such dynamics in the recent past represented the best way of attempting to anticipate such dynamics in the future. Neither complaining Member has advanced any reason under the Agreement why the USITC could not properly rely on more comprehensive official data where it was available.

156. New Zealand and Australia, conversely, contend that the USITC should not have relied on questionnaire data at all because it ignores the USITC’s finding concerning survivorship bias. Their assumption¹⁸⁷ that only injured firms answer questionnaires was, as the USITC found, the opposite of what the record in this case indicated. The available data suggested that those who answered were doing better than the industry as a whole.¹⁸⁸ This result suggested that responses are more likely to come from the less injured firms, which, in an industry with a multitude of small producers, are more likely to have the staff that can fill out the USITC’s extensive questionnaire. Moreover, the healthier responding firms may be short term beneficiaries of the deteriorating conditions in the industry in that

¹⁸⁴ USITC Report at I-17.

¹⁸⁵ In this argument Australia appears to adopt the USITC’s finding of a survivorship bias, although elsewhere Australia contests it.

¹⁸⁶ Australia’s First Written Submission at ¶ 122.

¹⁸⁷ Australia’s First Written Submission at ¶¶131, 154.

¹⁸⁸ For example, the 49 growers who furnished financial information were in business for the full five-year period of the investigation, whereas a significant contraction occurred in the number of growers during the five-year period.

they may be picking up business from the firms that have downsized or exited the industry. Firms in the most desperate condition, whose staffing has been cut to the bone as part of a struggle to survive, are less likely to have had the resources to fill out the questionnaire. Thus, to the limited extent that the USITC did rely on questionnaire data, neither New Zealand nor Australia has reason to complain about the result. To the extent that the questionnaire data fell short of being fully representative, it erred in favor of a finding of a lack of threat of serious injury.

157. Australia is absolutely wrong when it asserts that the USITC “did not attempt to obtain a valid picture” of the grower segment of the domestic industry.¹⁸⁹ Australia bases its complaint on the fact that the USITC sent out *only* 110 questionnaires to lamb growers, but does not allege any bias or imbalance in the USITC questionnaires or the choice of firms selected to receive questionnaires. Nor does Australia indicate what more the USITC should have done or what would constitute such a valid picture, or allege that the United States violated any specific article of the Safeguards Agreement in this regard.

158. To the contrary, the USITC undertook a vigorous effort to obtain data on grower operations and as a result had sufficient information at the time of its determination on which to draw a valid picture of what was happening in this sector. The USITC sent out a large number of questionnaires – 110 – to firms and individuals believed to be among the larger growers of lamb, more than it sends out in the course of a typical safeguard investigation. The USITC received usable data from more than half of the recipients, and in particular received usable financial data from 49 growers. This provided the USITC with a more than sufficient basis for drawing conclusions about the condition of the domestic industry. In addition, the USITC obtained more comprehensive data on grower operations compiled by the US Department of Agriculture to the extent such information was available, and received substantial additional information about grower operations from the parties in the investigation and from persons who testified at the public hearing. Finally, the USITC obtained a substantial body of comprehensive data on other industry segments, against which it was able to cross check grower data for purposes of confirming similarities or differences in trends.

159. None of the Australian and New Zealand respondents in the USITC investigation, who had access under administrative protective order to the individual confidential grower questionnaire responses, argued to the USITC that the data were biased or inaccurately portrayed the condition of growers. To the contrary, the New Zealand respondents in the USITC investigation argued that the financial data compiled by the USITC from grower questionnaires *supported* their position, in that they showed that domestic lamb growers “did remarkably well throughout the period of investigation.”¹⁹⁰

160. 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.¹⁹¹ The Agreement sets forth no specific standard of investigative thoroughness. Nor, contrary to Australia’s assumptions, does the Agreement require that questionnaire data be scientifically valid in a statistical sense. Rather, it requires that a determination be made “on the basis of objective evidence.”¹⁹² Such a standard does not require a competent authority, as Australia suggests, to send repeated waves of questionnaires to additional firms if extensive sampling does not yield universal responses. Such a requirement would unduly prolong a proceeding whose pendency can have distortive trade effects and whose purpose is to address emergency situations.

161. Here the USITC conducted an extensive investigation. Its efforts were reasonably calculated to obtain data that were impartial and as comprehensive as practicable under the circumstances. It

¹⁸⁹ Australia’s First Written Submission at ¶127.

¹⁹⁰ USITC Report at I-17.

¹⁹¹ Australia’s First Written Submission at ¶140.

¹⁹² Safeguards Agreement, Art. 4.2(b).

assured the objectivity of the evidence on which it relied by comparing results for different sources, where available, and evaluating the evidence for any indications of bias. It carefully drew only those inferences that the evidence objectively evaluated would allow and systematically relied on the most comprehensive data available. The Agreement requires no more.

(b) The USITC obtained objective evidence on domestic feeder, feeder/grower, and packer and breaker operations

162. The USITC obtained extensive and sufficient data on domestic feeder operations and these data support the USITC's finding that the domestic industry is threatened with serious injury. Australia's complaint¹⁹³ that the USITC report gives no basis for why its compilation of feeder data consists of nine feeders is easily answered: these were the firms that furnished the USITC with data. As explained in the USITC report, the USITC received responses from 18 feeder operations, some of which were also growers.¹⁹⁴

163. Australia's claim that the USITC data series for feeder operations is deficient because the number of firms furnishing full year and interim year data was different is without merit. Interim data are not directly comparable to full year data, and are most useful for comparing data for the most recent interim (part-year) period with those for the same period in the prior year. Thus, the fact that the number of firms furnishing full year and interim year data was different does not undercut the usefulness of the interim period data. Moreover, the USITC did note in its report that one of the firms that supplied interim 1997 data went out of business in 1998, and that this contributed to the reduction in net sales quantity and value and total expenses for interim 1997.¹⁹⁵

164. 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.¹⁹⁶ 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. Moreover, Australia's complaint here understates the USITC's data collection efforts with respect to grower/feeder operations. As the USITC stated in its report, it received 10 questionnaire responses from firms that reported themselves to be grower/feeder operations. However, the USITC reclassified seven of them as growers because they indicated that they fed only their own lambs.¹⁹⁷ Furthermore, Australia's complaint here only serves to reinforce the fact that the USITC made every reasonable effort to collect data from each type of producer in order to obtain a complete picture of what was happening in the industry and exercised great care in evaluating the evidence it obtained.

165. The USITC obtained extensive and sufficient data on domestic packer, packer/breaker, and breaker operations, and these data support the USITC's finding that the domestic industry is threatened with serious injury. The USITC received data on lamb meat operations from packers, packer/breakers, and a breaker accounting for approximately 76 per cent of domestic lamb meat production.¹⁹⁸ This represented a very substantial share of overall domestic lamb meat packing and processing operations, and provided more than sufficient basis for the USITC to draw conclusions about those operations. Australia's claim¹⁹⁹ that the USITC should have obtained data from additional packing and processing operations assumes that such data were readily available to the

¹⁹³ Australia's First Written Submission at ¶¶137-38.

¹⁹⁴ USITC Report at II-13, and II-13 n.46.

¹⁹⁵ USITC Report at II-29.

¹⁹⁶ Australia's First Written Submission at ¶134.

¹⁹⁷ USITC Report at II-29 n.89.

¹⁹⁸ USITC Report at II-24.

¹⁹⁹ Australia's First Written Submission at ¶¶ 140-141.

USITC. As the authority's report indicates, many of the packers and breakers devote only a portion of their overall operations to the processing of lamb²⁰⁰ and were unable to provide separate data on lamb meat operations.

166. In an industry as complex as the one at issue here, it will always be possible to point to gaps in the evidence an investigation obtains. This is why the Agreement does not mandate perfection in data collection and requires only objectivity. Neither Australia nor New Zealand has articulated any way in which the USITC's investigation transgressed the requirements of the Agreement.

(c) As to factors concerning which it was not practical to obtain objective information, the USITC objectively evaluated the record by placing no weight on those factors

167. The USITC found that it was not practical to collect data on capacity and capacity utilization from lamb growers and feeders. The USITC found that such data were not quantifiable. The USITC found that growers' range capacity would likely have varied from ranch to ranch depending on land conditions, and that feeder capacity also depended on a number of variables that are difficult to measure, including length of time that lambs are kept by the feeders, which may vary with market conditions.²⁰¹

168. Australia notes that "capacity utilization" is one of the factors listed in Article 4.2(a) of the Safeguards Agreement that a competent authority must consider, and claims that the USITC's inability to gather such data violates the Safeguards Agreement.²⁰² However, Australia overlooks the fact that Article 4.2(a) requires that a competent authority evaluate all relevant factors of an "*objective and quantifiable nature*" (emphasis added) bearing on the situation of the industry. For the reasons stated in the USITC report, the USITC correctly concluded that it was unable to compile data on grower and feeder capacity utilization that would have been "objective and quantifiable" within the meaning of Article 4.2(a).

169. The USITC obtained data on employment from domestic lamb growers and feeders, which showed a modest increase in employment during the most recent period. The USITC also obtained data on personnel costs from packers and breakers. The line item for these data in the packer and breaker financial tables is in the confidential version of the USITC's report; the actual data are business confidential information. However, as a general matter, packers and breakers were unable to provide the USITC with usable data on the number of employees and hours worked because many firms use the same production workers to slaughter and/or process other meat animals and products. Thus, the USITC was able to obtain only limited "objective and quantifiable" data within the meaning of Article 4.2(a) on packer and breaker employment. Thus, contrary to Australia's claim²⁰³, the USITC did obtain and present some employment-related data for lamb packing and processing operations. However, the USITC did not rely on employment data in making its affirmative determination.

170. The Agreement does not require an authority to give weight to each factor enumerated in Article 4.2(a). Rather, it only requires that the factors be evaluated, and then only when they afford objective and quantifiable evidence. The USITC's decision not to place weight on factors for which there were no reliable data was entirely consistent with the Agreement.

171. In summary, despite complainants' lengthy objections, their submissions to this Panel do not demonstrate that the USITC's investigation or determination can be said to have violated the Safeguards Agreement. As previous Panels have held, in making injury findings about industries as a

²⁰⁰ USITC Report at II-15.

²⁰¹ USITC Report at I-20 n.96.

²⁰² Australia's First Written Submission at ¶225.

²⁰³ Australia's First Written Submission at ¶¶170, 225.

whole, authorities may, but need not, make findings about segments, but in any case must analyze the significance of impacts on industries as a whole.²⁰⁴

6. Australia and New Zealand have failed to establish that the US safeguard measure is inconsistent with the requirement of Article 5.1

(a) Introduction

172. Based on a thorough and painstaking investigation, and after hearing from all interested parties, the USITC reached a unanimous determination that a surge in Australian and New Zealand lamb meat imports had left the domestic lamb industry in imminent peril of serious injury. In its findings, the USITC pointed to the variety of ways in which the domestic industry had been damaged under competitive pressure from increased shipments of Australian and New Zealand lamb meat into the US market during 1997-98. While the USITC found that the condition of the US lamb industry had not yet reached the point of significant overall impairment, the USITC plainly expected such impairment to occur very shortly if trends continued.

173. In these circumstances, the United States was entitled under Article XIX of *GATT 1994* and the Safeguards Agreement to modify its GATT tariff concessions to provide a limited period of relief to its lamb industry from import pressure, sufficient to prevent serious injury and facilitate the industry's adjustment to import competition. The relief that the United States provided was carefully and conservatively tailored to that purpose, consistent with the USITC's specific findings regarding the injury that the US lamb industry had experienced.

174. The relief package the United States put in place included a large component of financial assistance, in combination with domestic regulatory measures, aimed at enhancing industry competitiveness. The import element of the relief was limited in nature, designed to generate a modest increase in US lamb meat prices over three years and thus restore a minimal level of profitability to more efficient US lamb producers during that period. The relief sought to accomplish this result by effectively capping lamb imports at their high-water mark and introducing a limited increase in duties below that level, phased down over the three-year period.

175. Taken as a whole, the package represented minimal steps needed to give the US lamb meat producers a short period of breathing room to enhance productivity and regain competitiveness. The import component of the package is fully consistent with Article XIX and the Safeguards Agreement in that it provides a small degree of relief to US lamb meat producers over a limited time sufficient to assist them in responding to the challenge of import competition.

176. Australia and New Zealand nonetheless object to the import aspect of the relief package. While they each advance certain ill-founded criticisms of the remedy the United States applied, they fail to offer any systematic assessment of why it is inappropriate. Rather, the gist of their objections is that the import relief goes too far because it fails to leave the US lamb industry in the deteriorated state in which the USITC found it. That is, susceptible to imminent "serious injury." This is the conclusion to be drawn from Australia's and New Zealand's insistence that because the US lamb industry was merely under "threat" of serious injury the United States was foreclosed under Article 5.1 from applying any relief that might restrain lamb imports to below their highest levels during the 1997-98 surge period.

177. If this restrictive reading of Article 5.1 were to be credited it would undermine the remedial purpose of Article XIX and the Safeguards Agreement, which is to permit Members temporarily to suspend their GATT obligations, or modify their GATT concessions, in order to provide industries

²⁰⁴ See Korea--Dairy at ¶ 7.58; Mexico -- Anti-dumping Investigation of High Fructose Corn Syrup (HFCS) From the United States, WT/DS132/R, 28 January 2000 at ¶ 7.147.

experiencing or threatened by serious injury, a brief respite from competitive pressure sufficient to assist those industries in regaining competitiveness.

178. Article XIX has long been understood to permit Members to modify their tariff concessions to the degree required to place industries in a position to restore their competitiveness. The 1951 Report of the Working Party on the “Withdrawal by the United States of a Tariff Concession under Article XIX” (Felt Hats) considered the time and extent to which the United States was permitted under Article XIX to suspend tariff concessions and concluded that the original tariff concessions should be wholly or partially restored:

if and as soon as the United States industry is *in a position to compete with imported supplies* without the support of the higher rates of duty.²⁰⁵

179. The well-recognized remedial purpose of Article XIX was made explicit in Article 5.1, first sentence, of the Safeguards Agreement, which provides that safeguards measures may be applied both to prevent or remedy serious injury and to “facilitate adjustment.” The articulation of this second purpose for import relief makes clear that Members are not required to limit their safeguard measures to those that merely preserve an industry in a deteriorated state just short of serious injury, but rather may apply import relief that will place the industry in a position to regain its competitiveness.

180. In short, Australia’s and New Zealand’s reading of Article 5.1 cannot be sustained if Article XIX and the Safeguards Agreement are to provide, as they were intended, an opportunity for Members to provide limited, temporary, but real import relief both for industries already experiencing serious injury and those in imminent peril of such injury.

(b) Article 5.1 does not establish a "least trade restrictive" standard

181. New Zealand grounds its argument under Article 5.1 against the US lamb meat safeguard measure on the premise that the first sentence of that provision required the United States to identify and apply the “least trade restrictive” safeguard measure available to prevent serious injury to the US lamb industry and facilitate its adjustment.

182. New Zealand has mischaracterized the requirement imposed by Article 5.1, first sentence, effectively rewriting the sentence to require Members to identify and apply the hypothetical single least trade restrictive safeguard measure conceivable.²⁰⁶ That is a virtually impossible standard and is at variance with the straightforward manner in which Article 5.1, first sentence has been interpreted to date.

183. Article 5.1, first sentence, provides:

²⁰⁵ GATT/CP/106, report adopted on 22 October 1951, GATT/CP.6/SR.19, Sales No. GATT/1951-3, at 26, ¶ 38 (emphasis added).

²⁰⁶ New Zealand also mischaracterizes past GATT jurisprudence and the Appellate Body report in *Gasoline*, which do not in fact refer to any “least trade restrictive” test. New Zealand is also in error in claiming that the term “necessary” wherever it appears in the WTO Agreement has some uniform meaning allegedly derived from the particular context of Article XX of the GATT 1994, an affirmative exception. Nor does New Zealand explain how its approach, which imputes to the term “necessary” a series of conditions not found in the text, can be reconciled with the fact that when the drafters of the WTO Agreement wished to adopt a “no more trade restrictive” test, they did so explicitly in the text. See e.g., Art. 5.6 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*.

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

New Zealand reads this sentence as requiring the United States to ensure that its lamb meat safeguard measure is “necessary” to prevent or remedy the serious injury and to facilitate adjustment. The sentence does not say that the specific safeguard measure chosen must be “necessary”, however. Rather the sentence says that a Member “shall *apply*” safeguard measures “only to the *extent* necessary”.

184. The expression “only to the extent” in Article 5.1, first sentence, is plainly linked to the words “shall apply”. Thus, Members “shall apply” safeguard measures only to a certain “extent”. The term “necessary” modifies the word “extent”, meaning that the “extent” of application of the measure must be “necessary”. 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.

185. By contrast, New Zealand’s reading effectively rewrites the expression “apply safeguard measures only to the extent necessary” in Article 5.1, first sentence, to read “apply those safeguard measures that are necessary”. New Zealand’s construction ignores the fact that the word “extent” means “amount” or “degree” rather than “if” or “when”.

186. Read in its context, Article 5.1, first sentence, addresses the degree to which measures may be applied to accomplish the objectives set out in that sentence; it cannot be read to mean that such measures must be justified as “necessary,” much less “least trade restrictive”. Article 5.1 expands on language in Article XIX:1(a) of *GATT 1994*, which permits a contracting party to suspend GATT obligations and modify its GATT commitments in response to increased imports of a particular product that are causing, or threatening to cause, serious injury to a contracting party’s industry.

187. The relevant language of Article XIX:1(a) states that in such circumstances the contracting party:

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.

188. In this passage, the term “necessary” plainly modifies the expression “to the extent”, as it does in Article 5.1, first sentence. Moreover, the entire expression “to the extent . . . necessary” is linked to the phrase “to suspend the obligation . . . or modify the concession”. The plain meaning of this passage is that a contracting party may depart from its GATT commitments and obligations to the degree (and for the time) required to prevent or remedy the injury. Although it too includes the term “necessary,” the passage cannot be read as requiring a contracting party to adopt any particular measure, let alone a hypothetical single least trade restrictive alternative.

189. Article 5.1, first sentence, should be read along with the rest of Article 5 to amplify the relevant provisions of Article XIX:1(a), not to depart from them. Such a reading would be consistent with a principal object and purpose of the Safeguards Agreement, as articulated in its preamble, which is to clarify and reinforce the disciplines of Article XIX. The sentence should not be interpreted in such a restrictive fashion that it defeats the objective of Article XIX, which is to provide a meaningful opportunity for contracting parties (now Members) to provide to industries under siege from increased imports a meaningful opportunity to regain their competitiveness.

190. New Zealand suggests that the panel in the *Korea--Dairy* case accepted a “least trade restrictive” standard as the relevant test for interpreting a Member’s compliance with Article 5.1. In fact, the panel stated that a Member seeking to comply with Article 5.1 “. . . 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.” The panel did not refer to, or establish, a “least trade restrictive” test.²⁰⁷ Rather, it said that the measure the Member selects should be examined as a whole to determine whether it is more restrictive than necessary to achieve its purpose. The Appellate Body affirmed that reading.²⁰⁸

191. As the Appellate Body has stated, Article 5.1 imposes an obligation on a Member to ensure that its safeguard measure “is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment.”²⁰⁹ Thus, Article 5.1 does not require a Member to select any particular measure, let alone identify and apply the “least trade restrictive” one. Rather, it says that the measure the Member does select should be designed to accomplish the twin goals of preventing or remedying serious injury and facilitating adjustment and should not go further than required to meet those objectives.

192. New Zealand has not demonstrated why the US lamb meat safeguard fails this test. New Zealand’s principal argument is to point to the remedy that three of six USITC commissioners recommended, suggest that it represented a less trade restrictive alternative, and thereby conclude that the United States did not apply the “least trade restrictive” available safeguard measure. As noted above, however, Article 5.1, first sentence, did not compel the United States to adopt the “least trade restrictive” alternative. Article 5.1, first sentence, does not limit Members to a single choice, or set of choices, of safeguard measures.

193. New Zealand seeks to bolster its conclusion that the US lamb TRQ is not the least trade restrictive alternative by misreading the USITC report. New Zealand claims the USITC found that:

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.

Based on this reading of the USITC report, New Zealand claims that the United States was foreclosed under Article 5.1, first sentence, from imposing a remedy that restricted lamb meat imports to levels below those during the period of investigation.

194. New Zealand is wrong. The USITC found that during 1997-98 increased lamb meat imports had caused considerable injury to the US lamb industry. The USITC report demonstrates very specifically both the debilitated condition of the industry and the link between that injury and import levels during 1997-98.²¹⁰

195. While the USITC made no finding about whether the industry had reached the point of significant overall impairment – *i.e.*, “serious injury” -- the USITC did find that such injury was “imminent.” It is plain that at least three of the six USITC commissioners rejected New Zealand’s premise that the US industry would lapse into “serious injury” only if import levels exceeded those of 1998. Commissioners Miller and Hillman stated that:

²⁰⁷ If the framers of the Safeguards Agreement had intended to depart from Article XIX and impose a “least trade restrictive” test in Article 5.1, they would have included one explicitly. New Zealand’s attempt to read words into Article 5.1 that are not there violates the fundamental rule of treaty interpretation that a treaty interpreter must “read and interpret the words actually used by the agreement under examination, and not words which the interpreter may feel should have been used.” *European Communities - Measures Affecting Meat and Meat Products (Hormones)*, WT/DS26/AB/R, Report of the Appellate Body adopted 13 February 1998, at ¶ 181.

²⁰⁸ Report of the Appellate Body, *Korea -- Dairy*, at ¶ 103.

²⁰⁹ Report of the Appellate Body, *Korea -- Dairy*, at ¶ 96.

²¹⁰ USITC Report at I-18-21, I-23-26.

It is our view that the industry would experience serious injury caused by imports if import levels and prices continue at now-existing levels, even if no further price declines occur.²¹¹

196. Commissioner Koplan found, similarly, that a remedy set at existing import levels “would not stave off the threatened serious injury, much less provide the industry with the opportunity to make a positive adjustment to prepare for the import competition.”²¹²

197. In summary, the USITC found that the US lamb meat industry was *already* in a deteriorated condition due to competition from imports at 1997-98 volumes and prices. There was every reason to believe that the industry was imminently susceptible of decline into “serious injury” even if imports were held to then-existing levels. It was thus entirely appropriate for the United States to apply a safeguard measure that would guard against that possibility.

198. Moreover, New Zealand’s argument ignores the second purpose for safeguard measures stated in the first sentence of Article 5.1 -- namely, to allow a Member to apply safeguard measures to the extent required to facilitate the industry’s adjustment to import competition. Under New Zealand’s theory, a Member could impose safeguard measures sufficient only to preserve an industry in the same threatened condition its competent authority had found it in, with the result that on lifting the safeguard measure it would immediately be vulnerable to serious injury. That would increase the likelihood that the industry would, as soon as permissible, again seek import relief, leading to repeated impositions of safeguard measures, contrary to the purpose of the Agreement. Article 5.1, first sentence, makes clear that safeguard measures may be applied to the extent necessary to facilitate adjustment, an objective that would be frustrated by a reading of Article 5.1 that required a Member to do no more than keep its industry in a continuing state of distress.

199. Finally, New Zealand’s specific argument that the US safeguard measure was not “necessary” to facilitate the industry’s adjustment is baseless. New Zealand objects (at ¶ 7.107) that the US safeguard measure failed to include adjustment assistance and thus could not be “necessary” to promote industry adjustment. In fact, a principal element of the relief that the United States provided to the lamb meat industry was a package of adjustment assistance measures, as discussed below. New Zealand’s further claim (at ¶ 7.108) that the US measure was incapable of facilitating adjustment because it would lower consumer demand for lamb meat ignores the fact that the USITC found the demand for lamb meat to be relatively inelastic, so that price changes would have little effect on demand.²¹³ In any event, as explained above, New Zealand’s claim that the United States must demonstrate that its safeguard measure was “necessary” is based on a misinterpretation of Article 5.1, first sentence, and should be rejected.

(c) Australia has failed to establish a *prima facie* case of non-compliance with Article 5.1

200. Unlike New Zealand, Australia does not characterize Article 5.1, first sentence, as imposing a “least trade restrictive” remedy standard. Rather, Australia suggests that the US safeguard measure was excessive because, in Australia’s view, it is more restrictive than the remedy three of the USITC commissioners recommended. Both the remedy recommended by the USITC plurality, and the measure ultimately adopted, take the form of a tariff-rate quota (TRQ). Australia objects to the fact that the US safeguard measure includes an “in-quota” tariff and a higher out-of-quota tariff than the plurality recommended.²¹⁴ In Australia’s view, these differences mean the US safeguard measure

²¹¹ USITC Report at I-40.

²¹² USITC Report at I-49.

²¹³ USITC Report at II-70.

²¹⁴ New Zealand makes a similar argument (at ¶ 7.102).

went beyond the extent “necessary” to prevent or remedy the serious injury and facilitate adjustment, and therefore the measure contravenes Article 5.1.

201. The initial flaw with Australia’s theory is that its analysis is overly simplistic. Australia fails to note that the plurality recommendation, if implemented, would have imposed a four-year safeguard. By contrast, the lamb meat TRQ that the United States actually applied will terminate in three years and a day. In this sense, the US measure is clearly *less* restrictive, taken as a whole, than the remedy the plurality recommended.

202. Australia’s citation of the difference in over-quota rates is a second example of the flaws in its reasoning. It is true that the USITC plurality recommended over-quota duty rates that were lower than those included in the US safeguard measure. However, contrary to Australia’s assertion there is no difference in the trade restrictive effect of a 20 per cent *ad valorem* duty rate, which the USITC plurality recommended for the first year of the safeguard, and the 40 per cent *ad valorem* rate that the United States actually applied. Both the USITC plurality recommendation and the US safeguard set the quota at 1998 import levels. At those levels, the 20 per cent rate proposed by the USITC plurality was designed to be trade-preclusive²¹⁵, as was the 40 per cent rate included in the US measure. In fact, the only real difference between the plurality recommendation and the US measure in terms of the effect of out-of-quota duty rates is that under USITC recommendation the annual drop in duty rates, particularly in years three and four, provided for the possibility of limited imports beyond 1998 levels during those years.

203. Australia’s additional argument that there was “no conceivable basis” for applying a tariff to in-quota imports is mistaken as well. The sole rationale for Australia’s claim is that because the USITC unanimously found that the level of imports during 1997-1998 resulted in a threat of serious injury, and not present serious injury, applying an in-quota tariff went “well beyond” what was “necessary” to prevent serious injury. That is wrong.

204. The purpose of the in-quota tariff is modestly to increase prices for lamb meat in the United States and thereby generate additional revenue for the US lamb meat industry. The USITC threat of serious injury determination identified low prices as one of the principal reasons for the US industry’s poor financial health.²¹⁶ It was perfectly appropriate for the United States to structure its measure in a manner that provides relief from low prices, thus making it possible for the industry to return to profitability. That objective is consistent with facilitating the industry’s adjustment, as contemplated by Article 5.1, particularly in a case in which the US competent authority had found that the industry’s financial performance had worsened largely due to falling prices²¹⁷ and that, as a result, firms in the industry had experienced difficulty in generating adequate capital to finance modernization of their domestic plants and equipment.²¹⁸

205. The remainder of Australia’s Article 5.1 complaints (at ¶¶ 75-80) are directed at the USITC plurality recommendation, rather than at the US measure itself. Inasmuch as the United States did not apply the plurality’s suggested remedy, Australia’s arguments are not legally germane in this proceeding and need not be addressed further.

206. At this point, the United States would like to turn to a broader criticism of Australia’s position, a criticism that is relevant to New Zealand as well. Australia and New Zealand both rest much of their Article 5.1 arguments on the claim that the so-called “USITC recommended measure” was “less restrictive” than the actual US lamb meat safeguard. Their argument ignores, however, that the USITC actually issued three recommendations, not one. Under US law, the plurality

²¹⁵ See USITC Report at I-34, I-37.

²¹⁶ USITC Report at I-23-24.

²¹⁷ USITC Report at I-20.

²¹⁸ USITC Report at I-21.

recommendation is deemed to be the USITC “remedy finding,” but the President is not required to give it any greater weight than recommendations presented by commissioners, much less adopt it.

207. Moreover, the Safeguards Agreement placed the United States under no obligation to consider, or accord any weight to, the USITC plurality remedy recommendation (or any other proposed or hypothetical remedy recommendation). The Agreement does not seek to dictate the terms of a Member’s remedy selection process. Article 5 is silent on the procedures that a Member may employ in choosing a remedy. Instead, it imposes disciplines on the end result of that process, the safeguard measure itself. Accordingly, Australia’s and New Zealand’s reliance on the USITC plurality recommendation as the touchstone for applying Article 5.1 is misplaced.

208. Six USITC Commissioners participated in the investigation and unanimously agreed that lamb meat was being imported in such increased quantities as to be a substantial cause of the threat of serious injury to the domestic industry. They all examined the same record of the investigation and yet recommended three different remedies. Three Commissioners recommended a tariff-rate quota – the form of remedy the United States ultimately employed. Two recommended a straight tariff. One recommended a quantitative restriction. Each advanced reasons that their recommendation was the minimum necessary for purposes of preventing serious injury and facilitating adjustment.

209. This difference of opinion illustrates that there may be a range of remedies from which to choose in any given case depending on how the deciding body weighs the evidence of injury or threat and considers how it can best be addressed. Members should not be held to root out and apply a single, optimum, or “least trade restrictive” remedy. Rather, 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. Australia and New Zealand have not established a *prima facie* case that the US lamb meat safeguard measure fails that test.

(d) The lamb meat safeguard measure the United States applied was consistent with the objectives of Article 5.1

210. The various complaints that New Zealand and Australia have lodged against the US safeguard measure do not substitute for a systematic examination of its nature, the context in which it was applied, and the degree to which it meets or exceeds the objectives mentioned in Article 5.1, first sentence. In the view of the United States, in order to decide whether the lamb meat safeguard measure is being applied to an extent inconsistent with Article 5.1, it would be necessary to undertake a multi-step inquiry, along the lines of the following:

- (1) a review of the evidence of threat of serious injury that the USITC identified;
- (2) an examination of the nature of the safeguard measure the United States imposed, including its product coverage, form, duration, and level;
- (3) an analysis of how the measure both addresses the evidence of threat of serious injury the USITC identified and facilitates industry adjustment; and
- (4) in light of the foregoing, an assessment of whether the measure, in its totality, is more restrictive than required both to prevent serious injury from occurring and to assist the industry in adjusting to import competition.

211. In their First Submissions, neither Australia nor New Zealand suggests any systematic analysis of this sort, much less demonstrates why such an analysis shows that the US lamb meat safeguard measure does not withstand scrutiny under Article 5.1.

212. While the United States is not required to defend its safeguard measure in the absence of a showing of *prima facie* inconsistency with Article 5.1, 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. That discussion follows.

(i) *Injury and threat indicators identified by the USITC*

213. As discussed in depth above, the USITC identified a range of indices demonstrating that the condition of the US lamb industry had deteriorated significantly during 1997-98 as a result of increased lamb meat imports and suggesting that the industry was in imminent danger of declining still further into “serious injury.” These indicators included the US industry’s declining market share, drops in domestic production and shipments, declining industry profitability, and falling prices.²¹⁹ The USITC also found that the industry was encountering difficulties in generating adequate capital to finance modernization. The US safeguard measure was designed to address and ameliorate these difficulties, working in tandem with a financial assistance package and regulatory measures provided by the federal government.

(ii) *Description of the US measure*

214. The US measure was structured as a TRQ with a duration of three years and one day, and was accompanied by a sizeable industry assistance package. The nature of the TRQ is as follows:

In the first year, a 9 per cent *ad valorem* tariff on imports up to 31,851,151 kilograms and a 40 per cent *ad valorem* tariff on imports in excess of that level;

In the second year, a 6 per cent *ad valorem* tariff on imports up to 32,708,493 kilograms and a 32 per cent *ad valorem* tariff on imports in excess of that level; and

In the third year, a 3 per cent *ad valorem* tariff on imports up to 33,565,835 kilograms and a 24 per cent *ad valorem* tariff on imports in excess of that level.

215. In addition, at their request, the TRQ provides separate quota allocations for Australia and New Zealand. Those allocations guarantee Australia and New Zealand approximately 99 per cent of the total imports under the TRQ.

(iii) *The measure addresses the threat and injury identified by the USITC*

216. The United States designed the measure so that it would address the specific financial and commercial difficulties that the USITC had identified as demonstrating that the US industry was threatened with serious injury, and then 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.²²⁰

217. The “in-quota” tariff component of the TRQ was meant to address the low prices and consequent declining profitability that the USITC had identified as a principal source of the threatened serious injury.²²¹ The economic model predicted that the in-quota tariff included in the

²¹⁹ USITC Report at I-18-21.

²²⁰ The model is a simple partial equilibrium model that measures the impact of implementing various types of remedies. The model shows the change to US sales, by quantity and value, given the implementation of the TRQ. The model is a supply and demand model that assumes that domestic and imported products are less than perfect substitutes. Such models, also known as Armington models, are relatively standard in applied trade policy analysis.

²²¹ See USITC Report at I-19-20.

safeguard measure would generate a modest price increase. At a level of 9 per cent *ad valorem* in the first year of the safeguard measure, the in-quota tariff was estimated to generate an increase in domestic product prices of 0.8 to 3.4 per cent.

218. The purpose of the out-of-quota tariff component of the TRQ was to address the increased imports themselves. The USITC investigation had concluded that the increased imports had directly captured market share from the domestic producers and were likely to have a negative impact on the industry's shipments, prices, and financial performance.²²² Three of the six Commissioners explicitly found that the US industry would suffer serious injury if imports and prices remained at 1998 levels, even if there were no further price declines.²²³ The out-of-quota tariff ensured that imports could not exceed their 1998 level (the highest level imports had previously attained) in the first year of relief, and provided a measure of stability and predictability to the domestic industry with respect to the maximum amount of import competition over the second and third years as well.²²⁴

219. Based on a 9 per cent *ad valorem* in-quota tariff and a 40 per cent *ad valorem* out-of-quota tariff, the economic model suggested that the TRQ would generate a 4.4 to 11.9 per cent decline in total imports from 1998 levels in the first year of the remedy. The model estimated that, as a result, the domestic industry would be able to recapture a portion of its lost market share, and that domestic shipments would increase by 0.2 to 2.2 per cent. The combination of higher prices and higher US shipment volumes was expected to lead to a 1.2 to 5.2 per cent rise in US industry revenues, thereby modestly improving the industry's financial health. Greater US industry profitability, in turn, would assist the industry in generating new capital and in increasing its ability to borrow, modernize and adjust successfully to the changed conditions of trade.

220. As the foregoing suggests, the TRQ was structured to provide a minimal degree of relief to US lamb meat producers over a short period, sufficient to assist them in responding to the challenge of import competition without unduly restricting imports. In its first year, the TRQ was designed to leave lamb meat imports at levels higher than in any year but 1998. Import levels could be expected to increase in years two and three of the measure as the in-quota tariff rates decline and quota levels increase. In addition, by making the in-quota tariff rates degressive, the United States also ensured that the modest price increases in the first year of the measure would decline in years two and three.

221. Furthermore, while the six USITC Commissioners recommended leaving import relief in place for four years²²⁵, the President proclaimed the TRQ for only three years and a day, thereby limiting the effect of the safeguard measure on Australian and New Zealand producers. In addition, the United States has implemented the TRQ through an export permit system. The United States took this approach at the request of Australia and New Zealand, who sought to ensure the orderly marketing export and marketing their producers' lamb meat products in the United States.

222. In addition, again at New Zealand's and Australia's request, the United States agreed to delay implementation of the measure so that it would not apply to lamb meat shipments then in transit to the United States. As originally proclaimed, the TRQ applied to lamb meat *entering* the United States on or after 22 July 1999. At the request of Australia and New Zealand, the President issued a modified proclamation changing the application of the TRQ to lamb meat *exported* on or after 22 July 1999. The effect of this change was to allow in excess of 1.5 million extra pounds of Australian and

²²² USITC Report at I-24.

²²³ USITC Report at I-40, I-49.

²²⁴ As discussed above, Commissioners Miller and Hillman believed that the domestic industry "would experience serious injury caused by imports if import levels and prices continue at now-existing levels, even if no further price declines occur." USITC Report at I-40. Commission Koplan found, similarly, that a remedy set at existing import levels "would not stave off the threatened serious injury, much less provide the industry with the opportunity to make a positive adjustment to prepare for the import competition." *Id.* at I-49.

²²⁵ See USITC Report at I-29, I-39, I-47.

New Zealand lamb meat to enter the United States without being subject to the TRQ, thereby reducing further the effect of the measure on Australian and New Zealand producers.

223. Finally, the United States accompanied the safeguard measure with a substantial programme of federal financial and regulatory assistance, which was intended to facilitate the US industry's adjustment by providing up to \$100 million to assist with market promotion; product and production improvements; basic sheep research; a scrapie eradication programme; and a lamb surplus removal programme. Half of the \$100 million is being made available to the industry in the first year. By providing a substantial assistance package, the United States sought to minimize the import component of the relief to the degree possible.

224. In sum, the US measure was specifically tailored to address the factors that the USITC had identified as responsible for the threat of injury to the US industry and was carefully structured to assist the industry in its adjustment efforts over a relatively short period without restricting lamb meat imports during that time.

7. Australia and New Zealand have failed to establish that the US safeguard measure is inconsistent with the requirements of Article 3.1

225. Both Australia and New Zealand claim that the United States was obliged, under Article 3.1, to have published a report specifying the reasons that it imposed the safeguard measure that it did.²²⁶ That claim is unfounded.

226. Article 3.1 of the Safeguards Agreement establishes procedures that a competent authority must observe when conducting an investigation to determine whether grounds exist to apply a safeguards measure. The third sentence of Article 3.1 states that "[t]he competent authorities shall publish a report setting forth their findings and reasoned conclusions on all pertinent issues of law and fact." New Zealand and Australia assert that by failing to publish the reasons for its safeguard measure, the United States has failed to meet this requirement.

227. In the *Korea–Dairy* case, the European Commission attempted to read such a reporting requirement into the Safeguards Agreement, based on a more plausible provision than New Zealand and Australia advance in this proceeding. The EC argued that Article 5.1, the provision of the Safeguards Agreement that specifically governs the application of safeguard measures, required Korea to justify its dairy safeguard measure in advance of the panel proceeding. The panel agreed, concluding that Members:

are required, in their recommendations or determinations on the application of a safeguard measure, to explain how they considered the facts before them and why they concluded, at the time of the decision, that the measure to be applied was necessary to remedy the serious injury and facilitate the adjustment of the industry.²²⁷

228. On appeal, the Appellate Body reversed the panel's determination, explaining that "we do not see anything in Article 5.1 that establishes such an obligation for a safeguard measure *other* than a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years."²²⁸

²²⁶ Australia's First Written Submission at ¶ 67; New Zealand's First Written Submission at ¶ 7.110. Article 3.1 of the Safeguards Agreement states that the competent authorities conducting a safeguards investigation "shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law."

²²⁷ Report of the Appellate Body, *Korea–Dairy*, at ¶ 100, citing *Korea–Dairy* at ¶ 7.109.

²²⁸ Report of the Appellate Body, *Korea–Dairy*, at ¶ 99.

229. The lamb meat safeguard measure does not impose a quantitative restriction. Therefore, in line with the clear precedent of the Appellate Body, the United States was under no obligation under Article 5.1 to provide any justification for it.

230. Australia and New Zealand suggest that even if such a requirement cannot be found in Article 5 – which deals explicitly with safeguard remedies – it should be read into Article 3, which plainly does not. As an initial matter, the fact that Article 5.1 requires a justification for certain quantitative restrictions, but not for other safeguard measures, suggests that the Safeguards Agreement requires no justification for the latter. This is what the Appellate Body found in *Korea - Dairy*, and thus should lay to rest New Zealand's and Australia's claims to the contrary.

231. However, Article 3.1, even if read in isolation from Article 5, does not establish a requirement for a Member to provide findings and conclusions on the remedy it selected. Article 3 is entitled “Investigation.” It governs the procedures that apply when a competent authority examines whether there are grounds for imposing a safeguard measure. It does not establish a requirement that a Member conduct a remedy investigation and publish “findings and reasoned conclusions on all pertinent issues of fact and law” for the remedy decision it ultimately reached.

232. In the first place, there is no reason that a Member’s decision regarding whether to apply a safeguard and, if so, the nature and extent of such a measure, would necessarily be founded exclusively, or even primarily, on “issues of fact and law”. Unlike a determination of serious injury or threat of serious injury, which under the Safeguards Agreement must be based on specific legal and factual determinations, the decision-making process for selecting a safeguard measure is not subject to disciplines governed by that Agreement.

233. While the ultimate measure a Member selects must conform to Article 5, for example, the process of selecting that measure -- or deciding whether to impose any measure at all -- is likely to be subject to a range of considerations. These may include, for example, arguments advanced by other Members, such as those Australia and New Zealand communicated to the United States regarding the advisability and structure of a possible safeguard measure while the remedy issue was pending before the President. Article 3.1 cannot be read to require a Member to publish its findings and reasoned conclusions on such matters.

234. Article 3.1 does specify that a competent authority must hear “views” on whether or not application of a safeguard measure would be “in the public interest”. But this solely requires the competent authority to hear from interested parties on whether recourse to a safeguard measure would be appropriate. It does not establish a requirement to explain why the deciding authority reached the ultimate decision it did.

235. Indeed, nothing in the Safeguards Agreement suggests that the competent authority is required to have any role in selecting, applying, or explaining safeguard measures. References in the Agreement to the application of safeguard measures, for example in Articles 1, 5, 6, 7, and 8, refer to measures applied by “a Member” – not by a competent authority. These provisions do not condition application of a safeguard measure on any written explanation by the competent authority regarding the remedy selected. Appropriately, the “justification” referred to Article 5.1, second sentence, avoids any mention of the body that must provide it.

236. It is also worth noting that Article 3.1, on which New Zealand and Australia rely, requires competent authorities to publish reports containing ‘*their* findings and reasoned conclusions on all pertinent issues of fact and law.’ In countries like the United States that assign no role to their competent authorities in choosing or applying a safeguard remedy, they cannot be expected to have made their own findings and conclusions regarding the remedy their governments ultimately impose.

237. Finally, Article 4, which sets out the injury and causation factors a competent authority must consider in the course of its investigation, contains the following requirement, set out in paragraph 2(c):

The competent authorities shall publish promptly, *in accordance with the provisions of Article 3*, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.²²⁹

238. This explicit tie between the publication requirements in Articles 3 and 4 contrast sharply with the language of Article 5, which contains no such requirement. The absence of such a requirement in Article 5, together with its own, limited, requirement for a Member to justify certain quantitative safeguard measures, demonstrates that the United States was under no obligation to publish a report specifying the reasons that it imposed the safeguard measure that it did.

239. In sum, nothing in Article 3.1 compelled the USITC, or any other body in the United States, to provide an advance written justification for its lamb meat safeguard measure.

8. The United States properly excluded imports from developing countries, Canada, Mexico, and Israel from the safeguard measure

240. Australia and New Zealand complain that the United States has failed to include under the safeguard measure imports from beneficiary countries under the Caribbean Basin Economic Recovery Act (CBERA)²³⁰ and the Andean Trade Preference Act (ATPA)²³¹, and well as from Mexico, Canada, and Israel. New Zealand and Australia stake their arguments on incorrect premises that Article 2.2 and Article I of *GATT 1994* required the United States to include these imports in the TRQ.

(a) CBERA and ATPA imports

241. New Zealand and Australia correctly observe that the US lamb meat TRQ excludes imports from the CBERA and ATPA beneficiary countries. These exclusions are entirely consistent with, and indeed are compelled by, Article 9.1 of the Safeguards Agreement, which addresses the application of safeguard measures to imports of developing country Members. Specifically, Article 9.1 provides that:

Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for no more than 9 per cent of total imports of the product concerned.

242. This means the United States was required to exclude from its lamb meat safeguard measure imports from developing country Members whose import market shares were 3 per cent or below, and provided that their combined import shares did not exceed 9 per cent.

243. Each of the CBERA and ATPA beneficiary countries is a developing country Member.²³² Combined US lamb meat imports from all developing country Members during the period 1996-98 averaged well under 9 per cent of imports.²³³

²²⁹ Safeguards Agreement, Art. 4.2(c) (emphasis added).

²³⁰ 19 U.S.C. 2701-2707.

²³¹ 19 U.S.C. 3201-3206.

²³² The CBERA beneficiary countries are Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Costa Rica, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Montserrat, Netherlands Antilles, Nicaragua, Panama, St. Kitts and Nevis, Saint Lucia, Saint Vincent

244. Lamb meat imports from the CBERA and ATPA countries, in particular, during the last three years of the period of investigation, 1996-98, were *zero*.²³⁴ Consequently, pursuant to Article 9.1, the United States was required to exclude CBERA and ATPA imports -- to the extent there might be any -- from its lamb meat TRQ. Moreover, the United States would have been justified in excluding these imports from its safeguard measure even if the USITC had based its affirmative threat of serious injury determination on imports from all sources, as New Zealand and Australia claim. New Zealand concedes this point at footnote 188 of its First Submission.

245. However, Australia's and New Zealand's argument that the USITC based its determination on all imports is simply wrong. The USITC stated explicitly that its:

findings and recommendations in this case do not apply to Israel or to the Caribbean Basin and Andean countries. There were no reported importations of lamb meat from any of these countries during the period of investigation, based on a review of data compiled by the US Department of Commerce. None of these countries are known to be significant producers or exporters of lamb meat.²³⁵

246. Given these facts, and the specific requirement of Article 9.1, Australia and New Zealand have no grounds for objecting to the exclusion of CBERA or ATPA imports from the US safeguard measure.²³⁶

(b) Canada, Mexico, and Israel

247. The United States was also fully justified in excluding from the lamb meat TRQ imports from Canada, Mexico, and Israel.

248. As Australia and New Zealand note, Article 2.2 of the Safeguards Agreement establishes a general rule that “[a] safeguard measure shall be applied to a product being imported irrespective of its source.” Article 2.2 does not, however, specifically address the application of safeguard measures by the members of customs unions and free trade agreements (FTAs) to imports from other countries participating in the union or FTA.

249. Specific provisions addressing these issues are found in footnote 1 of the Safeguards Agreement, appended to Article 2.1. The last sentence of footnote 1 states that “Nothing in this Agreement prejudices the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.”

250. This language makes allowance for members of a free trade agreement established in conformity with Article XXIV of *GATT 1994* to exclude from their safeguard measures imports of

and the Grenadines, Trinidad and Tobago, and the British Virgin Islands. The ATPA beneficiary countries are Bolivia, Colombia, Ecuador, and Peru.

²³³ See USITC Report at II-19.

²³⁴ See US Exhibit 17.

²³⁵ USITC Report at I-34 n.170.

²³⁶ In addition, given that such favorable treatment is required by Article 9.1 of the Safeguards Agreement, New Zealand's argument that the measure violates Article I of the *GATT 1994* is misguided. See New Zealand First Written Submission at ¶ 7.114. General Interpretative Note to Annex 1A to the Marrakesh Agreement Establishing the WTO provides that, in the event of a conflict between provisions of the GATT and a provision of another agreement in Annex 1A (including the Safeguards Agreement), the provision of that other agreement shall prevail. There is a clear conflict between a provision in the Safeguards Agreement requiring the United States to favor developing countries under specified circumstances and the provision requiring most-favoured-nation treatment in GATT Article I. Accordingly, the General Interpretative Note mandates that the particular provision of the Safeguards Agreement – i.e., Article 9.1 – shall prevail.

products from their FTA partners. The United States has concluded Article XXIV-consistent FTAs with Canada and Mexico pursuant to the *North American Free Trade Agreement*, and Israel pursuant to the *United States - Israel Free Trade Area Agreement*, and notified them both to the GATT.²³⁷

251. The United States does not understand either Australia or New Zealand to suggest that Article 2.2 (or GATT Article I) precludes participants in a free trade area from excluding each other's imports from the application of their safeguard measures. This must be so, as Australia and New Zealand exclude *each other's* imports from their own safeguards measures under the Australia New Zealand Closer Economic Relations Agreement (ANZCERTA). Indeed, Australia has stated:

Article XIX of GATT 1994 and the Agreement on Safeguards do not provide the basis for action on imports into Australia covered by the Australia New Zealand Closer Economic Relations Trade Agreement (CER).²³⁸

252. New Zealand has made similar statements as well.²³⁹ The United States is attaching copies of Australia's and New Zealand's statements on this issue to the WTO Safeguards Committee for the Panel's reference.

253. Thus, Australia and New Zealand must instead be arguing that the United States erred in excluding Israeli, Mexican, and Canadian lamb meat imports from the TRQ because the USITC based its threat of serious injury determination on all imports, including Israeli, Mexican, and Canadian lamb meat imports.

254. This argument is based on a faulty premise. The USITC did not base its threat of serious injury determination on Israeli, Mexican, or Canadian imports. As noted above, the USITC report states plainly that its findings and recommendations do not apply to Israel.

255. There were no lamb meat imports from Mexico the last three years of the investigatory period.²⁴⁰ Thus, there is no basis for suggesting that imports from Mexico played any significant role in the USITC's determination.²⁴¹

256. Finally, Canadian imports during the 1996-98 period were negligible, reaching a high-water mark of 0.3 per cent of total imports in 1997. Imports at that level could not, and did not, account for the threat of serious injury that the USITC found. Indeed, the USITC stated this quite explicitly:

We find that imports of lamb meat from Canada . . . are not contributing importantly to the threat of serious injury. Imports from Canada accounted for less than 1 per cent of total lamb meat imports in each year of the period of investigation. At their

²³⁷ See North American Free Trade Agreement, L/7176/Add. 1 (1 February 1993); Israel-United States Free Trade Agreement, L/5862 (13 September 1985).

²³⁸ Replies to Questions Posed by Japan Concerning the Notification Provided by Australia of Laws and Regulations under Article 12.6 of Agreement, G/SW/W/141, at 3 (12 March 1996). Attached hereto as US Exhibit 18.

²³⁹ Replies to Questions Posed by Canada, the European Community, Korea and The United States to New Zealand Concerning the Latter's Notification of Laws and Regulations under Article 12.6 of the Agreement, G/SW/W/175, at 4 (5 June 1996) (stating that ANZCERTA does not permit Australia and New Zealand to take safeguard action against each other's imports). Attached hereto as US Exhibit 19.

²⁴⁰ See US Exhibit 17. The United States imported Mexican lamb meat during only one year of the investigatory period, 1995. In that year, Mexico's import market share was less than one per cent. USITC Report at I-27, II-18 n.73.

²⁴¹ Indeed, the USITC specifically found that Mexican lamb meat did not contribute importantly to the threat of serious injury. USITC Report at I-27.

highest level of the period of investigation, 209,000 pounds, in 1997, imports from Canada accounted for only 0.3 per cent of total US lamb meat imports.²⁴²

257. Thus, Australia and New Zealand are simply wrong in claiming that Canadian lamb meat imports figured in the USITC's threat of serious injury determination. Accordingly, New Zealand and Australia cannot stake an argument against the exclusion from the TRQ of Canadian lamb meat imports on the ground that the USITC based its determination in whole or part on those imports. It did not.²⁴³

258. In summary, the United States was fully justified by virtue of footnote 1 and Article XXIV of *GATT 1994* in excluding Canadian, Mexican, and Israeli lamb imports from its safeguard remedy.

9. The United States satisfied its obligations under Articles 8 and 12

(a) The United States has satisfied its obligations under Article 8

259. Australia, unaccompanied by New Zealand, suggests that the United States ran afoul of Article 8.1 of the Safeguards Agreement, purportedly by failing to offer Australia trade concessions substantially equivalent to those withdrawn by the US safeguard measure. Australia's argument is based on a misreading of Article 8 and should be rejected.

260. Article 8 provides as follows:

1. 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 GATT1994 between it and the exporting Members which would be affected by such a measure, in accordance with the provisions of paragraph 3 of Article.²⁴⁴ 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.

2. If no agreement is reached within 30 days in the consultations under paragraph 3 of Article 12, then the affected exporting Members shall be free, not later than 90 days after the measure is applied, to suspend, upon the expiration of 30 days from the day on which written notice of such suspension is received by the Council for Trade in Goods, the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure, the suspension of which the Council for Trade in Goods does not disapprove.

3. The right of suspension referred to in paragraph 2 shall not be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement.

261. 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

²⁴² USITC Report at I-27.

²⁴³ This alone is enough to distinguish this case from the situation in *Argentina--Footwear*. In that case, imports from MERCOSUR countries constituted between 21 and 55 per cent of total imports during the years examined. Argentina included those imports in its injury and causation analyses, but excluded them from its footwear safeguard. See *Argentina--Footwear* at n.474 and accompanying text.

²⁴⁴ Paragraph 3 of Article 12 states that "A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations . . . with a view to, *inter alia* , . . . reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8."

provide trade concessions as a condition for applying such a measure. This interpretation is borne out by the texts of Articles 8 and 12, as well as by the object and purpose of the Safeguards Agreement.

262. Article 8.1 provides that a Member proposing to apply a safeguard measure “shall endeavour to maintain a substantially equivalent level of concessions and other obligations . . . in accordance with the provisions of paragraph 3 of Article 12.” Article 12.3 provides that a Member shall provide opportunity for prior consultations with a view to, among other things, “reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.” 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.

263. Moreover, Australia’s interpretation of Article 8.1 improperly divorces that provision from its rightful place within the entirety of Article 8. Again, Article 8.1 provides that a Member proposing to apply a safeguard measure “shall endeavour to maintain a substantially equivalent level of concessions and other obligations . . . in accordance with the provisions of paragraph 3 of Article 12.” Article 8.2 then references the Article 12.3 consultations, explaining that the exporting country Members affected by a safeguard measure may suspend substantially equivalent concessions or other obligations under *GATT 1994* if no agreement is reached in the Article 12.3 consultations within 30 days. Finally, Article 8.3 states that the right of suspension referred to in paragraph 2 “shall not be exercised for the first three years” of the safeguard measure, provided that the requisite conditions are met.

264. Thus, it is clear that Article 8.1 creates an obligation to consult. Article 8.2 creates a right of retaliation if no agreement is reached in the consultations. However, Article 8.3 suspends that right of retaliation during the first three years a safeguard measure is in place, provided that the requisite conditions are met. The United States respectfully submits that it has fully met its obligations under the framework of Article 8.

265. A stated object and purpose of the Safeguards Agreement supports this interpretation of Article 8. The preamble to the Agreement recognizes the need “to re-establish multilateral control over safeguards and eliminate measures that escape such control.” Specifically, drafters of the Safeguards Agreement intended to eradicate so-called grey-area measures. To ensure this objective, they permitted Members to impose safeguards for a limited period without fear of “having to pay” for such action. At the same time, they imposed disciplines on voluntary restraint agreements and other grey-area measures. The inclusion in the Agreement of both Article 8.3 and Article 11, which have no counterparts in Article XIX, reflect the framers’ understanding.

266. 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.

267. Accordingly, the United States respectfully submits that it satisfied its obligations under Article 8.1 of the Safeguards Agreement.

(b) The United States satisfied Article 12 notification requirements

268. Australia also claims (again unaccompanied by New Zealand) that the United States has failed to observe the notification requirements set out in Article 12 paragraphs 2, 3, and 6. There is no basis for this assertion.

(i) *The United States notified "all pertinent information" to the Committee on Safeguards as required under Article 12.2*

269. While acknowledging that such a requirement is not "specifically called for" in the Safeguards Agreement, Australia nonetheless asserts United States was required by Article 12.2 to furnish the Committee on Safeguards a written justification of the US lamb meat measure.²⁴⁵

270. Article 12.2 of the Safeguards Agreement provides in relevant part:

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

271. In *Korea -- Dairy*, the Appellate Body concluded (at ¶ 109) that to satisfy Article 12.2, a Member's notifications under 12.1(b) and (c) must at a minimum address all of the items specifically enumerated in Article 12.2, as well as the injury factors listed in Article 4.2. The US notifications provided all such information, including a precise description of the proposed measure, its proposed date of introduction, expected duration and timetable for progressive liberalization.²⁴⁶ The United States has therefore amply satisfied the minimum notification requirements of Article 12.2. Australia has not suggested otherwise.

272. Instead, Australia seeks to read into Article 12.2 a requirement to provide a written justification of the measure the United States applied. In support of its position, Australia claims only that information regarding the basis for the US measure would be "highly pertinent."²⁴⁷ This bare conclusion does not amount to a legal argument and hence cannot support a finding that the United States has failed to carry out its obligations under Article 12.2.

273. In any event, as discussed earlier in this Submission, the Appellate Body has considered and rejected under Article 5.1 the notion that Members are under a general requirement to justify their safeguard measures. That door having been shut, Australia has sought two other avenues for imposing a justification requirement -- first, Article 3.1 and second, Article 12.2.

274. Australia's claim under Article 12.2 fails for essentially the same reason that it fails under Article 3.1. Article XIX, as applied in accordance with the Safeguards Agreement, permits Members to depart to a limited degree from their GATT obligations and concessions if, following an investigation based on the substantive and procedural strictures set out in Articles 3 and 4, they make an affirmative determination of serious injury or threat of serious injury consistent with Article 2.2 of the Agreement. Such a determination *is* the justification for applying a safeguard measures. No further justification or explanation is required under Article 3.1 or 12.2.

275. 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,

²⁴⁵ Australia's First Written Submission at ¶ 247.

²⁴⁶ G/SN/10/USA/3, G/SN/11/USA/3 (circulated 12 July 1999). Attached hereto as US Exhibit 6.

The United States issued a supplemental notification informing the Safeguards Committee that the measure would become effective with respect to goods *exported* on or after 22 July 1999. See G/SN/10/8SA/3/Suppl.1, G/SN/11/USA/3/Suppl. 1. Attached hereto as US Exhibit 7.

²⁴⁷ Australia's First Written Submission at ¶ 247.

including its communications with other Members. On the other hand, to the extent Australia is seeking to compel the United States to explain why the measure it chose is compatible with Article 5.1, the Appellate Body has already spoken.

276. Australia next asserts that the United States should have provided information to the Committee regarding “unforeseen developments,” which in Australia’s view was “pertinent information.” Australia’s claim on this point is once again a mere legal conclusion without legal argument sufficient to demonstrate the validity of its contention, much less demonstrate a *prima facie* violation.

277. In fact, nothing in Article 12.2 required the United States to make a specific notification regarding “unforeseen developments.” Inferring a requirement to do so would run contrary to the Appellate Body’s view in *Argentina -- Footwear* that “unforeseen developments do not constitute an independent condition for the application of a safeguard measure but rather certain circumstances that must be demonstrated as a matter of fact.”²⁴⁸ Unforeseen developments are thus unlike evidence of “serious injury,” for example, which *is* an independent conditions for the application of a safeguards measure, and thus is subject to notification under Article 12.2.

278. Article 12.2 does not require an accounting of all pertinent facts that a competent authority considered in its investigation. Even if it did, the United States would have fully complied with Article 12.2 on this score, since it forwarded to the Committee the USITC report on its lamb investigation. As fully explained at ¶¶ 47-60 of this submission, the USITC report amply demonstrated the existence of “unforeseen developments.”

(ii) *The United States conducted consultations in conformity with Article 12.3*

279. Australia argues that the United States failed to comply with Article 12.3 because, while it entered into consultations with Australia as that article requires, the United States failed to conduct the consultations in “good faith” with a view to achieving the objective of Article 8.1.²⁴⁹ Article 8.1 provides that a Member proposing to apply a safeguard “shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994.”

280. Australia does *not* allege that the United States failed to hold the consultations specified in Article 12.3 or that the subjects covered in those consultations failed to include those specified in that article. Rather, Australia raises the novel claim that the United States failed to comply with Article 12.3 because the United States referred in the course of those negotiations to the fact that Article 8.3 prevents a Member from suspending substantially equivalent concessions during the first three years of the measure. That objection does not form the basis for a violation of Article 12.3.

281. Article 12.3 requires a Member proposing to apply a safeguard to provide “adequate opportunity for prior consultations” with Members having a substantial interest in the product concerned. Australia does not deny that the United States not only provided this opportunity but entered into such consultations with Australia. Therefore, the United States fully met the obligation of Article 12.3. The United States emphatically rejects Australia’s assertion that citing Article 8.3 constituted a lack of good faith. Reference by a Member in the course of consultations under Article 12.3 to the rights and obligations set out in the Safeguards Agreement can scarcely be characterized as a demonstration of bad faith. Any finding to the contrary would inappropriately limit Members’ ability fully to represent their interests and address pertinent legal and factual issues in the course of such consultations.

²⁴⁸ Appellate Body Report, *Argentina -- Footwear*, at ¶ 92.

²⁴⁹ Australia’s First Written Submission at ¶ 253. Notably, Australia cites the provision of Article 8.1.

(iii) *The United States properly notified its "laws, regulations and administrative procedures" pursuant to Article 12.6*

282. Australia's final objection under Article 12 is that United States failed to observe the requirement in paragraph 6 to notify the Safeguards Committee of "laws, regulations and administrative procedures relating to safeguards measures."²⁵⁰ Australia finds support for this assertion in its contention that the US authorities deliberated for more than three months before deciding to apply a safeguard measure and the measure, in Australia's view, was more restrictive than the one the USITC had recommended.²⁵¹ Australia thus concludes that the United States must have engaged in "further intensive investigation" but did not notify such a procedure under Article 12.6.²⁵²

283. As previously demonstrated, nothing in the Safeguards Agreement required the United States to adopt the recommendation of the USITC plurality. Indeed, there is no requirement in the Agreement for the United States to develop and publish recommendations, such as those that US law requires of the USITC, much less adopt them. Unlike its injury investigation, a Member's remedy decision-making process is not subject to discipline under Article XIX or the Safeguards Agreement. Thus, Australia's complaint that the United States undertook a further review or "investigation" in the course of deciding on an appropriate remedy, even if true, would not be grounds for complaint in this forum.

284. The United States notified its laws and regulations relating to safeguards measures to the Safeguards Committee.²⁵³ The US notification set out the relevant provisions of the US safeguard law, in particular the following:

Sec. 203. Action by the President After Determination of Import Injury.

(1)(A) After receiving a report under Section 202(f) containing an affirmative finding regarding serious injury, or the threat thereof, to a domestic industry, the President shall take all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.

(B) The action taken by the President under subparagraph (A) shall be to such extent, and for such duration, subject to subsection (e)(1), that the President determines to be appropriate and feasible under such subparagraph.²⁵⁴

The notification also set out the range of factors that the President is required to take into account in making his determination and deciding what action to take.

285. Following the conclusion of the USITC's investigation, the President received a report from the USITC containing an affirmative finding of threat of serious injury to the domestic lamb meat industry. In accordance with the legal provisions notified to the Committee, the President then determined and took action in response to that report. Australia's claim that the United States has failed to notify the relevant procedure to the Safeguards Committee is demonstrably wrong.

²⁵⁰ Australia's First Written Submission at ¶¶ 250-257.

²⁵¹ Australia's First Written Submission at ¶ 257.

²⁵² Australia's First Written Submission at ¶ 257.

²⁵³ See G/SG/N/1/USA (6 April 1995).

²⁵⁴ *Id.* at 13, citing Section 203(a)(1) of the Trade Act of 1974, as amended.

10. The United States measure is not inconsistent with Article 11 of the Safeguards Agreement

286. Australia, once again alone, claims (at ¶¶ 266-270) that the US safeguards measure contravened Article 11 of the Safeguards Agreement because it allegedly was not an “emergency action.” The basis for Australia’s argument appears to be that if there had been a true emergency the United States would have imposed a safeguard measure sooner than nine months after the petition was filed.

287. Article 11.1(a) provides:

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.

288. Australia’s argument is founded on the erroneous assumption that Article 11.1(a) establishes an independent obligation for a Member to demonstrate that an “emergency” exists before it may take action under the Safeguards Agreement. As its title demonstrates, Article 11 is concerned with the “Prohibition and Elimination of Certain Measures.” The purpose of Article 11 is to discipline certain “grey-area” measures, not to establish additional conditions for imposing safeguard measures above and beyond those set forth in Article XIX or Article 2.2.

289. Australia simply misreads the phrase in Article 11.1(a) “emergency action on imports of particular products as set forth in Article XIX of GATT 1994”. The phrase is nothing more than a word-for-word recitation of the title of Article XIX. As such, it does nothing more than invoke that article. It thus does not create a requirement independent of those already set out in Article XIX, as applied through the Safeguards Agreement. As the United States has already demonstrated, the United States fully complied with its obligations under Article XIX and *GATT 1994*. Hence Australia’s Article 11 claim is without merit.

11. The United States satisfied its obligations under Article II of the GATT 1994

290. Finally, Australia and New Zealand claim that because, in their view, the United States has acted inconsistently with Article XIX of the *GATT 1994* and the Safeguards Agreement, it is therefore in breach of Article II of the *GATT 1994*. For all the reasons discussed above, the premise for this claim is baseless.

291. Having fully met the requirements of Article XIX as applied in accordance with the Safeguards Agreement, the United States was fully entitled to adopt the safeguard measure it did. Inasmuch as Article XIX and the Safeguards Agreement specifically contemplate the application of safeguard measures, the United States cannot be held to have acted inconsistently with Article II of *GATT 1994*.

VI. CONCLUSION

292. For the foregoing reasons, the United States respectfully submits that its safeguard measure applied to imports of lamb satisfies US obligations under Article XIX of *GATT 1994* and the Safeguards Agreement and does not contravene Article II of *GATT 1994*. Australia’s and New Zealand’s claims to the contrary are without merit and the Panel should reject them.

ANNEX 3-3

ORAL STATEMENT OF THE UNITED STATES CONCERNING PRELIMINARY ISSUES

(25 May 2000)

1. On behalf of the United States delegation, I would like to thank the Panel for this opportunity to present our views on the preliminary matters at issue in this proceeding. We will first address the adequacy of Australia's and New Zealand's panel requests. Next, we will address the exclusion of the US statute from the Panel's terms of reference. We will then address the issue of business confidential information, including Australia's argument that the United States should provide information that the Administration and the President of the United States took into account in the course of deciding whether to apply the US measure.

Insufficiency of Panel Requests

2. Turning first to the adequacy of New Zealand's and Australia's panel requests, the Panel in this dispute has the somewhat unusual advantage that the Appellate Body has spoken directly on the issue involved. In the Appellate Body report in *Korea Dairy* the provisions analyzed by the Appellate Body include the exact same provisions at issue here - Articles 2, 4, 5, and 12 of the Safeguards Agreement and Article XIX of the GATT 1994. And there the Appellate Body made clear that just listing these article in a panel request is not enough to satisfy the obligation under Article 6.2 of the DSU. While legally the Appellate Body report in that dispute is not binding on any other dispute, there is no reason why the Appellate Body would take a different approach if confronted with the same issue again.

3. The thrust of the arguments that Australia and New Zealand raised in their 17 May letters to the Panel confuse the functions of consultations and Panel requests. New Zealand and Australia insist that the United States should have known what claims their Panel requests raised because of issues they mentioned during consultations under Article 4 of the DSU. These arguments ignore the admonition of Article 4.5 that parties to consultations should "attempt to obtain a satisfactory adjustment of the matter."

4. Australia and New Zealand seem to be suggesting that consultations serve to place Members on notice of the claims that other Members participating in the consultations may later advance before a panel. But consultations are not meant to stake out legal claims. Rather, they are meant to facilitate efforts to achieve a mutually satisfactory resolution of the controversy. To credit Australia's and New Zealand's view that consultations should be understood to put Members on notice of legal claims that will be advanced in later legal proceedings would require this Panel (and will require future panels) to make a decision about the facts of an oral interchange in consultations of which no neutral records are kept, and where there are no neutral observers. There are good reasons why consultations are oral – the desire to facilitate settlement of disputes by negotiation and agreement, which is the most desirable outcome in many cases.

5. If panels were to hold Members to the specific claims they advanced in the course of such consultations, it would make consultations unnecessarily rigid and formalistic, undermine the objective of achieving a negotiated settlement, and reduce chances for narrowing the range of issues eventually presented to a panel if a settlement cannot be achieved. Moreover, no matter how much notice is provided during such consultations, no such notice will have been provided to other Members who may wish to intervene as third parties. In sum, we ask the Panel to reject the complainants' assertions that they could provide notice of their claims through consultations and thus

could avoid the requirement in Article 6.2 of the DSU to provide a summary of the legal basis for their complaints sufficient to present the problem clearly.

6. Article 6.2 was designed to avoid the kind of prejudice that the United States has suffered here in having to respond to 156 pages of argument within 26 days, when the Panel request did not present the legal basis for the claims made. The US safeguard measure was announced on 9 July 1999, which provided Australia and New Zealand with nine months in which to prepare their First Written Submissions. By contrast, the United States did not know with any certainty until three weeks before its First Submission was due precisely which claims Australia and New Zealand intended to advance.

7. Both Australia and New Zealand advanced a variety of legal claims during the lamb meat consultations. They have not pressed before this Panel some of the claims they made during the consultations, and at the same time they have also made new claims in this proceeding that they did not present in the consultations. Australia admits, for example, that it did not raise during consultations its claim that the United States breached Article 4.2(c) of the Safeguards Agreement. *See* Australia's 17 May Letter at ¶ 30. Thus, the United States was not in a position to know which arguments they raised during consultations would be raised in this proceeding, or in what form.

8. Australia's and New Zealand's attempt to shift the consequences of their failure onto the United States cannot be accepted. In arguing that the United States should have known which claims were at issue, Australia and New Zealand concede that they knew at the time of the consultations – or shortly thereafter – which obligations they would claim that the United States had violated. They could have, but apparently chose not to, identify these obligations in their panel requests, as required by Article 6.2. If they had done so, the United States would have been in a more equitable position to prepare its defense in the short time period allowed by the DSU.

9. Finally, contrary to complainants' assertions, the United States did not sit on its rights to challenge the panel request. Australia and New Zealand first argue that the United States should have challenged the panel requests when the panels were requested in October 1999, or alternatively at the DSB meetings in November 1999. Their argument ignores the fact that the Appellate Body only issued its decision in *Korea-Dairy* in December 1999.

10. They also argue that the United States could have objected to the panel requests at the organizational meeting of the Panel on 28 March 2000. The purpose of that meeting was in part to determine when it would be proper for parties to request preliminary rulings. In its working procedures, the Panel determined that requests for preliminary rulings should be submitted not later than in a party's first written submission. The United States did not know (and could not have known) how deficient the panel requests were, and the degree to which the United States was prejudiced, until Australia and New Zealand filed their First Written Submissions. The United States challenged the adequacy of the panel requests as soon as possible thereafter, and even before it filed its own first written submission.

11. Finally, the United States notes that complainants base much of their argument on the Appellate Body's statements in *United States – Tax Treatment for "Foreign Sales Corporations"* (FSC). Their argument is wholly misplaced, as the issue in the FSC case related to the adequacy of a request for *consultations*, not a request for a panel. A consultation request clearly presents different timing issues and different opportunities to raise objections. The circumstances here are entirely different.

12. Finally, the gist of complainants' argument here is that once a panel request is filed, the burden of perfecting any defects in the request shifts to the *responding member*. Nothing in Article 6.2 or elsewhere in the DSU shifts the burden to the responding member; the burden at all times lies with the complaining member.

13. Accordingly the United States respectfully submits that the Panel should dismiss this proceeding in its entirety, or, in the alternative, exclude those claims that were not adequately set out in the complainants' panel requests.

Exclusion of the US Statute from the Panel's Terms of Reference

14. I would now like to turn briefly to our request that the Panel rule that the consistency of the US statute with US obligations under the Safeguards Agreement is not within the Panel's terms of reference and is thus outside the scope of this dispute. Australia and New Zealand each concede that they are not seeking a finding that the US statute is inconsistent with the Safeguards Agreement. New Zealand claims, however, that it *is* challenging the USITC's application of the "substantial cause" test. This is in essence challenging the statute itself. New Zealand is free to claim, as it does, that the USITC's report does not adequately establish a causal link as required by Article 4. But it cannot challenge the application of the US statutory standard without having referenced the statute in its panel request.

15. Indeed, as the United States noted in its First Written Submission (at ¶ 110), the USITC found that factors other than increased imports played no significant role in causing the threat of serious injury. This being the case, New Zealand's challenge can only concern the fact that the USITC stated its conclusions in the terms mandated by the US statute. Such a challenge asks the Panel to rule on the validity of the US statute regardless of the actual content of the authority's findings. Since New Zealand appears to agree that its panel request does not notice such a challenge, the Panel should regard this aspect of New Zealand's submission as beyond the terms of reference.

16. Accordingly, we urge the Panel to rule that the consistency of the US statute with US obligations under the Safeguards Agreement is not within the Panel's terms of reference and is thus outside the scope of this dispute.

Request to Produce Information

17. I will now turn briefly to address Australia's request in its First Written Submission (at ¶¶ 15-18) that the Panel make a preliminary ruling requesting the United States to produce all confidential business information that the USITC gathered in its lamb meat investigation and information taken into account by the Administration and the President of the United States in the course of deciding whether to apply the US measure. This is not in truth a request for a preliminary ruling, because there is nothing to rule on. The Panel is not being asked to make any finding, but merely to exercise its authority to request information. The Panel has the ability to request information at any time during a proceeding.

18. The United States explained in its May 5th letter why the release of business confidential information collected by the USITC is a complex issue, and suggested an appropriate procedure that was best designed to help the US authority obtain consent for disclosure to the Panel of confidential information that the Panel might request. The United States recognizes, as the Appellate Body indicated in *Canada -- Aircraft*, that under DSU Article 13.1, a Panel may seek information from any body it deems appropriate and the United States is fully prepared to assist the Panel if it should make such a request. However, the complainants' blanket requests for all information in the USITC record does not justify the Panel's seeking business confidential information presented to the USITC, nor are those requests reasonably calculated to allow the US authority to obtain the consent necessary to disclose any such information to the Panel.

19. Article 3.2 of the DSU recognizes the fundamental principle that the DSU "serves to preserve the rights and obligations of Members under the covered Agreements" and that "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered

agreements.” Accordingly, the Panel’s authority under Article 13.1 of the DSU to seek information reaches its limit when providing the information requested would cause a Member to violate its obligations under another covered Agreement.

20. Article 3.2 of the Safeguards Agreement governs treatment of business confidential information that an authority obtains in the course of its investigation. Article 3.2 states that confidential information submitted to the competent authority “shall not be disclosed without permission of the party submitting it.” This provision makes no exception for the disclosure of confidential information in Panel proceedings.

21. Consequently, in order for the United States to assist the Panel in obtaining access to confidential information submitted to its authority, it must obtain the submitters’ consent. The USITC received information in this investigation from about 100 questionnaire recipients. The indiscriminate request that Australia, as well as New Zealand, make for all confidential information obtained by the authority almost ensures that it will be impracticable to obtain consent from the multitude of different firms involved.

22. Moreover, neither complainant has stated how any of the information they are seeking would be relevant to the Panel’s consideration of issues they have raised, much less why it would be essential for the Panel to make an objective assessment of the facts of this case. This failure impedes the United States’ ability to explain to the submitters of the information why they should consent to the further disclosure of their business confidential information and what particular information is required. The question for the Panel is whether the USITC determination sets forth under Articles 3.1 and 4.2(c) reasoned conclusions on the pertinent issues of law and fact and provides a detailed explanation showing the relevance of the factors examined. The complainants have shown no reason why this question cannot be answered without recourse to confidential business information. Indeed, Article 4.2(c) expressly contemplates that the published report will omit confidential business information, because it requires that the report be published in accordance with the provisions of Article 3, and Article 3.2 prohibits disclosure without permission. As stated by the Panel in *Argentina -- Footwear* at ¶ 8.126, it is not the job of the Panel to conduct its own assessment of the underlying evidence as contained in the entire record before the competent authority, because that would effectively be engaging in a *de novo* review.

23. Finally, the United States explained in the cover letter to its First Written Submission that Australia’s request for “all information” that the Administration and President took into account in the course of deciding whether to apply the US measure is without legal foundation. 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. There is no basis in the Safeguards Agreement for such an enquiry. Australia’s request should be rejected.

24. This concludes our presentation. We would be pleased to receive any comments that you may have.

ANNEX 3-4

FIRST ORAL STATEMENT OF THE UNITED STATES

(25 May 2000)

1. On behalf of the United States delegation, I would like to thank the Panel for this opportunity to comment on certain issues raised by Australia and New Zealand in their First Written Submissions. We do not intend to offer a lengthy statement today; you have our written submission, and we will not repeat all of the comments that we made there. We will be pleased to receive any questions you may have at the conclusion of our statement.

2. I will first make some general comments concerning the importance of this proceeding. Mr. Gearhart of the USITC, the US competent authority, will then briefly address topics raised by Australia and New Zealand concerning the USITC's injury determination, the USITC's identification of the domestic industry, and its demonstration of unforeseen developments. I will then return to Australia's and New Zealand's claims regarding the safeguard measure that United States applied and certain procedural complaints they have made as well. For brevity, we will refer to Australia and New Zealand together as the "complainants".

3. Mr. Chairman, this proceeding squarely presents the question of whether Members of the World Trade Organization can seek meaningful, temporary relief for industries seriously injured, or threatened with serious injury, due to a surge in imported products that are the subject of tariff concessions those Members have made. Article XIX, the so-called "safeguards" provision, has been a fundamental component of multilateral trading rules for more than 50 years. Article XIX was elaborated upon and strengthened in the Agreement on Safeguards, negotiated during the Uruguay Round, but its fundamental purpose has not changed. From the very beginning, Article XIX has been an essential component of the GATT because it has allowed the Contracting Parties, whether developed or developing countries – and now the Members of the WTO – to make tariff concessions with the confidence that they can take temporary action to assist their industries in the event that those concessions lead to import surges that seriously injure or threaten to injure their domestic industries. Article XIX sets high standards -- for example, there must be "serious injury" instead of the lower "material injury" standard that applies in antidumping and countervailing duty cases. But if those standards are met, Article XIX states explicitly that Members "shall be free" to take action to prevent or remedy the serious injury. If this avenue did not exist, or was unduly limited, Members would make fewer concessions in the first place, and would be more likely to respond to injury caused by increased imports by either permanently modifying or withdrawing concessions under Article XXVIII of the GATT, or resorting to "grey-area" measures, such as voluntary restraint agreements, instead.

4. Prohibiting grey-area measures was a principal achievement of the Safeguards Agreement. Members were willing to agree to accept the greater disciplines imposed by the Safeguards Agreement in the expectation that if they followed the rules set out in that Agreement, they would be able to provide meaningful, short-term relief to domestic industries suffering or threatened with serious injury due to increased imports subject to their tariff concessions.

5. This is a case where the United States scrupulously observed the disciplines imposed by the Safeguards Agreement and has sought to provide modest short-term import relief for an industry, US lamb meat producers, threatened with serious injury resulting from a sudden jump in imports from Australia and New Zealand. As the Safeguards Agreement provides, the USITC conducted a thorough, transparent investigation, open to the participation of all interested parties (including the exporting countries' producers and governments), held public hearings, and gathered detailed information from importers, producers, consumers, and publicly available sources. Based on the

information it collected, the USITC carefully reviewed the condition of the domestic lamb meat industry over the most recent five-year period and determined that it had experienced a severe downturn at the end of that period, specifically in 1997 and the first nine months of 1998. Mr. Gearhart will describe some of the USITC's detailed injury findings. The USITC concluded that the industry's condition had deteriorated to the point where serious injury was clearly imminent. The USITC next looked at each of the factors that might have accounted for the industry's decline and found that only one, a surge in imports during the period from Australia and New Zealand, played an important role.

6. Based on the USITC's determination, the United States was fully entitled to apply temporary safeguard measures -- both to ensure that the industry did not deteriorate further into serious injury and to give the domestic industry short-term breathing room in which to adjust to import competition. The safeguard measure that the United States selected is limited in scale and duration. It takes the form of a three-year tariff-rate quota (TRQ), tailored to address the threat of serious injury that the USITC had found, and structured to facilitate the industry's adjustment to import competition.

7. The TRQ is specifically designed to raise US market prices, and limit import levels, just enough to return the domestic industry to minimally profitable levels during the three-year period. The import relief is phased down over the second and third years, allowing both imports and import competition to increase. Moreover, the United States did not place the entire burden of relief on imports. The United States also committed substantial financial and regulatory assistance to the US lamb industry to assist in its recovery.

8. As it was considering an appropriate safeguard measure, the United States heard repeatedly from both Australia and New Zealand and took their views into account to the extent possible. Most importantly, the TRQ is structured to ensure that lamb meat imports into the United States can continue at the highest level they achieved before their all-time peak in 1998. Moreover, the United States limited the application of the TRQ to just three years. By contrast, the USITC had recommended four years of import relief.

9. The United States took pains to minimize the measure's effects on producers in Australia and New Zealand in other ways as well. For example, at the complainants' request, the United States agreed to provide separate quota allocations to New Zealand and Australia and also agreed to implement the TRQ through an export permit system. Also at the complainants' request, the United States delayed implementation of the TRQ, allowing approximately 1.5 million extra pounds of Australian and New Zealand lamb meat to enter the United States without being subject to the safeguard measure. In each of these ways, the United States sought to ensure that the safeguard measure would restrict Australian and New Zealand lamb meat imports to the minimum degree compatible with preventing serious injury and facilitating the domestic industry's adjustment.

10. In sum, the United States has faithfully adhered to the letter and spirit of Article XIX and the Safeguards Agreement, both in the conduct of its serious injury investigation and in the application of a temporary safeguards measure. By contrast, in their innumerable claims, Australia and New Zealand are asking this Panel at every turn to read Article XIX and the Safeguards Agreement in such a constricted or contorted way that recourse to Article XIX would effectively be rendered unavailable. This is unjustifiable. In *Wool Shirts* (at p. 16), the Appellate Body described the transitional safeguard mechanism provided in Article 6 of the Agreement on Textiles and Clothing as a fundamental part of the rights and obligations of WTO Members. Article XIX, which has been part of the GATT for over half a century, and the Safeguards Agreement, are no less a fundamental part of Members' rights and obligations.

11. If the complainants' approach in this proceeding is credited, then Members may well conclude that, despite their plain text, the WTO safeguard provisions cannot be relied upon. That could raise doubts about the continued willingness of Members to make difficult market access

commitments in the multilateral trade negotiations that lie ahead. We urge the Panel to reject the excessively narrow interpretations that the complainants are proposing in this case. Instead Article XIX and the Safeguards Agreement should be given effect based on their plain meaning, their context, and the object and purpose they serve.

12. I will now ask Mr. Gearhart to address the USITC determination.

13. While the USITC's findings are discussed at considerable length in the United States' First Written Submission, I would like to highlight a few key points. The USITC's report demonstrates that it properly considered all relevant factors during its investigation. In their First Written Submissions to the Panel, neither Australia nor New Zealand disputes the core facts that led the USITC to determine that the US lamb meat industry was threatened with serious injury caused by increased imports, and that serious injury was imminent. In reaching its affirmative determination, the USITC found that imports of lamb meat from Australia and New Zealand surged late in the period of investigation. Although the USITC examined imports and the condition of the domestic industry over the full 1993 to September 1998 period of investigation, the USITC based its determination on the most recent data for 1997 and the first nine months of 1998, which the USITC referred to as "interim 1998." The USITC's focus on 1997 and 1998 was consistent with the Appellate Body's decision in *Argentina -- Footwear*, which held that the competent authority should concentrate on the most recent period. Focusing on that period, the USITC found that lamb meat imports increased by 19 per cent in 1997 over the previous year, and by another 19 per cent in interim 1998 over the same period in 1997. Since imports actually declined between 1993 and 1994 and were otherwise steady early in the period of investigation, the sharp increases in imports in 1997 and thereafter were, in terms used by the Appellate Body in *Argentina -- Footwear* (at ¶ 131), "recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively" to cause threat of serious injury.

14. The ITC Report demonstrates that these developments were unforeseen. The import surge coincided with an unexpected change in the type of lamb meat being imported into the United States. This change in the market was unforeseen at the time the United States negotiated its Uruguay Round tariff concession on lamb meat in 1992 and 1993 or granted that concession in 1995. Prior to 1995, most imported lamb meat was frozen and comprised of smaller cuts, while US lamb meat was sold as fresh or chilled in larger cuts. However, the mix in imported products shifted after 1995 – particularly in 1997 and interim 1998 – from frozen lamb meat to fresh or chilled lamb meat, and to larger cuts. Consequently, the imported product unexpectedly became more similar to the domestic like product. Imported lamb meat competed more vigorously with domestic lamb meat in the US market and eroded US market share. In fact, US market share held by imports nearly doubled during the period of investigation, with most of the increase occurring in 1997 and 1998. At the end of the period, the direct effect on the US product was apparent as the USITC found that a 9.7 million pound increase in imports came at the direct expense of an 8.4 million pound decline in US lamb shipments. Both domestic and foreign producers told the USITC that they expected these trends to continue and even accelerate in the imminent future.

15. Although Australian and New Zealand producers claimed that some of the imports were filling new demand in US markets created as a result of their promotional efforts and differentiated marketing, the USITC concluded, instead, that demand had stabilized and the change from smaller frozen products to larger fresh cuts had made imports more similar to US products, not more differentiated. The surge in imports and change in the mix of the imported products caused prices to fall sharply in 1997 and interim 1998. The USITC made explicit the correlation between the fall in US lamb meat prices and price pressure from increased imports. Data the USITC gathered for individual cuts showed that imported lamb meat had undersold domestic lamb meat by wide margins in most quarters, often by more than 20 per cent.

16. Moreover, the USITC found serious injury was imminent. Projections by Australian and New Zealand producers in response to USITC questionnaires showed that their exports to the United States would increase by an additional 21 per cent in 1999, that is, at an even faster rate than in 1997 and interim 1998. Further, they told the USITC that the major portion of the 1999 increase would be in fresh or chilled lamb meat, the product most similar to domestic lamb meat. The USITC concluded that this increase in import volume was "likely to have further negative effects on the domestic industry's prices, shipment volumes, and financial condition in the imminent future."

17. The USITC considered all of the evidence with regard to the impact of the surging, low-priced imports on the domestic lamb meat industry and concluded that the industry as a whole was threatened with serious injury, and that serious injury was clearly imminent. The USITC determined that the domestic industry included growers and feeders of live lambs, as well as packers and breakers of lamb meat. As the USITC found, packers and breakers are essentially "finishers" of lamb meat, adding only a small proportion of value-added. The USITC's industry definition reflected (1) a continuous line of production from the raw to the processed product in which lambs are substantially devoted to lamb meat production; and (2) a substantial coincidence of economic interests between the growers and the processors. Indeed, some lamb growers both feed and slaughter their lambs. In such circumstances, the USITC properly found that firms in all four segments of the line of production were producers. The alternative would have led to an artificial definition of the domestic industry not in keeping with the injury analysis required by the Safeguards Agreement.

18. Even if the USITC had defined the domestic industry more narrowly to include only packers and breakers as Australia and New Zealand suggest, the complainants have not shown that this would have made a difference in the injury determination the USITC reached. To the extent practicable, the USITC obtained data on each of the economic factors for all four segments of the industry and found that packers, like other segments of the industry, experienced deteriorating profits during 1997 and interim 1998. Furthermore, firms in the packer and breaker segments reported difficulties in recouping new investments in plant and equipment and in repaying loans. The USITC also found that the operating income for most packers and breakers during the period of investigation fell to its lowest point in 1997 and interim 1998, consistent with the decline registered by other segments of the industry at that time.

19. Contrary to Australia's and New Zealand's claims, the USITC's determination also fully satisfied the requirement of Article 4.2(b) not to attribute to increased imports injury caused by other factors. Australia and New Zealand would have the Panel believe that the US lamb meat industry was not threatened with serious injury from increased imports but was in a long-term decline brought about by falling demand and made worse by the termination in 1996 of Wool Act support payments to lamb growers and feeders. The complainants are simply asking this Panel to undertake a *de novo* review of the evidence on this point. The USITC found, to the contrary, that termination of the wool subsidy payments did not have much influence on events after 1996. This is because payments under the Wool Act were phased-out principally in 1994 and 1995, and ended in 1996, *before* the surge in imports occurred in 1997 and interim 1998. The USITC found that consumption had stabilized by 1996 – after the termination of the Wool Act – and any lingering residual effect of termination of the payments receded each month after 1996. Moreover, the payments never went to the packers and breakers. The USITC reasonably concluded that it was the surge in imports in 1997 and interim 1998 that explained the imminent worsening of the entire domestic industry's condition at the end of the period of investigation -- not the cessation of payments made under the Wool Act. The USITC found no factor other than increased imports that would have a significant impact on the deterioration of the US industry in the imminent future. Thus, the USITC did not and could not have attributed to increased imports the effects of other factors, because it found no other factors of significance in the relevant period, 1997 and interim 1998.

20. Australia and New Zealand also wrongly question the objectivity of the evidence on which the USITC relied in making its safeguard determination. We note that their objections do not go to

the USITC's evidence on packers and breakers, whom the complainants insist should have constituted the entirety of the domestic industry. In evaluating the condition of the grower segment of the industry, the USITC relied on data obtained both from responses to USITC questionnaires and from the US Department of Agriculture (USDA). The USITC noted that the sheer size of the domestic industry, which comprised 70,000 growers nationwide in 1997 alone, made it impossible for it to develop a statistically valid sample. Consequently, the USITC prudently relied on the more comprehensive USDA data when possible.

21. Although the complainants allege that the use of two data sets from different sources in analyzing injury can allow an authority to pick and choose which set to use arbitrarily to support an outcome, it is clear that the USITC did not do so here. In evaluating factors such as financial conditions -- for which there were no USDA data -- the USITC did rely on questionnaire response data. Its careful analysis of that information assured that the USITC based its determination on objective evidence. Available data suggested that those who answered the questionnaires were, if anything, doing better than the industry as a whole. Thus, the USITC reasonably concluded that information from those questionnaire responses suggesting a downturn in the grower segment was not likely to be overstated.

22. The complainants have not asserted a violation of the Safeguards Agreement in the USITC's approach to the available data. The Agreement does not require that an authority rely only on questionnaire data that it finds scientifically valid in a statistical sense or require, as Australia suggests, the authority to send repeated waves of questionnaires to additional firms if extensive sampling does not yield responses from each and every addressee. As the Panel in *Korea-Dairy* stated at ¶ 7.31, quoting *US -- Shirts and Blouses*, the Safeguards Agreement does not impose on the importing Member any specific method for collecting data. Rather, it simply requires the competent authority to examine all relevant factors of an objective and quantifiable nature, to explain its findings, and to demonstrate the relevance of the factors it examined. That is what the USITC did.

23. In summary, an objective assessment of the USITC's report shows that it properly defined the domestic industry; it examined all relevant factors concerning its determination of the threat of injury; it adequately explained why the facts supported its conclusion; and it reached its determination based on objective evidence in accordance with the Safeguards Agreement.

24. Mr. Ross will now discuss Australia's and New Zealand's remaining claims.

25. Mr. Chairman, Members of the Panel, as I noted at the outset of this presentation, I do not intend to consume a large amount of your time; my remaining comments will be brief.

26. As Mr. Gearhart has discussed, after conducting a thorough, transparent, and well-documented investigation, the USITC properly found that increased lamb meat imports from Australia and New Zealand threatened the US lamb industry with serious injury. The USITC's findings demonstrated in detail the deterioration the domestic industry had suffered due to the increased imports, as well as the basis for concluding that serious injury from those increased imports was clearly imminent.

27. Under these circumstances, the United States was fully entitled under Article XIX of *GATT 1994* and the Safeguards Agreement to apply a temporary safeguard measure sufficient to prevent the serious injury from occurring and to assist the domestic lamb meat industry to regain its competitiveness.

28. Article XIX does not specify or mandate particular safeguard measures. Decisions regarding the appropriate safeguard measure have always been understood to be left to the government concerned, subject to the limitation that the measure -- whatever its form -- should not be applied

beyond the time and extent commensurate with the twin goals of preventing or remedying serious injury and facilitating the domestic industry's adjustment to import competition.

29. Article 5 of the Safeguards Agreement elaborates on the pertinent language of Article XIX. However, nothing in the text of Article 5 can be read as a departure from the basic rule that the choice of measures is left to the importing Member. Article 5.1 mentions the possibility that a Member may choose to apply a quantitative restriction, using the introduction "If a quantitative restriction is used". This language suggests that the Member concerned is free to choose among a range of measures. The discipline that Article 5.1 imposes is to ensure that there is a reasonable relationship between the degree to which a measure is applied, on the one hand, and the objectives that safeguard measures are intended to achieve, namely preventing or remedying serious injury and providing a short period of relief for the domestic industry, on the other.

30. Contrary to the position that New Zealand and Australia advocate, neither Article XIX nor Article 5.1 says that there can be only one possible safeguard measure in any particular case. There is no requirement in either provision that Members must search out and apply the single, theoretical "least trade restrictive" measure available. Rather, Article 5.1 calls for a Member to ensure that any safeguard measure it applies is commensurate with the specific injury findings its competent authority has made, both as it seeks to prevent or remedy that injury and to help the industry adjust to import competition. To date, New Zealand and Australia have failed to present a *prima facie* case that the US measure is inconsistent with this standard. By contrast, the United States has made clear why the import relief it has provided for its lamb meat industry represents a careful, measured response to the USITC findings, structured to prevent serious injury and facilitate industry adjustment, and no more.

31. Australia's and New Zealand's claims regarding Article 3 of the Safeguards Agreement are also unfounded. They suggest that the United States was required under that Article to justify its safeguard measure at the time it was applied. Article 3 is entitled "Investigation." By its plain terms, the obligations in that Article apply to the investigation conducted by a competent authority; here, the USITC. Article 3 does not apply to a Member's subsequent decision on whether to apply a safeguard measure, and it did not oblige the United States to "justify" its measure or publish an explanation of why its chosen measure was "necessary".

32. I would next like to comment briefly on the US decision to exclude lamb meat imports from Canada, Mexico, Israel, and developing countries from the safeguard measure. The United States was required to exclude developing country imports under the plain terms of Article 9.1 since they were negligible. During its oral statement, Australia asked why the United States did not notify the safeguard measure under Article 9. In fact, the United States did notify the measure under Article 9; the US notification is attached to our First Written Submission as US Exhibit 6.

33. As we noted in our written submission, in their own safeguards legislation, Australia and New Zealand exclude each other's imports from their own safeguard measures under the Australia New Zealand Closer Economic Relations Agreement. Therefore, they cannot be arguing that the United States is prohibited from doing likewise under its free trade agreements with Canada, Mexico, and Israel.

34. Instead, they must simply be arguing that a Member cannot base a threat of injury determination on an increase in imports from all sources, and then apply a safeguard measure to imports from only some of those sources. If this *is* their argument, then it must fail, because New Zealand and Australian imports constituted approximately 99 per cent of total imports during the period of investigation, and there was no discernible increase in lamb meat imports from Mexico, Canada, or Israel during the 1997 - interim 1998 period. Thus, Australia and New Zealand cannot credibly argue that the USITC's injury determination was based on increased imports from Canada, Mexico, or Israel.

35. Australia also raises claims under Articles 8, 11, and 12. These arguments are unfounded as well. One of the primary accomplishments of the Safeguards Agreement was to subject "grey-area" measures to GATT disciplines. As part of the overall understanding that made that accomplishment possible, Article 8.3 permits Members to impose safeguards for a three-year period without fear of having to "pay" for such action. Australia's argument that Article 8.1 obliged the United States to offer compensation for its three-year safeguard measure jeopardizes the objective of re-establishing multilateral control over safeguards. It would encourage Members to find methods outside the Safeguards Agreement to protect their threatened or injured domestic industries. Article 8.1 imposes an obligation on a Member considering a safeguard measure to provide an opportunity for prior consultations, and the United States satisfied that obligation by meeting with Australia twice.

36. Similarly, the United States did not contravene Articles 11 or 12. Despite Australia's claim, the US safeguard measure fully satisfied the specific prerequisites established in the Safeguards Agreement for applying import relief. Article 11, which addresses "grey area" measures, does not establish any further such requirements, in particular any need for a Member to make an additional showing that an emergency exists before taking action under the Agreement. Finally, the United States provided the Committee on Safeguards all pertinent information required by Article 12.2; conducted consultations in conformity with Article 12.3; and properly notified its laws, regulations and administrative procedures as required by Article 12.6.

37. I would now like to turn briefly to one final issue. During this morning's presentation, New Zealand submitted a new exhibit NZ13, a report prepared for the New Zealand Government for purposes of this dispute. New Zealand claims that it is submitting the report to show that it is possible to conduct such an analysis and to demonstrate that if the USITC had conducted such an analysis, it would have reached a different conclusion in its investigation. The United States has obviously not had any chance to study the report, and therefore our initial comments must necessarily be limited and confined to the question of the appropriateness of such a report to the Panel's work. We do, however, wish to stress a few important points.

38. First, the United States notes that New Zealand's point that such a report could have been prepared is not relevant. As the United States noted in its First Written Submission (at ¶ 131), the Safeguards Agreement does not require that a competent authority perform such an analysis. In fact, the Agreement does not address any specific methodology that a competent authority must perform. The United States explained in its first written submission (at ¶ 131) why using such studies is questionable.

39. Second, and more important, New Zealand concedes that its purpose in submitting the report to the Panel is to demonstrate that the USITC would have reached a different conclusion if it had conducted such an analysis. This suggests to the United States that New Zealand is trying to lead this Panel to conduct an impermissible *de novo* review, something that New Zealand conceded in the standard of review section of its brief is not appropriate.

40. Indeed, this study was never submitted to the USITC. This must be so, since the report cites the USITC's Report, and it plainly was commissioned for purposes of this dispute by a party with a direct interest in challenging the result of the USITC investigation. This is troubling in several respects.

41. First, as we have already stated, the Report invites an inappropriate *de novo* review of the USITC's determination. Second, it is not clear whether the data it is based on was part of the USITC's record. Third, if New Zealand *had* submitted the Report to the USITC during the proceeding, the USITC itself – as well as the US lamb meat industry and other interested parties – would have had an opportunity to review the Report, the underlying data (if made available), and the conclusions that it reached. By failing to submit the Report during the USITC's proceeding,

New Zealand has rendered such scrutiny impossible. Finally, there are obvious problems with submitting at this late stage a report done by a party solely for purposes of an adversarial proceeding.

42. Therefore, the United States respectfully submits that the Panel should disregard Exhibit NZ13. However, if the Panel is nevertheless inclined to consider the Report, then the United States respectfully submits that it too be permitted to submit econometric studies commissioned for purposes of this dispute that will analyze the various factors at issue in the USITC's investigation. Otherwise, the United States will be unfairly prejudiced.

43. This concludes our presentation today. As we noted at the outset, we will be pleased to receive any questions you may have.

ANNEX 3-5

CLOSING STATEMENT OF THE UNITED STATES AT THE FIRST MEETING OF THE PANEL

(25-26 May 2000)

1. On behalf of the United States delegation, I would like to thank the Panel for taking the time during the past two days to hear our views on this important proceeding, and for giving us the opportunity today to make this closing statement. I have only a few points to make this morning.

2. First, New Zealand and Australia make several claims that find no textual support in the Safeguards Agreement. Indeed, it is difficult to see how the complainants are reading the same Safeguards Agreement as the one agreed to by the Uruguay Round negotiators. According to the complainants, the Safeguards Agreement prescribes all manner of detail about the investigation by the competent authority and the decision on the measure to apply. However, complainants are unable to support these claims by any provision in the text. For example, in the first submissions, New Zealand, but not Australia, argues that Article 5.1 requires a Member to apply the "least trade restrictive" measure available. But the text of Article 5.1 says that a Member shall apply a measure "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment," not that a Member shall identify and apply the "least trade restrictive" measure. Similarly, complainants argue that the United States was required to "justify" its choice of safeguard measures. But once again, Article 5.1 says nothing of the sort. Complainants also claim that Article 3.1 requires a Member to publish the reasons it imposed a particular safeguard measure. But Article 3.1, by its plain terms, applies to the investigation conducted by a competent authority, not to a Member's decision to apply a safeguard measure. Finally, Australia suggested in its oral presentation yesterday (at ¶ 71) that the President of the United States was somehow required to impose the USITC plurality's suggested remedy. But nothing in the Safeguards Agreement requires a competent authority to recommend a safeguard measure, let alone requires a Member to adopt such a recommendation.

3. These points are important because the WTO is a treaty-based system, based on the mutual consent of the Members as reflected in the text of the WTO Agreements. Therefore, if there is no textual basis for complainants' various "tests" and "requirements", then the Members of the WTO have not consented to be bound by them. Accordingly, the United States urges the Panel to interpret the terms that the drafters actually used, not the terms that Australia and New Zealand wish they had used.

4. I would now like to respond briefly to certain points raised by complainants regarding the USITC's investigation and determination.

5. The USITC's affirmative threat determination was soundly based on the record developed by the USITC in its investigation, and the USITC findings and conclusions as set out in its report met all the requirements of Articles 3 and 4 of the Safeguards Agreement. The United States' First Written Submission did not "concoct" or "cobble together" a new version of the USITC's findings to fill in "gaps" or create a more defensible decision. It did not need to.

6. The United States at ¶¶ 79-82 summarized four central findings of the USITC report that were essentially uncontested by the complainants:

7. First, imports of lamb meat from Australia and New Zealand surged late in the period of investigation, and this surge was projected to continue through 1999.

8. Second, the mix of imported lamb meat imports shifted during the investigation, from frozen lamb meat to fresh/chilled lamb meat, and from smaller cuts to larger cuts, the form and cut size of lamb meat most similar to that produced and marketed by domestic lamb meat producers. This trend was projected to continue through 1999.

9. Third, this surge in imports, and the change in mix of imported product, led to falling domestic prices for lamb meat in 1997 and interim 1998, and the USITC found that these trends would continue in the future.

10. Fourth, economic indicators relating to the health of the domestic industry, which had stabilized in 1996 after the termination of the US Wool Act payments, deteriorated sharply in 1997 and interim 1998, when imports surged. This deterioration was predicted to continue into 1999. In particular, industry profitability fell sharply in 1997 and interim 1998.

11. Contrary to New Zealand's contention yesterday, this is all stated in the USITC's written findings. The recent increase in imports and projected further increase was described on pages I-15 and 23 of the USITC report. The change in product mix and projected further change was described on pages I-22 and 23. The fall in prices in 1997 and interim 1998 and linkage to increased imports, and likely impact on prices of further increases in imports, was described on pages I-23-24. The fact that the domestic industry had stabilized in 1996 after termination of the Wool Act, the fact that the condition of the domestic industry had deteriorated and that further deterioration was projected, and the linkage between the deterioration, the projected further deterioration, and the surge in lamb meat imports, are all described on pages I-17 to 21 and on I-23 to 26.

12. Thus, the United States had no need to create a revised story. The story was in the USITC report. In case there were any doubt, the United States urges the Panel to rely simply on the USITC report.

13. I would now like to turn briefly to the USITC's causation finding. In asserting that the USITC found increased imports to be one of several factors causing the threat of serious injury, New Zealand fails to consider the USITC's evaluation of each of those factors. While the USITC expressed its finding in terms of the US statute, it is clear from the USITC's evaluation of the several possible causes that increased imports were the *only cause of any significance* of the deterioration in the condition of the domestic industry in 1997 and interim 1998, and the projected continuation of this deterioration in 1999. The USITC did not attribute the effects of other factors to increased imports.

14. Finally, as the United States made clear in its First Written Submission and in its oral statement yesterday, the USITC report demonstrates –

- (1) that the USITC conducted a thorough investigation that met all the requirements of Article 4.2(a) of the Safeguards Agreement. As the United States stated in its First Written Submission and again yesterday, the Safeguards Agreement does not prescribe any specific methodology that an authority must follow in demonstrating the link between increased imports and the threat of serious injury;
- (2) that developments relating to the change in import mix and size were unforeseen by the United States at the time it negotiated and implemented its most recent tariff concession on lamb meat imports;
- (3) that the USITC properly defined the domestic industry, and that the USITC would have reached the same conclusion if it had limited the industry to lamb meat packers and breakers; and
- (4) that the USITC found that the serious injury was clearly imminent.

15. Mr. Chairman, Members of the Panel, I discussed at length yesterday the importance of Article XIX and the Safeguards Agreement as critical components of trade liberalization. We would like to close by asking the Panel to keep that perspective in mind in addressing this proceeding, and in particular when addressing the arguments by Australia and New Zealand that these provisions should be narrowly construed.

16. Finally, Mr. Chairman, it bears repeating that Australia and New Zealand have the burden of proof in this proceeding, a burden that the United States considers they have not met in any respect. We respectfully ask this Panel to so find in the report that it prepares.

17. This concludes our presentation today.

ANNEX 3-6

UNITED STATES' REPLIES TO QUESTIONS FROM AUSTRALIA

(22 June 2000)

Injury

Question 1. *Does the US rely in this dispute on any data designated as confidential in the public version of the USITC Report? If so, where does this occur? Could the US please provide any such confidential data from the USITC Report on which it seeks to rely for justifying the measure and the US's compliance with Safeguards Agreement and GATT 1994 Article XIX.*

Reply

1. We believe that the public report of the USITC provided the detailed analysis and demonstration of the relevance of the factors examined that are required by Article 4.2(c). The “views” of the USITC Commissioners, which set out their findings and conclusions on all pertinent issues of fact and law, contain virtually no confidential data. The small amount of confidential data in their views relates to (1) data concerning the proportion of lamb meat imports that are fresh or chilled (certain Australian data were confidential);¹ (2) data relating to the per cent of the value of packers’ net sales accounted for by carcasses and per cent accounted for by pelts and offal;² (3) support for the petition by firms other than those listed in the petition;³ (4) the percentage by which packer production declined between 1993 and 1997 (but not the fact that production fell);⁴ (5) the percentage amount by which the value of net sales of packers and breakers fell (but not the fact that the value of their net sales fell);⁵ and (6) certain inventory data (which the USITC did not find particularly relevant because lamb meat is perishable).⁶

2. Thus, USITC Commissioners directly cited confidential data in the non-public version of their views in only six instances. In four of the instances, the first, second, fourth, and fifth, the data support findings and conclusions that are fully stated in the public version of the report. The data in the two remaining instances do not relate findings on which the USITC based its affirmative decision (the position of non-petitioner firms, and certain inventory data).

3. With respect to the provision of confidential information, please see the United States’ response to the Panel’s Question 24 to the United States.

Question 2. *Does the US agree that one of the essential requirements under the Safeguards Agreement for a Member to apply a safeguard measure is that its competent authority has made an affirmative finding in terms of SG Article 4 that increased imports are causing or are threatening to cause serious injury to the "domestic industry" specified in SG Article 4.1(c)?*

¹ USITC Report at I-11.

² USITC Report at I-13.

³ USITC Report at I-14.

⁴ USITC Report at I-18.

⁵ USITC Report at I-19.

⁶ USITC Report at I-20.

Reply

4. Yes. The United States also wishes to call to Australia's attention its responses to the questions of the Panel.

Question 3. *At paragraph 66 of its First Submission, the US refers to "vertical integration of the industry". Could the US please provide data on how many growers are feeders, and how many growers are both feeders and packers.*

Reply

5. Approximately 20 per cent of all growers and grower/feeders who responded to USITC questionnaires indicated they were both growers and feeders.

6. The USITC Report states that at least one grower owns both a feeder and a packer.⁷ We also note that one holding company is a major domestic lamb packer that also owns both a major feeder and a major breaker operation.⁸ Some lamb producers retain title to their lambs in feedlots, by having them fed for a fee or in partnership with the feedlot owner.⁹ The exact number is not known. Clearly, lamb producers have a direct interest in slaughter operations as estimates indicate that 70 to 80 per cent of lambs slaughtered were previously fed in feed lots.¹⁰

Question 4. *Could the US please also provide the numbers of feeders, packers, packer/breakers, and breakers in the US, including not only specialist packers and breakers of sheepmeat but also those that produce meat from other livestock species.*

Reply

7. **Number of Feeders:** 11¹¹

8. **Number of Packers:** The exact number is not known. USDA data show that 9 plants accounted for 85 per cent of the sheep and lambs slaughtered in 1997, while 571 plants were certified by USDA in 1997 to slaughter lamb and sheep.¹²

9. **Number of Packer/Breakers:** Four operators defined themselves as packer/breakers in response to USITC questionnaires.

10. **Number of Breakers:** Less than 10 major firms.¹³

Measure to be applied "only to the extent necessary"

Question 5. *Was there a further investigation or inquiry by whatever name carried out by the US following the USITC reporting to the President in April 1999? If so, could the US please*

⁷ USITC Report at II-12.

⁸ USITC Report at I-14.

⁹ USITC Report at II-12.

¹⁰ USITC Report at II-24.

¹¹ USITC Report at II-13.

¹² USITC Report at II-15, n. 57.

¹³ USITC Report at II-15.

provide details about it and any new information obtained. Could the US please also provide copies of the documentation, if any, setting out the findings and reasoned conclusions of the investigation or inquiry on WTO issues regarding the measure.

Reply

11. After the USITC issued its affirmative determination that imports of lamb meat were threatening to cause serious injury to the US industry, the United States considered whether to apply a safeguard measure and, if so, to what extent. As part of this process, the United States authorities conferred with interested parties, including on several occasions with representatives of Australia and the Australian lamb meat industry, to obtain their views on an appropriate remedy. Indeed, after the United States announced its measure, Australia's Deputy Prime Minister and Minister for Trade issued a press release crediting "Australia's intensive lobbying" for delaying and ultimately reducing the level of the US measure.¹⁴

12. Article 3.1 of the Safeguards Agreement requires competent authorities to publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law. By its plain terms, Article 3.1 applies to the competent authority's investigation, not to the subsequent decision by a Member on whether to apply a safeguard measure and, if so, the nature of the measure. Neither Article 3.1 of the Safeguards Agreement nor any of its other provisions requires a Member to maintain or publish a record of its deliberations.

13. Australia's request for "documentation . . . setting out the findings and reasoned conclusions of the investigation or inquiry on WTO issues regarding the measure" appears to be a request for the United States to provide a justification of its measure. The Safeguards Agreement imposes no requirement of this kind. As a complainant in this dispute, Australia has the burden of proving its claim that the United States has applied a safeguard measure beyond the extent necessary to prevent or remedy serious injury and to facilitate adjustment. Australia cannot shift that burden to the United States.

Question 6. Did the US make a finding on the necessity of the extent of the measure under SG Article 5.1 before applying the measure? If so, could the US please provide a copy of the decision and supporting documentation.

Reply

14. Please see response to question 5.

Question 7. What was the "economic model" referred to in paragraphs 216-224 of the US's First Submission? Could the US please provide details of the model used.

Reply

15. The United States provided details on the model in footnote 220 of the United States' first written submission.

Question 8. 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?

¹⁴ Attached hereto as US Exhibit 42.

Reply

16. 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.

"Shall endeavour to maintain a substantially equivalent level of concessions and other obligations"

Question 9. Can the US confirm that, as set out in the last sentence of paragraph 35 of its Opening Statement on 25 May 2000, it considers that it met its SG Article 8.1 obligations by meeting with Australia twice and did not endeavour to maintain a substantially equivalent level of concessions and other obligations with Australia.

Reply

17. Paragraph 35 of the United States' opening statement does not state that the United States "did not endeavour to maintain a substantially equivalent level of concessions and other obligations with Australia." It does, however, note that the United States consulted with Australia on two occasions, specifically, on 28 April and 14 July 1999.

18. Australia argues that Article 8.1 required the United States to offer Australia trade concessions in recompense for the trade effects of the US safeguard measure. Article 8.1 imposes no such requirement, a fact that Australia itself appears have acknowledged outside this proceeding.

19. After Australia notified its safeguards regime to the Committee on Safeguards¹⁵, Canada asked whether the safeguard procedures that Australia had notified provided for adequate compensation under Article 8 and, if not, whether other Australian legislation made provision for compensation. Australia's response was:

No. That would not be the responsibility of the [Australian competent authority]. There is no specific provision for this in Australian legislation. The issue of compensation or concessions would have to be addressed in each case and, if appropriate, the requisite action taken, which might conceptually involve new legislation. *Our understanding is that the issue of compensation or concessions, apart from the issue of the size and administration of quota and tariff quotas has been rare for safeguard action.*¹⁶

20. 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 will rarely be appropriate. Australia also appears to view this question as one for the importing Member to decide.

21. The United States has acted in this case in conformity with the approach Australia outlined in its response to Canada's question. Throughout the course of its deliberations on an appropriate remedy, the United States conferred with Australia on an appropriate safeguard measure. The high in-quota quantity included in the TRQ, the separate quota allocations for Australia and New Zealand, and the fact that the TRQ does not establish specific limits for fresh and frozen lamb meat products are all consistent with requests that Australia (and New Zealand) made to the United States as the

¹⁵ G/SG/N/1/AUS/2, circulated on 2 July 1998.

¹⁶ Notification of Laws and Regulations Under Article 12.6 of the Agreement, Replies from Australia to Questions Posed by Canada and the United States, G/SG/Q1/AUS/3, at 2 (27 April 1999) (emphasis added).

measure was under consideration. Moreover, at Australia's and New Zealand's request, the United States promulgated a regulation to administer the TRQ through an export certificate system and agreed to delay the effective date of the measure to permit an additional 1.5 million tons of lamb meat to enter the United States outside the TRQ. As noted above in response to question 5, Australia's Deputy Prime Minister and Minister for Trade issued a press release crediting "Australia's intensive lobbying" for delaying and ultimately reducing the level of the US measure.

ANNEX 3-7

REPLIES BY THE UNITED STATES TO QUESTIONS FROM THE PANEL

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

Question 1

In *Korea - Dairy Safeguard and Argentina - Footwear Safeguard*, the Appellate Body stated that "the developments which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been 'unexpected'", Australia, New Zealand and the EC interpret this statement to mean that there must be unforeseen developments that *cause* a surge in imports which *in turn* causes a threat of serious injury, for the "unforeseen developments" requirement of Article XIX to be fulfilled.

(a) Please comment on this interpretation of the Appellate Body's statement.

Answer 1(a)

1. Through their two-step causation approach, Australia, New Zealand, and the EC have misconstrued both the relevant language of Article XIX and the Appellate Body's findings. The error in this approach is that, contrary to the plain language of Article XIX:1(a), and the Appellate Body's characterization, it de-links the "unforeseen developments" both from the "conditions" under which increased imports are occurring and from the serious injury (or threat) that the increased imports have caused.

2. As a preliminary matter, it is worth noting that, unlike the complainants and the EC, the Appellate Body did not describe the relationship between "unforeseen developments" and increased imports in terms of the former "causing" the latter. That is because Article XIX:1(a) uses the expression "If, as a result of" [emphasis supplied] to describe this relationship, and indeed the relationship between "unforeseen developments" and both "under such conditions" and serious injury (or threat). By distinction, paragraph 1(a) uses the expression "as to cause" in linking "such increased quantities" and "under such conditions" to serious injury.

3. The choice of the expression "If, as a result of" suggests that the framers of Article XIX were seeking to characterize a situation in which a particular outcome ("a result") has followed generally from earlier occurrences. By contrast, the expression "as to cause or threaten", used later in the paragraph, denotes a considerably more direct, cause-effect relationship. The words "If, as a result of" emphasize the end result of "unforeseen developments" (namely, products being imported in such increased quantities and under such conditions as to cause or threaten serious injury) rather than the manner in which those developments produced that outcome.

4. 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.

5. Thus, the complainants' specific suggestion that Article XIX:1(a) imposes a simple, two step causation requirement is wrong because it fails to differentiate between "If, as a result of" and the causation language used elsewhere in that article.¹ It is also wrong because the "result" of unforeseen developments can be either an increase in imports or a change in economic, financial, or other "conditions" that apply to such imports, or both. The text of Article XIX:(1) makes clear that both increased imports and such "conditions" can result from "unforeseen developments," not merely the former.

6. Indeed, as the phrasing of Article XIX:1(a) suggests, there may be an interplay between the conditions under which increased imports affect a domestic industry and the quantity of the increase that will cause serious injury. For example, where conditions of competition have unexpectedly changed, an increase in imports that would not otherwise have been injurious may cause serious injury.

7. Moreover, as the Appellate Body recognized in the quotation that the Panel cites, "unforeseen developments" of the kind described in Article XIX:1(a) do not merely lead to increased imports or changes in the conditions under which they are imported. Rather the result of the "unforeseen developments" is those specific types of import increases ("in such quantities") and circumstances ("under such conditions") that cause or threaten serious injury. Thus, the result of unforeseen developments is the entire set of consequences addressed by Article XIX:1(a): to wit, an increase in imports that is "recent enough, sudden enough, sharp enough, and significant enough" as to cause or threaten serious injury to a domestic industry.²

8. Because this is the case, it would be highly unlikely that a Member would ever have "foreseen" developments of the sort mentioned in Article XIX:1(a) at the time it makes a tariff concession. The structure of GATT tariff concessions (incremental reductions phased in over time), the fact that Members bargain for and schedule tariff concessions on a product-by-product basis, and the intermittent nature of tariff negotiating rounds together create an environment in which governments can grant tariff concessions in a manner that avoids knowingly imperiling their domestic industries. 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.

- (b) In the light of the Appellate Body's statement, how does the United States substantiate its argument that a major "unforeseen development" was increased import volume combined with a shift in the product mix of imports away from frozen lamb meat and toward fresh/chilled lamb meat?**

Answer 1(b)

9. The facts in this case are similar to those found by the Working Party in *Hatters' Fur* to constitute unforeseen developments.³ Here, as in *Hatters' Fur*, an unforeseen development both

¹ As the Appellate Body concluded in *Hormones*, "the implication arises that the choice and use of different words in different places in the SPS Agreement are deliberate, and that the different words are designed to convey different meanings. A treaty interpreter is not entitled to assume that such usage was merely inadvertent on the part of the Members who negotiated and wrote that Agreement." *European Communities - Measures Concerning Meat and Meat Products*, WT/DS26 and 48/AB/R, Report of the Appellate Body, 13 February 1998, at ¶ 164, citing *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R, Report of the Appellate Body, 25 February 1997, at 17.

² *Argentina-Footwear*, Report of the Appellate Body at ¶ 131.

³ *Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade*, GATT/CP/106, report adopted on 22 October 1951.

results in increased imports *and* contributes to conditions in which the quantity and effects of the increased imports so affect the domestic industry as to cause or threaten to cause serious injury. In fact, the USITC found that both increased imports and a deterioration in the condition of the domestic industry occurred as a result of the shift in the product mix of imports from frozen to fresh or chilled lamb meat.

Increased imports

10. The change in the product mix of imported lamb meat resulted in a surge of low-priced lamb meat into the United States after 1995. The surge was not foreseen at the time the tariff concession on lamb meat was negotiated as part of the Uruguay Round. Lamb meat imports increased by 19 per cent in 1997 from the same period a year earlier, and imports increased by 19 per cent in the first nine months of 1998. Most of the increase in imports between 1995 and 1997 was in fresh or chilled lamb meat, which increased by 101 per cent during that period, as compared to 11 per cent for imports of frozen lamb meat.⁴

Conditions based on quantity and effects of imports

11. The shift in the product mix of imports away from frozen lamb meat and toward fresh and chilled lamb meat deeply affected conditions in the US market. This was true both in terms of increased quantities of imported lamb meat flooding the US market in 1997 and interim 1998, and in their effects. A primary effect of the change in the product mix of imports was an increasing convergence in the US market of domestic and imported product. Consumers were no longer limited to purchasing fresh or chilled lamb meat only from domestic sources but could purchase competing, lower-priced imports sold in a form (fresh or chilled) and cut similar to that produced by the domestic industry. Since 1996, the majority of lamb meat imports from Australia has been fresh or chilled⁵, and an increasing share of imports from New Zealand were fresh or chilled.⁶

12. The changing conditions of competition in the domestic lamb market during the latter stages of the period of investigation required US producers to adjust to a market with increased competition from imported fresh and chilled lamb meat.⁷ Competing imports displaced US product, which resulted in a higher market share for importers of lamb meat.⁸ Complainants' submissions before the Panel, and their nationals' submissions before the USITC, evidenced that imports displaced domestic lamb meat. Australia has conceded that about one third of the increase in lamb meat imports over the period of investigation displaced domestic lamb meat.⁹ During the USITC investigation, both Australian and New Zealand respondents made a similar concession.¹⁰

13. Neither the change in the product mix of imports nor the degree to which this change would affect market conditions for US producers of lamb meat could have been foreseen in 1993 by US negotiators of the tariff concession on lamb meat. The change in the product mix of imports, in this particular case, both resulted in increased imports and contributed to conditions in the US market whereby the quantity and effects of the increased imports threatened to cause serious injury to the domestic industry.

(c) Please explain your apparent view that no *finding* of "unforeseen developments" is necessary for this provision of Article XIX:1 of GATT 1994 to be fulfilled. If

⁴ USITC Report at I-22.

⁵ USITC Report at II-16.

⁶ USITC Report at II-43.

⁷ USITC Report at I-32.

⁸ USITC Report at I-31 and I-32.

⁹ Australia's First Written Submission at ¶ 146.

¹⁰ USITC Hearing Transcript at 164, attached hereto as US Exhibit 20.

no such finding is necessary, how can compliance with this provision be reviewed by a panel?

Answer 1(c)

14. The Appellate Body's decisions in *Korea–Dairy* and *Argentina– Footwear* establish that "unforeseen developments" do not constitute an "independent condition" for the application of a safeguard measure. This conclusion is in keeping with the specific language of Article XIX:1(a) as discussed above. It is also consistent with the fact that nothing in Article 3 of the Safeguards Agreement, which establishes procedures for investigations by the competent authorities, or Articles 2 and 4, spelling out the subject matter of such investigations, requires the establishment of such a condition. Nor do any of these provisions furnish a standard on which the competent authorities could decide on the degree, type, source, and specificity of evidence necessary to determine whether a government's negotiators (or the government as a whole) "foresaw" later developments. This fact again suggests that the competent authorities are not required to find the existence of "unforeseen developments" in the course of their investigation.¹¹

15. This silence reflects the understanding embodied both in Article XIX and arising from the structure and procedures applicable to GATT tariff concessions, as discussed above, that Members should not ordinarily be presumed to intend their tariff concessions to result in serious injury to their domestic industries. This conclusion is consistent with the historical context in which Article XIX was developed.

16. Paragraph 1(a) of Article XIX was inserted in the GATT 1947 at US insistence. It was derived virtually verbatim from so-called "escape clause" provisions included in contemporaneous US trade agreements, specifically the US reciprocal trade agreement with Mexico, negotiated in 1942.¹²

17. The United States' insistence on such provisions, both in bilateral agreements and in the GATT, reflects the restraints that had been placed on the President's ability to negotiate tariff concessions. At the time, the President was negotiating trade agreements under a limited grant of tariff authority from the Congress provided in the Reciprocal Trade Agreements Act of 1934 (an amendment to the Smoot-Hawley Tariff Act of 1930).¹³ To reassure domestic industries, the President was constrained under the 1934 Act in the depth of tariff cuts he could commit the United States to undertake. As a result, US tariff concessions in any particular negotiation – including the original GATT negotiations – were necessarily limited in nature.

18. Moreover, under the terms of an Executive Order issued in February 1947 (between the GATT preparatory sessions)¹⁴, before negotiating any trade agreement the President was required to seek written, public advice from the USITC (then the US Tariff Commission) on the probable economic effect of tariff reductions on all product categories the President proposed for inclusion in

¹¹ If competent authorities were required to make findings with regard to "unforeseen developments", they would need to undertake two additional inquiries, one directed at identifying those developments and their impact and a second regarding whether they were "foreseen". The first investigation would take a considerable time, perhaps as long as the authorities' injury and causation investigation itself, since much of the evidence to be collected would be related to and derived from evidence in the injury investigation. The second investigation could not begin until the first had been completed, thus substantially delaying issuance of the authorities' final report. The second inquiry would entail an entirely new additional investigation, based on interviews of and the results of questionnaires addressed to current and former government and industry officials, plus an examination of pertinent negotiating, other governmental, and industry records. Moreover, it is not clear that competent authorities (which normally perform economic analyses) would have the expertise, or legal authority, to perform such a task.

¹² 57 Stat. 833 (1943), E.A.S. 311 (effective 30 January 1943), attached hereto as US Exhibit 21.

¹³ Attached hereto as US Exhibit 22.

¹⁴ See John Jackson, *World Trade and the Law of GATT* 553 (1969), attached hereto as US Exhibit 23.

the negotiations.¹⁵ That is, the Commission was to publish its views on the effect that tariff reduction would have on each product.

19. The net effect of the tariff limitation and public advice provisions included in the 1934 act and the subsequent executive order was to place the President under legal and political restraints designed to preclude the negotiation of drastic tariff reductions of a nature that might be expected to result in a flood of imports and serious injury, or threat of injury, to any domestic industry. By contrast, the President was authorized to agree to smaller duty reductions negotiated on a product-by-product basis to avoid imperiling US producers. This incremental approach to tariff reduction was reflected in the relatively modest, phased-in duty reductions provided for under the original GATT tariff concessions, and was enshrined in GATT Article XXVIII *bis*, which calls for periodic rounds of tariff negotiations with a view to progressive duty reductions over time.

20. Given this gradualist approach, while tariff concessions might be expected to lead to modest import growth in particular sectors, the concessions would not normally be expected to unleash a flood of imports with consequent serious injury, or threat of serious injury, to domestic industries. Nonetheless, US negotiators recognized that even with limited tariff concessions, it was impossible to rule out the possibility – especially given the economic dislocations and uncertainty provoked by World War II – that future, unforeseen changes in market, financial, or economic conditions might lead to a surge in imports. That concern created the need for an “escape clause,” which would be available to allow “emergency action” to address such situations. The escape clause provided reassurance for concerned domestic constituencies and, in turn, enabled the United States (and other governments) to make tariff concessions that might otherwise have been politically impossible.

21. Viewed in this light, the “unforeseen developments” referenced in Article XIX are any later occurrences that upset a Member’s expectation that its tariff concession will not result in serious injury or threat of serious injury for its domestic industry. As the chairman of the Tariff Commission remarked in a report submitted to the Senate Finance Committee in June 1948 on the Commission’s procedures for implementing the “escape clause” (then embodied both in an Executive Order and in GATT Article XIX:1(a)):

The construction which the Commission places on the words ‘unforeseen developments,’ as concerns the exercise of its functions under the escape clause, is that when imports of any commodity enter in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers, this situation must, in the light of the objective of the trade agreements programme and of the escape clause itself, be regarded as the result of unforeseen developments.¹⁶

¹⁵ See Exec. Order No. 9832 of February 25, 1947, ¶¶ 5-8, attached hereto as US Exhibit 24.

¹⁶ *Extending Authority to Negotiate Trade Agreements, Hearings before the Committee on Finance, United States Senate*, H.R. 6556, at 128 (1948), attached hereto as US Exhibit 25. Three members of the Commission repeated this view in a 1953 report of an escape clause investigation conducted on imports of hand-blown glassware. Despite the fact that these Commissioners found that increased imports had not caused serious injury, they observed that:

In granting trade agreement concessions, the United States fully contemplates that imports will increase. It does not, however, intentionally grant concessions of such breadth and depth as to cause (or threaten) serious injury to a domestic industry. The major purpose of the escape clause legislation is to provide a remedy whenever experience under a trade agreement concession indicates that an error was committed and that imports have in fact increased, either absolutely or relatively to domestic production, to such an extent as to cause or threaten serious injury to a domestic industry.

22. Thus, the Tariff Commission made clear as early as 1948 – like the Appellate Body more than 50 years later – that the reference to “unforeseen developments” does not create an independent condition for application of the escape clause. Rather, the language is a restatement of the circumstances in which recourse to the escape clause itself is permitted – namely, a situation in which, following implementation of a negotiated tariff reduction, a surge in imports and serious injury (or threat) to a domestic industry has unexpectedly occurred.

23. The 1951 Working Party report on *Hatters' Fur* provides further support for this conclusion. The members of the Working Party (with the exception of the United States) considered that “unforeseen developments” should be understood to be “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”.¹⁷

24. As the Working Party report notes, US negotiators in Geneva had been aware in 1947 that hat styles were subject to change and they had expected some increase in imports following implementation of the tariff concession. The members of the Working Party (except the United States) considered that US negotiators should have foreseen that hat fashion styles would, in fact, change. But the Working Party (except Czechoslovakia) found that US negotiators could not have foreseen the specific change in style that actually occurred, the large scale of that change, or its prolonged duration.¹⁸

25. Taken as a whole, the Working Party report suggests that future developments (e.g., later changes in hat styles) can be understood to have been “foreseen” at the time the tariff concession was made if they are a direct result of economic factors of which the tariff negotiators had actual knowledge at the time (hat fashions are subject to change). But the report also suggests that specific developments in the marketplace of the type leading to an injurious import surge (a major, sustained shift to a new hat style) cannot be understood to have been “foreseen”. Thus, the Working Party report confirms the conclusion that specific changes in the marketplace that result in an injurious import surge cannot normally be considered to have been “foreseen”.

26. Since Members can normally be assumed to structure their tariff concessions in a way to avoid unleashing an injurious import surge, a surge of that nature must presumptively be regarded as the result of unforeseen developments. The developments themselves will typically be apparent in the competent authority’s report of its investigation, as is the case in the USITC report of its lamb meat investigation. Their unforeseen character will be implicit in the result they have produced.

27. There may be rare instances in which a Member has specifically contemplated that a tariff concession it has made would result in sudden and severe injury, or threat of injury, to a domestic industry. In such a case, parties appearing before the competent authority in its injury investigation would be free, under Article 3.1 of the Safeguards Agreement, to present evidence to this effect and argue that the application of safeguard measures would not be “in the public interest.” Should such measures be applied nonetheless, a complaining Party in panel proceeding brought under the DSU would equally be free to point to this evidence and argue that the normal presumption of “unforeseen developments” should not apply.

United States Tariff Commission, *Hand-Blown Glassware*, Report to the President on Investigation No. 22 Under Section 7 of the Trade Agreements Extension Act of 1951, as amended, at 51-52 (1953), attached hereto as US Exhibit 26.

¹⁷ *Hatters' Fur* at ¶ 9.

¹⁸ *Hatters' Fur* at ¶ 11.

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

Question 2

The United States takes the view that - where there is a "continuous line of production from the raw to the processed product" and "substantial coincidence of economic interest" - producers of input products form part of the "domestic industry" producing the processed product. Can the United States explain, in the hypothetical situation where the end-product is composed of and processed from a large number of inputs which are functionally dedicated to the production of only that end-product, under which conditions or circumstances input producers would be *excluded* from the domestic industry definition even if there is a continuous line of production and economic interests happen to substantially coincide? Or is it the United States' view that such input producers would in all cases be a part of the domestic industry?

Answer 2

28. The panel's hypothetical has not arisen before the USITC and will not because of the nature of the USITC's test. Cases in which the USITC considers whether to include producers of the raw product (e.g., growers) and processors in the same domestic industry solely involve processed agricultural products.¹⁹ In those investigations, the USITC examines whether the evidence establishes a continuous line of production from the raw product to the processed product. As reflected in the term "raw," the product moves along the continuum from unfinished to finished form. Multiple inputs are not contemplated in such a situation because the test is reserved for moving a primary product from being raw to "market-ready." The US test does not, as the *Manufacturing Beef* panel characterizes the Canadian test at issue there, simply provide for relief to be available to input suppliers in general when they suffer injury from imports equivalent to that normally suffered by those who produce end-products.

29. Likewise, the hypothetical the panel poses would not arise because of the second prong of the USITC's test. The hypothetical assumes there would be a "substantial coincidence of economic interest" between the producers of multiple inputs and the processors of the finished product. However, it is difficult to conceive of a processed product comprised of a mix of raw agricultural products, each of which would be dedicated to only one end-product. It is also unlikely there would ever be a coincidence of economic interests between such multiple input producers and the processors of the final product. Such a situation is only liable to occur where, as here, the processing stage reflects minor value-added components contributing to essentially a finishing operation.

Question 3

We note that Article 4.1(c) focuses on the "output" of the "like or directly competitive products" (i.e., "firms whose collective *output of the like or directly competitive products* constitutes a major proportion of the total domestic production of those products"). How would the United States reconcile its definition of the domestic industry with this provision?

Answer 3

30. The United States' definition of the domestic lamb meat industry is consistent with Article 4.1(c) of the Safeguards Agreement. The USITC defined the domestic industry producing

¹⁹ See *Fresh Tomatoes and Bell Peppers*, Inv. No. TA-201-66, USITC Pub. 2985 (Aug. 1996), at I-9-10, attached hereto as US Exhibit 27; *Apple Juice*, Inv. No. TA-201-59, USITC Pub. 1861 (June 1986), at 5-10, attached hereto as US Exhibit 28; *Certain Canned Tuna Fish*, Inv. No. TA-201-53, USITC Pub. 1558 (Aug. 1984), at 5-7, attached hereto as US Exhibit 29.

lamb meat to include growers and feeders of live lambs as well as packers and breakers of lamb meat.²⁰ The ordinary meaning of the term “product” is defined as the “output” of an industry or firm²¹, and the ordinary meaning of the word “production” is defined as the “total output especially of a commodity or an industry”.²² Consistent with these definitions, lamb meat is produced by the domestic industry through an extended and continuous line of production yielding the output of a commodity, “lamb meat”. The plain meaning of the term “output” refers to “something produced” in “agricultural or industrial production”.²³ US growers and feeders of live lambs as well as packers and breakers of lamb meat all produce an “output” that is an agricultural product.

Question 4

In this context, please discuss the *Canada - Manufacturing Beef* dispute (SCM/85), in which the panel rejected Canada's reasoning (which was very similar to the USITC's reasoning in this case) for considering the producers of live cattle to be among the producers of manufacturing beef. Why would that panel's reasoning not be equally persuasive and relevant in this case?

Answer 4

31. It is important to note at the outset that *Manufacturing Beef* was an unadopted decision. In *Japan–Taxes on Alcoholic Beverages*, the Appellate Body discussed the legal status of panel reports, and in particular unadopted panel reports. *Adopted* panel reports:

are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.²⁴

32. *Unadopted* panel reports, by contrast, “have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the CONTRACTING PARTIES to GATT or WTO Members”.²⁵ The Appellate Body’s conclusion is especially pertinent in this case, because the WTO membership could have “endorsed” the *Manufacturing Beef* decision by codifying it in the new WTO Subsidies Agreement. Their failure to do so should counsel against extending that decision’s reasoning to cases under the Subsidies Agreement, much less the Safeguards Agreement.

33. In any event, even if the panel’s decision in *Manufacturing Beef* were applicable in a countervailing duty case, it is not relevant to this case. The panel’s determination that cattle producers were not “producers” of manufacturing beef was based in large part upon its interpretation of Article 6.6 of the Subsidies Code, which stated that:

The effect of the subsidized imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of production in terms of such criteria as: the production process, the producers’

²⁰ USITC Report at I-13.

²¹ Webster’s Third New International Dictionary (Unabridged) at 1810 (1981), attached hereto as US Exhibit 30.

²² Webster’s New Collegiate Dictionary at 918 (1977), attached hereto as US Exhibit 31.

²³ Webster’s Ninth New Collegiate Dictionary at 838 (1985), attached hereto as US Exhibit 32.

²⁴ *Japan–Taxes on Alcoholic Beverages*, Report of the Appellate Body, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, at 14.

²⁵ *Id.* at 14-15.

realization, profits. When the domestic production of the like product has no separate identity in these terms the effects of subsidized imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.²⁶

34. In the view of the Panel, Article 6.6:

indicates a preference for narrowing the analysis of injury to those production resources directly engaged in making the like product itself. Applied to a vertical production process involving several stages, this principle would indicate that the analysis should likewise be focused on the stage of production devoted to actually making the like product in question, as opposed to earlier stages devoted to producing inputs.²⁷

35. The Panel also cited Article 6.6 in distinguishing the panel's decision in *New Zealand – Transformers* (unlike *Manufacturing Beef*, an adopted decision), which, as the United States explained in its First Written Submission (at ¶ 71), supports the USITC's determination of the domestic industry in this case.

36. The Safeguards Agreement contains no provision equivalent to Article 6.6. Therefore, the Panel's analysis, which was based on that provision, is inapposite.²⁸

37. As discussed in the United States' First Written Submission, the USITC's approach in this case is supported by the express purposes of the Safeguards Agreement and its remedial provisions, which are not comparable to provisions of the Tokyo Round Codes. The resolution of the question at hand should be decided on the basis of the text of the Safeguards Agreement, the particular Agreement at issue, and not by reference to an unadopted decision of a GATT panel interpreting another Agreement and, in particular, a provision of that Agreement that does not appear in the Safeguards Agreement.

38. In addition, this case is distinguished from *Manufacturing Beef* not only by its legal posture, but also by its facts. In *Manufacturing Beef*, the Panel found boneless manufacturing beef to be a "by-product" resulting from economic activities whose principal aim was to produce other products for sale.²⁹ The EEC had argued that "viewing the entire economic process by which inputs were produced for transformation into boneless manufacturing beef, it could not be said to involve either continuous production or functional dedication".³⁰ In contrast, and as confirmed by the USITC, the production of lamb meat involves both continuous production and functional dedication of the live lamb to lamb meat. The USITC found that, in the United States, most sheep and lambs are meat-type animals kept primarily for the production of lambs for meat.³¹ Except for lambs withheld for breeding purposes, virtually all meat-type lambs are shipped to feeders in the fall³² and are then generally shipped to packers for slaughter.³³ Packers then either further process the lamb or ship the carcasses to breakers who perform a similar processing function.³⁴ The cuts are then sold to wholesalers or

²⁶ Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, Art. 6.6.

²⁷ *Manufacturing Beef* at ¶ 5.3.

²⁸ In the view of the United States, the Panel's interpretation of Article 6.6 (and thus its conclusion in *Manufacturing Beef*) was erroneous. Therefore, even if the Safeguards Agreement did include such a provision, it would not change the fact that the USITC's approach to this issue was correct.

²⁹ *Manufacturing Beef* at ¶ 5.12.

³⁰ *Manufacturing Beef* at ¶ 3.23.

³¹ USITC Report at I-13 and II-4.

³² USITC Report at I-13 and II-11, II.

³³ USITC Report at I-13 and II-14.

³⁴ USITC Report at I-13 and II-14-15.

retail outlets. Obviously, this is not a case where production of the like product results “from economic activities whose principal aim is to produce other products for sale” as was claimed in *Manufacturing Beef*.

39. To the extent *Manufacturing Beef* is at all relevant, it is because one of the complainants in this case – Australia – took a position in *Manufacturing Beef* that was contrary to the position it takes here. In *Manufacturing Beef*, Australia argued it was the growers who produced the beef; the abattoirs were merely finishers who placed the product in a usable form.³⁵ Australia adopted the same reasoning as the USITC in its lamb meat investigation and agreed that the CCA should include cattle growers in the domestic industry producing beef. As Australia there argued, when the processor is simply making a product “market-ready”, a grower is properly regarded as a producer of the finished good. Australia’s position in that case is inconsistent with any conclusion that the ordinary meaning of the term “producer” can resolve the question at issue here contrary to the United States’ position. Further, if Australia believed in *Manufacturing Beef* that cattle growers supplying less than 50 per cent of a product’s meat input constituted producers of the finished product, then it certainly must also believe that lamb growers supplying 100 per cent of the product’s meat input are producers of the product.

40. As Australia argued in *Manufacturing Beef*³⁶, such an approach is in keeping with Ad Article XVI of the *GATT 1994*, Section B, paragraph 2, which defines a primary product as “Any product of farm . . . in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade”. Although the *Manufacturing Beef* panel declined to rely on the Ad Article because it and the Tokyo Round Agreement had different purposes, the Ad Article definition provides further evidence that, in normal trade parlance, the production of primary products involves both raw and processed forms.

Question 5

Please comment on New Zealand's argument at para. 29 of its oral statement that the term "as a whole" in Article 4.1(c) has to do with the representativeness of the data used in an investigation in respect of the entire industry, and not with the scope or breadth of the domestic industry itself.

Answer 5

41. The term “as a whole” is not defined by the Safeguards Agreement. While the United States supports New Zealand’s view that the purpose of the term may be to ensure that a safeguard investigation is not limited to selected individual members of an industry, it rejects the claim that “as a whole” is a qualifying term meant to define the scope of the producers *within* an industry. Contrary to New Zealand’s additional assertion, the United States has not used the term “as a whole” to expand the membership of an industry beyond those who produce the “like or directly competitive product”.

Did the USITC demonstrate that the domestic industry faced a "threat of serious injury" due to "increased imports"?

Question 6

In its investigation, how did the USITC determine that the threatened injury was “serious” as opposed to some lesser degree of injury? Where in its determination can this be found?

³⁵ *Manufacturing Beef* at ¶ 4.1.

³⁶ *Manufacturing Beef* at ¶ 4.1.

Answer 6

42. As a preliminary matter, it would appear that the question of whether Article 3.1 of the Safeguards Agreement required the USITC to state in its report why the threatened injury was “serious” as opposed to meeting some lesser standard, does not appear to be at issue in this dispute and would be outside the Panel’s terms of reference. Article 3.1 is the only provision obligating a Member to publish conclusions reached on pertinent issues. The complainants did not identify this issue in their panel request, nor did they raise it in their first written submissions. Those submissions rely on Article 3 only in challenging the United States’ choice of a safeguard measure, not in challenging the USITC’s threat of serious injury determination, for which they rely on Article 4. Consequently, any claim that under Article 3.1 the USITC should have articulated an additional legal conclusion is outside the terms of reference of this dispute. However, the United States is pleased to respond to the Panel’s question.

43. The USITC justified its conclusion that the industry was threatened with injury that was serious through its findings at pages I-16 through I-21. That discussion affirmatively explains why the USITC regarded “the deterioration in [economic] indicators . . . after 1996”³⁷ as confirming that the industry was threatened with serious injury. The USITC explicitly recognized that the requisite standard for its injury determination was whether there had been “a serious . . . overall impairment in the position of [the] domestic industry”,³⁸ which is the definition of serious injury under Article 4.1(b) of the Safeguards Agreement. The authority’s conclusion emphasized the declines in the domestic industry’s “market share, production, shipments, profitability, and prices, among other difficulties that the domestic industry [was] facing”.³⁹ The findings on those factors demonstrate why the USITC regarded the industry on the verge of a significant overall impairment of its position.

44. The Agreement does not require more. The WTO Agreements as a whole do not articulate a precise relationship between the “serious injury” standard set forth in the Safeguards Agreement and other standards set forth in other agreements, such as the “material injury” standard used in the Antidumping Agreement. Although the Safeguards Agreement defines the term “serious injury”, neither the Antidumping Agreement nor Article VI of the GATT 1994 defines “material injury”. Consequently, the WTO Agreements do not provide the basis for a precise comparison between different “degrees” of injury, nor do any of the Agreements call for a comparison.

Question 7

Under the causation standard applied by the United States in this case, can it be determined that imports of lamb meat in isolation were causing or threatening to cause a degree of injury that is "serious", regardless of the possible additional injury that might be caused by other factors? If so, how? Is such a determination necessary? Please explain.

Answer 7

45. Underlying New Zealand’s assertion that the Safeguards Agreement required the USITC to “isolate” the effects of increased imports is the apparent assumption that the Agreement requires increased imports to be the sole cause of serious injury or threat of serious injury. Both the purported “isolation” requirement and the premise on which it is based are unfounded.

Sole Cause

³⁷ USITC Report at I-18.

³⁸ USITC Report at I-16, quoting Section 202(c) of the Trade Act of 1930.

³⁹ USITC Report at I-21.

46. Articles 2.1 and 4.2 of the Safeguards Agreement, which respectively set out the conditions for the application of safeguard measures and requirements for determinations of serious injury or threat thereof, both employ the verb “to cause” in one form or another. *Webster’s Third New International Dictionary (Unabridged)* at 356 (1981) defines the verb ‘cause’ as follows: “to serve as cause or occasion of.” Webster’s makes clear that ‘cause’ (in noun form) need not be the sole determinant of an outcome:

cause indicates a condition or circumstance or combination of conditions and circumstances that effectively and inevitably calls forth an issue, effect or result *or that materially aids in that calling forth.* (emphasis added.)⁴⁰

As the preceding definition indicates, while a cause need not be the sole determinant of a result, it must nevertheless be important. That is, it must *materially* aid in generating the result.⁴¹ Webster’s defines the term ‘material’ as follows: “being of real importance or great consequence: substantial”.

47. New Zealand has objected to the fact that the USITC applied a “substantial cause” analysis in determining whether increased imports threatened serious injury to the US lamb industry. But, as demonstrated above, the expression “substantial cause” (defined under US law as “a cause which is important and not less than any other cause”) fully accords with the ordinary meaning of “to cause” as used in the Safeguards Agreement.

48. The fact that the Safeguards Agreement treats “cause” in accordance with its ordinary meaning, rather than as “sole cause”, finds support in Article 4.2(b). That provision requires a competent authority to demonstrate “the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof.” The term ‘causal’ has the meaning “of or relating to, or dealing with a cause” and the term ‘link’, “a unifying element: a means of connecting or communicating”.⁴² Contrary to New Zealand’s reading of “to cause”, the manner in which Article 4.2(b) defines ‘causal link’ suggests that a competent authority is under no obligation to demonstrate that increased imports alone caused the serious injury or threat of serious injury. Rather, Article 4.2(b) requires a competent authority simply to demonstrate a connection between the increased imports and the injury it has found.

49. That the terms ‘cause’ and ‘causal link’ do not require that a cause be the sole cause is illustrated by the way these terms may ordinarily be used to describe the causes of disease.⁴³ To use a medical analogy, the fact that a particular person has experienced coronary heart disease may be traceable to several “causes”, including high fat intake, sedentary lifestyle, genetic predisposition, prolonged periods of stress, and so forth. These factors can act together and in combination to produce a single medical condition: each, to use the dictionary terms, “materially aids in calling forth” the disease.

50. Article 2 of the Safeguards Agreement contemplates a similarly synergistic approach to causation. Specifically, it calls for an analysis not just of whether a particular product is being

⁴⁰ Webster’s Third New International Dictionary (Unabridged) at 356 (1981), attached as US Exhibit 33.

⁴¹ While the relevant *New Shorter Oxford English Dictionary* (“NSOED”) definitions support the concept of multiple causes, see NSOED at 355 (defining “cause” as “That which produces an effect or consequence; an antecedent *or antecedents* followed by a certain phenomenon”) (emphasis added), they do not address the “materiality” element of “cause”. See also NSOED at 355 (defining “to cause” as “Be the cause of, effect, bring about; occasion, produce; induce, make, bring it about.”).

⁴² Webster’s Third New International Dictionary (Unabridged) at 355, 1317 (1981), attached hereto as US Exhibit 33.

⁴³ See Webster’s Ninth New Collegiate Dictionary at 217 (“agent of a disease” used to explain “causal”), 695 (meaning of ‘link’ illustrated by “sought a . . . between smoking and cancer”) (1985), attached hereto as US Exhibit 34.

imported in such increased quantities, but also “under such conditions”, as to cause or threaten serious injury. Thus, Article 2 contemplates an inquiry into those other factors affecting an industry that may help create the conditions under which increased imports cause serious injury.

51. Moreover, as noted in the United States’ first written submission (at ¶ 116), Article 4.2(b) recognizes that factors other than increased imports may be “causing injury to the domestic industry at the same time.” This language makes plain that the serious injury or threat of serious injury that the domestic industry has experienced need not be traceable exclusively to increased imports. Thus, neither the ordinary meaning of the term “to cause” nor the relevant language of Article 4.2 supports the claim that the Safeguards Agreement requires increased imports to be the sole cause of serious injury or threat of serious injury.

52. Finally, the negotiating history of the Safeguards Agreement indicates that the drafters did not intend to impose a “sole cause” requirement. In 1988, the United States submitted a paper that explained US procedures for determining injury in Article XIX cases.⁴⁴ The paper specifically addressed the US “substantial cause” standard and explained that “the increase in imports must be both an important cause and a cause that is equal to or greater than any other cause of serious injury or threat”.⁴⁵ Subsequently, the Secretariat issued a note that summarized the United States’ discussion of its paper and briefly summarized descriptions by the EEC and Australia of their safeguards regimes. It also summarized the negotiating group’s discussions on the causation standard:

Many delegations said that it should be demonstrated that the cause of serious injury and threat thereof derived from sharp increases in imports, and that a major part of domestic producers were adversely affected. Some delegations said that the causal link between increased imports and the overall decline in the conditions of domestic producers had to be clearly established. One delegation said that if there were a multitude of causes, then it had to be established that increased imports was the principal cause, not just an important or substantive cause.⁴⁶

* * * * *

The Chairman summed up the discussions There seemed to be agreement that there should be a direct, demonstrable causal link of imports to injury, although there were various opinions on whether increase in imports should be an essential, substantial, or important cause.⁴⁷

Notably, there were no suggestions that imports should be the “sole” cause of the serious injury.

53. The Secretariat’s summary demonstrates that the negotiators of the Safeguards Agreement were aware that the causation language in Article XIX was susceptible of different constructions, though none of them included the “sole cause” option that New Zealand apparently advocates. In the light of this range of views, it is significant that the negotiators did not seek to specify in the Safeguards Agreement the degree of “causation” required, whether “essential,” “substantial”, “important”, “principal”, or otherwise. Consistent with the divergent practice of GATT contracting parties under Article XIX, the Safeguards Agreement does not seek to impose a rigid benchmark for causation, but instead treats “cause” in a manner consistent with its ordinary meaning.

⁴⁴ *Negotiating Group on Safeguards: United States Procedures for Determining Injury in Article XIX Cases*, MTN.GNG/NG9/W/13 (3 March 1988).

⁴⁵ *Id.* at 6.

⁴⁶ Negotiating Group on Safeguards, Meeting of 7 and 10 March 1988, Note by the Secretariat, MTN.GNG/NG9/5, at ¶14 (22 April 1988).

⁴⁷ *Id.* at ¶ 24.

Isolation Requirement

54. Nothing in the Safeguards Agreement requires that the competent authority examine the effects of increased imports “in isolation” from other factors, even if such examination were in general practicable. The GATT panel in *United States -- Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Salmon from Norway*⁴⁸ rejected just such a proposition when it was urged that provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (the Tokyo Round Anti-Dumping Code) similar to those of the Safeguards Agreement required that the effect of subject imports be considered “in isolation”.⁴⁹ The report is also relevant for purposes of considering whether the Safeguard Agreement imposes an “isolation” requirement regarding the effects of increased imports.

55. 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”.⁵⁰

56. Similar to the relevant provision of the Tokyo Anti-dumping Code, Article 4.2(a) sets out specific factors that the authority is to examine in determining whether increased imports have threatened to cause serious injury. None of those factors requires the authority to ascertain the extent of harm due to other causes in order to ascertain the effects of imports viewed in isolation. Indeed, the specific factors that an authority is to examine under Article 4.2(c) may be influenced by a number of conditions. An industry facing increased imports may, for example, sacrifice market share and sales but not cut employment or close facilities. Or it may seek to protect its market share at the price of lost profits. Alternatively, an industry may cut production, close facilities and reduce employment while retaining profitability. Presumably, other factors will affect the nature of its response. Since it is generally the case that multiple factors are affecting a domestic industry at the same time, if the negotiators had intended to require an isolation analysis in every case, they would have explicitly required such an analysis.

57. The Panel’s use of the word “somehow” (“the USITC should somehow have identified the extent of injury . . .”) suggests that the Panel understood that the notion of “isolating” the effects of increased imports is problematic, at least in many cases. For example, the multiple factors affecting an industry are often interdependent and attempting to isolate the effects of imports can involve creating counterfactual constructs based on unverifiable assumptions or broad estimates. Nothing in the terms of the Safeguards Agreement can be read to require such constructs.

58. Moreover, economic models that attempt to isolate factors generally assume that a market remains in price equilibrium, a particularly questionable assumption in the circumstances giving rise to a safeguards investigation, where imports have suddenly surged. While equilibrium may be reached over the long run, threat determinations in particular concern the “imminent” future.

59. The Safeguards Agreement, like the Tokyo Round Antidumping Code, does not mandate an analysis in which effects of imports are “isolated” from other effects. It requires authorities to

⁴⁸ See *United States -- Imposition of Antidumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, 30 November 1992, at ¶¶ 544-561 (“United States -- Atlantic Salmon”) (interpreting provision of Tokyo Round Antidumping Code).

⁴⁹ The panel report will be discussed further in response to Question 10, particularly as it addresses the origin of the second sentence of Article 4.2(b) of the Safeguards Agreement.

⁵⁰ *United States -- Atlantic Salmon* at ¶ 555.

examine all relevant factors bearing on the industry's condition, but it does not instruct them on how to do so.

Question 8

The United States argues that the fortunes of all segments of the industry as defined in the investigation rise and fall together although possibly at different times. The data and discussion in the USITC report seem to indicate that the growers and feeders performed worse during the period of investigation than the packers and breakers. This suggests that the price effects of increased imports were felt first by the producers of live lambs and only thereafter by the packers and breakers, i.e., the producers of lamb meat, in spite of the fact that the imports were of lamb meat. If this is correct, why would this be the case, i.e., would such a situation not depend on the ability of the packers and breakers to immediately pass along the full price impact of the imports to the growers? Where in the USITC's report is it demonstrated that this in fact happened, and on the basis of what factual information? Please explain in detail.

Answer: 8

60. This question in effect asks two questions: (1) which segments of the industry were hurt worst; and, (2) which segments were hurt first.

61. The USITC did not rank the segments of the domestic lamb meat industry in terms of which were hurt most. Thus, it did not find that the grower segment or any other segment was hurt more than any other. It found that the price of lamb meat affects all four segments of the industry similarly, and that all four segments of the domestic lamb meat industry suffered financially during 1997 and interim 1998 when the surge in imports occurred. While the USITC cited evidence indicating that the price effects of increased imports were felt first by the packers and breakers of lamb meat and later by the producers of live lambs, it did not find it necessary to find a progression or find that the most injured segment was the segment initially impacted. The facts in a case rarely fall into the perfect sequence. Indeed, it is entirely possible that the grower segment, which was clearly being impacted by the surge in low priced lamb meats imports, was the most injured of the four segments due in part to the residual and receding effects of termination of the Wool Act payments. What is important is that the USITC looked at the condition of the whole industry – all four segments – and concluded that the industry as a whole was threatened with serious injury due to the surge in low priced imports.

62. The principal USITC finding on this point is set out on page I-14 of the USITC report. The USITC stated as follows:

There is also evidence that the price of lamb meat affects all four industry segments similarly – that is, when processors do well, growers and feeders also benefit, *but when processors confront lower prices, they pass the lower prices back to feeders and then growers, and all suffer to some extent.* [Emphasis added.] As described below, all four segments suffered financially over the period of investigation, and all experienced significant declines in the unit value of their sales at the end of the period. No representatives in any of the four industry segments testified that the economic interests of packers and breakers diverged from those of growers and feeders.

63. The USITC's finding is amply supported by evidence in the record of the investigation. For example, the USITC report shows that the value of net sales of packers and breakers fell from 1996 to 1997, and between interim 1997 and interim 1998.⁵¹ Operating income for packers was at its lowest point at the end of the period of investigation. Representatives of packer and breaker firms reported

⁵¹ USITC Report at I-19.

having to reduce prices, sometimes selling at a loss in order to compete with low-priced imports.⁵² The USITC also cited testimony at its injury hearing on the pass-through effect from witnesses representing different industry segments.⁵³ The USITC quoted testimony of a rancher to the effect that “lower import prices forced processors to reduce prices for the carcasses they bought from packers, who in turn had to reduce the prices they paid to feedlots for live lambs”. The rancher explained that because of falling prices at the processor level, feedlot operators sold their lambs in the spring of 1998 for less than they paid for them in the fall of 1997, and had to reduce the price they could pay for lambs in the fall of 1998. The USITC further found, quoting the rancher, that “lower import prices ‘forced the entire US lamb meat industry in successive waves to substantially reduce the prices they could pay for the lamb’”.⁵⁴

64. The phrase in the second sentence of the question that refers to performance “during the period of the investigation” suggests that the question might be premised at least in part on a consideration or comparison of industry data for some of the four segments during the period that preceded the surge in imports. While the USITC examined imports and industry conditions during the period 1993-September 1998, the full “period of the investigation,” as explained in the United States’ First Submission, the USITC’s threat determination was based on the surge in imports that occurred after 1996 and the resulting downturn in industry indicators, and the projected continuation of these trends.⁵⁵ The evidence in the USITC’s report concerning the sequence of events that occurred after the surge in imports fully supports the USITC’s determination.

Question 9

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. Could the United States indicate precisely which information in the published report supports this statement?

Answer 9

65. The USITC stated explicitly that “we find that all sectors show evidence of a threat of serious injury”.⁵⁶ The USITC gathered data on all four segments of the domestic lamb meat industry so that it would have the ability to include domestic growers and feeders in the domestic industry if the facts supported such a finding. Specifically, the USITC gathered data and other information that directly related to lamb meat packers, packers/breakers, and breakers with respect to market share, domestic lamb meat production, shipments, profitability, capacity, capacity utilization, inventories, employment, productivity, and prices. In its causation analysis it also considered possible causes of injury other than imports at the processor level.

⁵² USITC Report at I-19.

⁵³ USITC Report at I-14, n.50.

⁵⁴ USITC Report at I-14, n.50. *See also* similar testimony of Joseph Casper, Vice President, Chicago Lamb & Veal Co., a breaker, transcript of injury hearing at 22, attached hereto as US Exhibit 35; testimony of Harold Harper, owner of a feedlot operation, transcript of injury hearing at 30, attached hereto as US Exhibit 36 (“Here is how it happened. In the fall of ‘97, I bought lambs for approximately \$1 a pound. However, when I went to sell the lambs in the winter of ‘97 and ‘98, I could only get 40 and 60 cents a pound. Why? Because the packer that I had traditionally supplied with lambs was forced to reduce his prices to me because his customer, the processor, had to lower his prices substantially to compete with imports. The impact of the incredibly low prices offered by importers was felt throughout the distribution chain as each sector was compelled to demand price breaks from their suppliers to try to remain competitive.”)

⁵⁵ *See, e.g.*, United States’ First Written Submission at ¶¶ 79-82.

⁵⁶ USITC Report at I-16, n.61.

66. The USITC's findings show why it found evidence of the threat of serious injury if the packer and breaker sectors were considered alone. That analysis focused on the 1997-98 period, when imports' share of the US lamb meat market rose from 20.7 per cent in 1996 to 24.8 per cent in 1997 and to 30.7 per cent in interim 1998.⁵⁷ It also found that the 9.7 million pound increase in lamb meat imports in 1997 was mirrored by a decline in US lamb shipments of 8.4 million pounds.⁵⁸ Based on data developed by the US Department of Agriculture, the USITC found that both domestic production and shipments of lamb meat fell in 1997, and that production continued to fall in interim 1998.⁵⁹

67. Based on responses to USITC questionnaires, the USITC found that the value of net sales and operating income of packers and breakers declined significantly. The USITC referenced the percentage decline in its confidential report. The USITC found that the operating income for most packers and breakers was at the lowest point at the end of the period of investigation in 1997 and interim 1998. The USITC also observed that representatives of packer and breaker firms reported having to reduce prices, sometimes selling at a loss, in order to compete with low priced imports.⁶⁰ The USITC also found that firms in the packer and breaker segments reported difficulties in recouping new investments in plant and equipment and in repaying loans.⁶¹

68. The USITC found that packer capacity was lower in 1997 than earlier in the investigation, although higher in interim 1998 than in interim 1997. It found that packer capacity utilization, after having risen irregularly during 1993-96, fell in 1997 and was at its lowest level of the investigation period, 73.5 per cent, in interim 1998, significantly below the level the level of 85.7 per cent in interim 1997.⁶² The USITC found that breaker capacity utilization declined significantly, although it noted that breaker capacity had also increased significantly.⁶³

69. The USITC collected extensive data comparing domestic and imported lamb meat prices. It found that US, Australian, and New Zealand lamb meat prices were in most cases lower in the second half of 1997 and the first three quarters of 1998 at the time that imports were rapidly increasing. It found that further increases in imports would be expected to put further downward pressure on prices in the US market.⁶⁴ The USITC found that the financial performance of "the various segments worsened due to declining sales and falling prices, as a result of the increase in imports".⁶⁵

70. In examining other possible causes of injury, the USITC made findings specific to the packer/breaker segments of the domestic industry. Specifically, it found none of these other possible causes – competition from other meat products, increases in input costs, concentration in the packer segment, and the effectiveness of domestic marketing plans – to be causes of any significance, and that the only cause of significance of the threat of serious injury was increased imports. With respect to competition from other meat products, the USITC found no evidence that other meat products were displacing lamb meat, but rather that domestic consumption of lamb meat had been relatively steady since 1995.⁶⁶ With respect to input costs, the USITC found that costs of inputs for packers and breakers rose moderately in line with production; it thus concluded that there had been no increase in input costs that explained the sharp decline in industry profits, and that no increase was predicted in the imminent future.⁶⁷ With respect to packer concentration, the USITC noted petitioners' claim that concentration had actually fallen during the most recent 5 years. The USITC also reasoned that an

⁵⁷ USITC Report at I-24, II-50 (Table 32).

⁵⁸ USITC Report at I-24.

⁵⁹ USITC Report at I-18.

⁶⁰ USITC Report at I-19.

⁶¹ USITC Report at I-21.

⁶² USITC Report at I-20.

⁶³ USITC Report at I-20.

⁶⁴ USITC Report at I-24.

⁶⁵ USITC Report at I-24.

⁶⁶ USITC Report at I-25.

⁶⁷ USITC Report at I-25.

undue level of concentration among packers would have suggested that they would have been sheltered from the effects of low-priced imports, and would have been able to pass through lower prices more readily to feeders and growers. Instead, packers experienced deteriorating profits and operated at a loss in interim 1998.⁶⁸

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?

Question 10

Would the United States agree that Article 4.2(b) requires that increased imports, even in isolation from other causal factors, must be demonstrated to cause a threat of serious injury? If not, what in your view is the correct reading? Please explain. If so, how does the US "substantial cause" standard applied in this case ("important cause and not less important than any other single cause") reconcile with this requirement?

Answer 10

71. As demonstrated in response to Question 7, the Safeguards Agreement does not require increased imports to be the sole cause of serious injury or threat of serious injury. The "substantial cause" standard established under US law comports fully with the requirement in Article 4.2(a) to determine whether increased imports "caused" serious injury or threat of serious injury. In the same response, the United States demonstrated that Article 4.2(a) does not require a competent authority to conduct an isolation analysis and explained why the results of any such analysis would be suspect.

72. Nothing on the face of Article 4.2(b) mandates an isolation analysis of the type the panel describes. The second sentence of that article simply requires the competent authority to avoid attributing to increased imports injury caused by other factors. That can be done, as the USITC did, simply by examining each possible injury factor in turn to determine its effect, if any, on the industry's condition.

73. The derivation of Article 4.2(b), second sentence, argues strongly against construing it to require an "isolation" analysis. Prior to the completion of the Uruguay Round, the language incorporated in that sentence was understood not to impose an isolation requirement.

74. Article 4.2(b), second sentence, is drawn from similar language in Article 3:4 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (also known as the Tokyo Round Anti-Dumping Code). The second sentence of Article 3:4 provided that "[t]here may be other factors which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports".⁶⁹ Well before the Uruguay Round negotiations concluded in 1994, a GATT dispute settlement panel interpreted Article 3:4, second sentence, in a manner that flatly rejected the argument that New Zealand makes here, concluding that the requirement:

⁶⁸ USITC Report at I-25-26.

⁶⁹ The second sentence of Article 4.2(b) of the Safeguards Agreement 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." The dependent clause of this sentence, like the parallel provision in the Tokyo Round Antidumping Code, recognizes that other factors may, in some cases, but not all, also be causing injury. The independent clause substitutes "shall not" for "must not" and, in keeping with the different subjects of the agreements, "increased imports" for "dumped imports". Thus, the changes made in the adoption of this language into the Safeguards Agreement are insubstantial.

not to attribute injuries caused by other factors to the imports . . . did not mean that, in addition to examining the effects of imports under Article 3:1, 3:2 and 3:3, 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.⁷⁰

The *Norwegian Salmon* panel held that it was sufficient that the USITC had not ignored other factors it found had caused adverse effects on the US industry. In that case, the USITC did not eliminate the possibility that other factors had caused adverse effects.⁷¹

75. As in the current case, the Panel considered whether the USITC determination had adequately addressed increased production of other, similar products that might have affected prices for the subject product. Although the USITC did not specifically address the issue in its determination, "the Panel considered that the specific factors discussed by the USITC suggested that the increased availability of Pacific salmon could have had only a limited effect on domestic prices in the United States of fresh Atlantic salmon".⁷²

76. Likewise, the Panel upheld the USITC's discussion of problems unique to the industry as a possible alternative cause of injury, finding it sufficient that the industry had recently been profitable and its more recent financial performance was worse than would otherwise be expected.⁷³ Discussing the USITC's findings concerning the effects of increases in non-dumped imports as an alternative cause, the Panel held it sufficient that "it could not, in the view of the Panel, reasonably be found that the USITC had attributed to the Norwegian imports effects entirely caused by imports from other supplying countries".⁷⁴

77. In no instance did the *United States -- Atlantic Salmon* panel find that the obligation not to attribute injury due to other causes to the subject imports required that the authority isolate the effects of subject imports and determine whether the amount of injury they caused was material. In the current case, the USITC determination goes well beyond what the *United States -- Atlantic Salmon* panel held was sufficient. In that case, the panel held that the USITC need not explicitly address the effects of each proposed alternative cause of injury. Unlike that case, in the investigation at issue here, the USITC examined each proposed alternative cause. The *United States -- Atlantic Salmon* panel did not require that the USITC find that the effects, for example, of non-subject imports were not more important than those of dumped imports. The USITC examination of causation in safeguards investigations must, under US law, contain conclusions that no other cause is more important than increased imports. Thus, the US examination of alternative causes goes beyond what was held to be sufficient in *United States -- Atlantic Salmon* to assure that injury due to other causes is not attributed to increased imports.

78. If the framers of the Safeguards Agreement had wanted to impose an "isolation" requirement, they would not have been content with language nearly identical to text that had already been interpreted, well before the Uruguay Round concluded, not to impose such a requirement. The United States would be deprived of the benefit of its bargain if Article 4.2(b) of the Safeguards Agreement were interpreted to require an "isolation" analysis.

Question 11

⁷⁰ *United States -- Atlantic Salmon* at ¶ 555.

⁷¹ See *United States -- Atlantic Salmon* at ¶ 547, quoting the USITC Report.

⁷² *United States -- Atlantic Salmon* at ¶ 558.

⁷³ *United States -- Atlantic Salmon* at ¶ 559.

⁷⁴ *United States -- Atlantic Salmon* at ¶ 557.

The USITC found 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”. In its first written submission in this case, the United States argues that the USITC found no evidence that any other alleged factors might have significantly affected the condition of the domestic industry during 1997 and interim 1998 (para. 108). Please explain how you reconcile the apparent difference between the language of the USITC report and the language of the US first written submission, i.e., where in the USITC report can the findings referred to in the US first written submission be found?

Answer 11

79. The findings referred to by the United States in ¶ 108 of its first written submission are in the USITC’s evaluation of the evidence with regard to each of the other possible causes of injury alleged or identified during the investigation. While the USITC framed its finding in terms of the US statute, its evaluation of the evidence with respect to each of those other possible causes – termination of the US Wool Act payments, competition from other meat products, increased input costs, overfeeding of lambs, alleged concentration in the packer segment, and effectiveness of the industry’s marketing programme – makes it clear that no asserted cause other than increased imports significantly contributed to the threat of serious injury.

80. With respect to the impact of termination of the US Wool Act, the USITC found that the payments under the act were largely phased out in 1994 and 1995 and terminated in 1996, *before* the surge in imports. It found that the industry had experienced some recovery since full termination of the payments, and that remaining effects of termination were receding with each month. Accordingly, the USITC’s report shows no nexus between the diminishing effect of the termination of Wool Act payments and its conclusion that the domestic industry’s condition would *worsen* in the imminent future. Although the USITC addressed the Wool Act termination as an alleged “other cause”, it is clear that the termination was not such an other factor within the contemplation of Article 4.2(b), which requires such a factor to be causing injury “at the same time” as increased imports. Moreover, the USITC found that the effects of termination could only have had an indirect effect on the packer and breaker segments of the industry, since firms in those two segments never received payments under the Wool Act.⁷⁵

81. With respect to competition from other meat products, such as beef, pork, and poultry, the USITC found that domestic per capita consumption of lamb meat had been relatively steady since 1995, indicating no shift by consumers away from lamb meat to other meat products.⁷⁶ The USITC also found no reason to anticipate such a shift in the imminent future. Thus, although this factor was alleged as another cause of injury, the USITC rejected the allegation.

82. With respect to increased input costs, the USITC found that expenses for growers rose at a modest rate and then fell in interim 1998, that expenses for feeders increased at a faster pace but not at a dramatic pace, and that input costs for packers and breakers rose moderately in line with production. The USITC concluded that there had been no significant increase in input costs that explained the sharp decline in industry profits, and no increase was predicted in the imminent future.⁷⁷ In short, the USITC found no causal link between input costs and the threat of serious injury.

83. The USITC also considered the allegations of the Australian and New Zealand respondents in the investigation that US feeders in 1997 held lambs unduly long in feed lots and that such over-weight “fat” lambs depressed prices when sent to slaughter. Here, too, the USITC rejected the allegation on the facts. The USITC noted that US Department of Agriculture data showed that the fat

⁷⁵ USITC Report at I-24-25.

⁷⁶ USITC Report at I-25.

⁷⁷ USITC Report at I-25.

content of domestic lambs was lower in 1997 than earlier in the period of investigation. It also found that, even if it accepted respondents' allegations, these "fat" lambs would have accounted for no more than a small share of total domestic lamb production. The USITC also noted that respondents did not allege that such overfeeding was currently taking place or represented a future threat.⁷⁸ Thus, again, this was a factor that was not occurring "at the same time."

84. With respect to concentration in the packer segment, the USITC noted petitioners' claim, unrefuted by respondents, that concentration in the packer segment had actually decreased over the past five years. Moreover, the USITC found that undue concentration would have suggested that packers would have been sheltered from the effects of low-priced imports and better able to pass through lower prices to feeders and growers. Instead, packers, like other segments of the domestic lamb meat industry, experienced deteriorating profits in the latter part of the investigation and operated at a loss in interim 1998.⁷⁹ The USITC also rejected this allegation on the facts.

85. Finally, the USITC considered the industry's failure to develop an effective marketing programme to expand demand in light of the repeal of Wool Act payments.⁸⁰ The USITC was not required to assume that it was appropriate to consider the absence of such a programme to be a factor causing injury under Article 4.2(b), as opposed to a possible adjustment measure to address injury. It would indeed be a paradoxical interpretation of the Safeguards Agreement to hold that, because an industry had not earlier applied adjustment measures, it is prevented from obtaining the relief necessary to make adjustment measures effective.

86. In any event, the USITC found only that development of an effective programme could (*i.e.*, had the potential to) have had an important impact. It did not find that the industry could have developed a programme that would have been successful between the end of Wool Act payments and the onset of the import surge.⁸¹ The USITC did not find the failure to develop programmes to expand demand, about whose potential benefits it could only have speculated, a factor causing the threat of injury. Rather, it referred to its decision as a whole, in which (as mentioned above) it found that consumption, which had previously declined, had stabilized since 1996 when Wool Act payments ended. It also found that there was no reason to expect consumer preference for lamb to change in the imminent future.⁸² Thus, the USITC found stabilized demand as a condition under which increased imports would cause US producers to lose sales, lower prices or both in the imminent future.⁸³ In short, the report as a whole shows that the USITC did not regard lack of demand enhancement programmes as causing worsening conditions in the imminent future.

87. In sum, the USITC's findings establish why none of the proposed alternative causes of injury should be considered "factors other than increased imports [that] are causing injury to the domestic industry at the same time" under Article 4.2(b). The fact that the USITC stated its conclusions in terms of whether, in keeping with the US statute, proposed other causal factors were more important than the increased imports does not change this conclusion. As is shown elsewhere, even if the USITC had found them to be relevant alternative causes, its findings under the US standard would

⁷⁸ USITC Report at I-25.

⁷⁹ USITC Report at I-25-26.

⁸⁰ USITC Report at I-26.

⁸¹ Indeed, the Commissioners' findings on remedy suggest the contrary. Three Commissioners observed that it would "take time" to develop new markets and products that expand demand. USITC Report at I-34. Indeed, those Commissioners' remedy recommendation made clear that a demand-expansion programme alone could not have prevented serious injury in the imminent future, particularly since it recognized that production-side adjustment, as well as marketing, was needed to make the US industry competitive. USITC Report at I-34, n.169. Two Commissioners noted that there was an unavoidable "degree of uncertainty" as to whether the industry, even with safeguard protection, could effectively implement adjustment. USITC Report at I-41.

⁸² USITC Report at I-22, I-25.

⁸³ USITC Report at I-22.

have been adequate. However, even if the Panel holds to the contrary on that issue, the fact that the USITC stated its conclusions in the terms required by the US statute is not properly at issue in this case.

88. As is discussed in answer to the Panel's first question to the United States, the sole requirement to state legal conclusions appears in Article 3.1 of the Safeguards Agreement, and complainants have not attacked the USITC's determination under that article. Thus, the only question on this issue before the Panel is whether the USITC report pursuant to Article 4.2(c) contains a detailed analysis of the case and demonstrates the relevance of the factors examined such that it shows compliance with Article 4.2(b). Regardless of the terms in which the USITC expressed its conclusions, its examination of other asserted causal factors meets the requirements of Article 4.2(b) even as interpreted by New Zealand.

Question 12

If in two hypothetical situations increased imports accounted for the same proportion of serious injury (e.g., 30 per cent), but in the first situation one of the "other factors" accounted for more than 30 per cent, while in the second situation no "other factor" individually caused more than 30 per cent, would the US "substantial cause" standard permit the imposition of a safeguard measure in the first situation, but not in the second one?

Answer 12

89. As will be recognized from the answers that the United States has given the Panel in Questions 7 and 10, this question poses a hypothetical situation that does not accord with the nature of the USITC analysis under the US statute. The USITC does not, as this question assumes, isolate the particular proportion of injury caused by each factor and then compare their percentages. Rather, it determines whether increased imports are important within the mix of causes of overall serious injury and then decides whether other factors are more important. "Importance" in this sense is seldom, if ever, reduceable to numerical percentages.

90. Indeed, because Article 4.2 does not set a single benchmark for "measuring" serious injury, it is difficult to see how, even if the effects of different causes of injury could be isolated, the percentages of total injury that those effects might represent could be ascertained and compared. Article 4.2(a) enumerates specific factors that competent authorities are to evaluate. To the extent that they have discrete effects, different causal factors may affect different economic indices differently. Moreover, the various enumerated factors are not commensurate with each other. For example, a factor that lowers productivity may raise employment if production is not reduced. The Agreement provides no standard according to which such variable effects are to be compared. The Panel's question presupposes a precision in the evaluation of causal factors that is incommensurate with the terms of the Agreement.

91. The Panel's question is, however, correct in its recognition that the US statute directs the USITC, in determining whether increased imports are a substantial cause, to evaluate not only whether their effects are important in themselves, but also whether other causes of injury may be more important causes of the overall serious injury or threat of serious injury. The United States does not necessarily contend that this second step in its statutory causation analysis is required by the terms of the Safeguards Agreement. This standard is, however, consonant with the objective set out in the preamble to the Safeguards Agreement that recognizes the "importance of structural adjustment." If other causes of injury are predominant, it is unlikely that addressing increased imports alone will facilitate adjustment. If, on the other hand, increased imports are an important causal factor and no other is more important, then imposing a safeguard measure on increased imports can be more reasonably expected to aid an industry in its adjustment efforts.

Question 13

Does the United States agree with the characterization in New Zealand's oral statement (para. 51) that the United States "admits" that a safeguard measure can be applied even where increased imports are, e.g., only one of three equal causes of a threat of serious injury? Please explain.

Answer 13

92. New Zealand's speculation as to a possible result under US law is irrelevant in this proceeding because the USITC did not find that increased imports were one of three equal causes of the threat of serious injury. While the USITC framed its finding in terms of US law, finding that none of the other alleged causes of injury was a more important cause than increased imports, the USITC identified only increased imports as being an important cause of the threat of serious injury. Indeed, the USITC report shows that increased imports were the only cause of any significance of the threat of serious injury. New Zealand's hypothetical question has no bearing on the finding that the USITC actually made or the measure that the United States applied.

93. Moreover, New Zealand's hypothetical ignores the fact that, in order to find that increased imports are a "substantial cause" of serious injury or threat of serious injury, the USITC must under US law find that increased imports are both an "important" cause and "not less than any other cause".⁸⁴ As the United States stated in ¶ 121 of its First Written Submission, the legislative history of the US provision makes clear that a cause of injury would not be an important cause of injury, and thus not a "substantial" cause, when it was one of many such causes, even if it was equal to or greater than any other cause. The US Senate committee that drafted the substantial cause standard stated, "The [USITC] Commissioners will have to assure themselves that imports represent a substantial cause or threat of injury, and not just one of a multitude of equal causes or threats of injury".⁸⁵ Accordingly, it cannot be said in the abstract that, if the USITC found that increased imports were one of three equal causes of serious injury, the USITC would see fit to regard any of those causes as "important".

94. Moreover, New Zealand's position, as paraphrased in this question, misstates the manner in which the US statute operates. The statute requires the United States to determine whether increased imports are an important cause of serious injury or threat of serious injury. Only if it finds increased imports to be an important cause does the USITC compare their importance to that of other causal factors. Thus, it is possible for the USITC to conclude that increased imports are not an important cause even if, had it proceeded to compare the effects of increased imports to those of multiple other causes, it would have found no other cause to be more important than increased imports.

How representative are the facts and evidence on which the determination of the USITC and the decision of the President were based?

Question 14.

Could you indicate the total number of operators in each of the industry segments (i.e., growers, feeders, grower/feeders, packers, breakers and packer/breakers, etc.), how many of those received questionnaires in each segment, how many responded and which share of the production by each industry segment is accounted for by the companies that provided usable questionnaire data? Where in the USITC's report can this information be found? Did the

⁸⁴ 19 U.S.C. 2252(b)(1)(B), attached hereto as US Exhibit 37.

⁸⁵ *Trade Reform Act of 1974, Report of the Committee on Finance . . . on H.R. 10710*, S. Rep. No. 93-1298, 93rd Cong., 2d Sess. 120-21 (1974), attached to the United States' First Written Submission as US Exhibit 16.

collective output of responding operators in each of the industry segments represent a major proportion of the total domestic production of that segment within the meaning of Article 4.1(c)? Please explain.

Answer 14

95. The evidence of record shows the following numbers of operators in each of the industry segments:

Growers:	74,710 in 1997. ⁸⁶
Feeders:	11 ⁸⁷
Grower/Feeders:	18 ⁸⁸ (This number reflects a total of 11 feeders, plus those growers who reported that they also conduct feeder operations). ⁸⁹
Packers:	The exact number is not known. USDA data show that 9 plants accounted for 85 per cent of the sheep and lambs slaughtered in 1997, while 571 plants were certified by USDA in 1997 to slaughter lamb and sheep. ⁹⁰
Breakers:	Less than 10 major firms. ⁹¹
Packer/Breakers:	4 ⁹²

96. The number of operators receiving questionnaires in each segment is as follows:

Growers:	110 ⁹³
Feeders:	See Grower/Feeders
Grower/Feeders:	11 ⁹⁴
Packers/Slaughterers:	17 ⁹⁵
Breakers:	16 ⁹⁶
Packer/Breakers:	4 ⁹⁷

97. The following responded to USITC questionnaires:⁹⁸

⁸⁶ USITC Report at I-18, II-11, and II-12.

⁸⁷ USITC Report at II-13.

⁸⁸ USITC Report at II-13.

⁸⁹ USITC Report at II-13.

⁹⁰ USITC Report at II-15, n.57.

⁹¹ USITC Report at II-15.

⁹² This number is based on USITC questionnaire responses from 4 packer/breakers.

⁹³ USITC Report at I-17 and II-11.

⁹⁴ USITC Report at II-13.

⁹⁵ USITC Report at II-14.

⁹⁶ USITC Report at II-15.

⁹⁷ This number is based on USITC questionnaire responses received from four packer/breakers.

Growers and Grower/Feeders: 70⁹⁹ (USITC received usable data from 57 growers).¹⁰⁰

Grower/Feeders: 18^{101 102},

Packers/Slaughterers: 6¹⁰³ (USITC received usable data from 5 firms on packing operations).¹⁰⁴

Packer/Breakers: 4¹⁰⁵ (USITC received usable data from 2 firms).¹⁰⁶

Breakers: 5¹⁰⁷ (USITC received usable data from 4 breakers).¹⁰⁸

98. The share of production by each industry segment is accounted for by the companies that provided usable questionnaire data:

Growers:	}	
Feeders:	}	All three groups = 57 usable questionnaire responses representing an estimated 6 per cent of lamb production (lamb crop; the number of lambs reported to be born during the year) in 1997. ¹¹⁰
Grower/Feeders ¹⁰⁹	}	
Packers	}	
Breakers:	}	5 responding packers representing an estimated 76 per cent of the sheep and lambs slaughtered (based on US Department of
Packers/Breakers:	}	

⁹⁸ The number of responses with usable data is also noted, although not each usable response contained usable information on all items requested.

⁹⁹ USITC Report at II-11. The Commission sent questionnaires to approximately 110 firms believed to be involved in raising lambs. Responses were received from approximately 70 growers and growers/feeders.

¹⁰⁰ USITC Report at I-17 and II-11.

¹⁰¹ USITC Report at II-13. The Commission sent questionnaires to 11 firms believed to be feeders and received responses from 18 feeder operations, including several growers that also maintain feeder operations. USITC Report at II-13, n.46 states “[s]ome of the firms identified as feeders are also growers. Some of these firms provided questionnaire responses on their feeding operations and others could not separate the data for the two operations”.

¹⁰² USITC Report at II-13. The Commission sent questionnaires to 11 firms believed to be feeders and received responses from 18 feeder operations, including several growers that also maintain feeder operations. USITC Report at II-13, n.46 states “[s]ome of the firms identified as feeders are also growers. Some of these firms provided questionnaire responses on their feeding operations and others could not separate the data for the two operations”.

¹⁰³ USITC Report at II-14.

¹⁰⁴ USITC Report at II-14.

¹⁰⁵ This number is based on USITC questionnaire responses received from four packer/breakers.

¹⁰⁶ USITC Report at II-24 and II-33 n. 93.

¹⁰⁷ USITC Report at II-15.

¹⁰⁸ USITC Report at II-15.

¹⁰⁹ USITC Report at II-29 n.89, regarding the financial condition of the industry, states that “[t]en firms reported they were grower/feeders; however, the questionnaire responses of seven of the firms indicated that they fed only their own live lambs. Those seven producers were reclassified by Commission staff to growers. [Financial] [d]ata for the three grower/feeders are presented separately [in the report] from growers and feeders because of the difficulty in separating growing operations from feeding operations.”

¹¹⁰ USITC Report at I-17 and II-11. However, USITC financial data was based on 49 questionnaire responses of growers representing 5 per cent of the US lamb crop in 1997 (USITC Report at II-24) and USITC financial data on feeders represented one-third of the slaughter lambs fed in feedlots in 1997. (USITC Report at II-24).

Agriculture (USDA) data).¹¹¹ (USDA reported that 9 plants accounted for 85 per cent of sheep & lamb slaughtered in 1997).¹¹²

Of 16 questionnaires sent to breakers, 5 responded and 4 provided usable data. The American Meat Institute estimates that 75 per cent of lamb carcasses currently are processed by breakers. The other 25 per cent are broken by packers at the slaughter plants.¹¹³

Where in the USITC's report can this data be found?

99. Please see the citations provided in the response to the earlier portion of this question.

Did the collective output of responding operators in each of the industry segments represent a major proportion of the total domestic production of that segment within the meaning of Article 4.1(c)? Please explain.

100. As discussed in the answer to Question 16, the Safeguards Agreement does not set a fixed proportion as constituting "a major proportion." The information received from questionnaires in each segment was, when combined with other information received by other means, sufficient to permit the USITC to make objective conclusions about each segment and the industry as a whole.

Question 15

How did the USITC decide to which specific companies to send the questionnaires (e.g., how did the USITC select the 110 growers of the roughly 70,000 in the United States)? Did the USITC send questionnaires only to companies associated with the petitioners, or to other companies as well? Please explain and indicate where in the USITC's report this information can be found.

Answer 15

101. The USITC, based on a listing of all companies that had received Wool Act payments before the termination of the programme, sought to select a group to receive questionnaires that would be reasonably calculated to yield both the highest level of response and the greatest proportion of industry production.

102. Given the total level of production in the industry and the number of firms involved, the USITC knew that a large number of producers were extremely small, growing fewer than 10 lambs per year. As a result, it sought to send questionnaires to the largest producers, recognizing based on experience that it would be very unlikely to receive any level of response from the large number of extremely small producers. The USITC selected the largest producers from the list of all producers based upon the level of Wool Act payments they had received.

103. All growers in the United States were associated with petitioners, since membership in the petitioning association was automatic based upon receipt of Wool Act payments.¹¹⁴ Thus, the USITC

¹¹¹ USITC Report at II-14 and II-24.

¹¹² USITC Report at II-14 n.48 and II-15 n.57.

¹¹³ USITC Report at II-15 n. 63.

¹¹⁴ The petitioning American Sheep Industry Association, Inc. ("ASI") is a federation of 50 state organizations of lamb growers and feeders representing the nation's approximately 75,000 US sheep producers. Its membership therefore accounts for virtually 100 per cent of US production of live lambs. See Petition For Relief From Imports of Lamb Meat Under Section 201 of the Trade Act of 1974, dated 30 September 1998, at 5, attached hereto as US Exhibit 38.

could not send questionnaires to “unassociated” growers. Only a few growers were named individually as petitioners, so the great majority of questionnaire recipients consisted of companies with no particular known view of the safeguard proceeding.

104. Information describing the USITC’s decision to select these 110 questionnaire respondents is provided in the USITC Report at I-17. The USITC identified questionnaire respondents in the other three industry segments based on names and addresses which petitioner supplied in the petition pursuant to USITC regulation 19 C.F.R. § 206.14(b)(3)¹¹⁵¹¹⁵ The regulation requires that the petition contain the names and locations of all producers of the domestic article known to the petitioner (meaning, not simply those supporting the petition), to the extent such information is available from governmental and non-governmental sources.

105. Information describing the USITC’s decision to select at least the nine feeders named in the petition is provided in the USITC Report at II-13; its decision to send questionnaires to 17 packers is provided at II-14; and its decision to send questionnaires to 16 breakers is provided at II-15 of the USITC Report.

Question 16

Does the United States consider that as long as the USITC undertakes a questionnaire survey exercise, and as long as some responses are received, the USITC can proceed on the basis of those responses, regardless of the percentage of total production for which they account? Or would there be circumstances in which the response rate to the questionnaires and/or the percentage of the total industry represented by the questionnaire responses did not account for a major proportion of the industry? If the latter, what would those circumstances be, and has this ever happened? Please explain.

Answer 16

106. Nothing in the Agreement suggests that a competent authority should not render a decision simply because it has been unable to obtain questionnaire responses from a particular percentage of producers in a highly fragmented industry. Indeed, nothing in the Agreement requires the authority to issue questionnaires at all. Thus, the share of domestic production reflected in questionnaire responses would not be determinative of whether the authority can or should proceed with its investigation. Article 4.2(a) of the Agreement obligates a member to “evaluate all relevant factors of an *objective* and quantifiable nature”¹¹⁶ (emphasis added), but it does not state how this is to be done. It does not prescribe any specific approach that an authority should follow in making its evaluation, or even refer to the term “questionnaires.” Consequently, nothing in the Agreement precludes an authority, in evaluating the relevant factors, from relying entirely on data collected by another government agency, or information furnished by interested parties. Thus, the issuance of questionnaires may be just one of the methods that an authority chooses, but is not required to used, in obtaining information. Provided that the information evaluated is objective and the authority has conducted an objective analysis, the authority has met its obligation.

107. Although the USITC endeavours in most investigations to send questionnaires to all known producers, this approach is impossible when the domestic industry is comprised of a very large number of small producers. Moreover, in fragmented industries, communicating directly with a large proportion of producers may be impracticable in any reasonable time frame, when no producer or reasonably reachable group of producers accounts for a significant share of production. In such a situation the USITC compares, as it did concerning the grower segment of this industry, its information from several sources to assure that the information on which it relies is sufficiently

¹¹⁵ Attached hereto as US Exhibit 39.

¹¹⁶ Safeguards Agreement, Article 4.2(a).

representative to allow it to make objective inferences about the industry as a whole. Such an approach entirely accords with the requirements of Article 4.2(a).

108. Nothing in the use of the phrase “a major proportion” in the definition of the term domestic industry in Article 4.1(c) of the Agreement affects this analysis. First, it is Article 4.2(a), not the definition of “domestic industry”, which sets the standards for investigations. As indicated above, under Article 4.2(a), it is sufficient that the relevant factors be evaluated on an “objective” basis, a standard that is satisfied when conclusions are reached on a data set or sets that the competent authority has reasonably assured is not biased and provides a reasonable basis for making inferences about the entire industry. Second, even if, although the agreement does not require questionnaires, Article 4.1(c) did suggest that some minimum number of producers should receive questionnaires, the words “major proportion” are undefined. They are preceded by the article “a” (as opposed to the article “the”), thus indicating that the “major proportion” means “less than 50 per cent”. Except that it may be less than 50 per cent, the phrase gives no fixed percentage.

109. The flexibility of this phrase suggests that the percentage that would constitute a major proportion could be different for highly fragmented industries than for concentrated industries. If this were not the case, the Safeguards Agreement would afford practical relief to concentrated industries but not to those industries that are likely to be most highly competitive. Such a result would be economically perverse and contrary to the express purpose of the Agreement “to enhance rather than limit competition in international markets”. The Agreement also does not suggest that investigations be extended in order to achieve some fixed percentage of questionnaire responses because, as the Appellate Body has recalled, safeguards under GATT Article XIX are designed to address “emergency” situations. Such investigations cannot be prolonged in order to achieve a fixed ideal of data coverage. On these bases too, whether the investigation has been adequate should be evaluated in terms of whether the competent authority undertook an investigation that was reasonably calculated to obtain objective information about the industry as a whole.

110. Finally, in this case, it is also important to note that none of the respondents in the investigation, who had access to the raw grower questionnaire data under a USITC administrative protective order, argued that the data were biased or inaccurately portrayed the condition of growers.¹¹⁷ Rather, those parties’ representatives urged the USITC to rely on that data. One of the evident purposes of Article 3.1, which requires that authorities give interested parties an opportunity to present evidence and their views, including responding to the presentations of other parties, is to help assure that, by exposure to conflicting views, an authority receives an objective picture of the information before it. When the parties before it agree that the information the authority has received is objective, the authority should be able to rely on it.

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?

Question 17

Is it reasonable for a Panel to assume that the remedy recommended to the President by a plurality of the USITC is sufficient to prevent serious injury and facilitate adjustment? If not, why not? If so, on what basis did the President not adopt the USITC recommendation? Please provide the factual basis and reasoning that supports the measure as actually applied in terms of Article 5.1, first sentence.

Answer 17

¹¹⁷ USITC Report at I-17.

Plurality Recommendation

111. It would not be reasonable for a Panel to assume that a USITC plurality remedy, if applied, would be sufficient to prevent serious injury and facilitate adjustment. Neither US law nor the Safeguards Agreement provides any basis for such an assumption. Moreover, the fact that the six USITC Commissioners split three ways on an appropriate remedy demonstrates that the plurality recommendation should not be presumptively regarded as adequate.

112. US law does not intend the USITC remedy recommendation to be understood as a definitive statement of remedial sufficiency. Section 203(a)(2)(A) of the Trade Act of 1974, as amended, requires the President to take the USITC's recommendation into account (along with other enumerated factors) in determining what remedy may be appropriate. But there is no requirement that he adopt the recommendation, or give it weight. He is free to apply a different remedy, or no remedy at all. The same provision of law also requires the President to take the USITC's *report* into account in fashioning the remedy. This means the President is to review the USITC's injury and causation findings, not just its remedy recommendation, and reach his own conclusion on what remedy would be most appropriate to address those findings.

113. The USITC plurality recommendation remedy presented the views of just three of the six USITC Commissioners. The three other Commissioners recommended different remedies, and each concluded that the plurality's remedy was insufficient to prevent serious injury and facilitate adjustment. All six Commissioners considered that four years of import relief were required. The President granted relief of three years and one day.

114. The three remedy recommendations also contained various suggestions on appropriate domestic assistance measures. The domestic assistance that the President ultimately provided differed from those recommendations. As the time they issued their remedy recommendations, the Commissioners did not know what level of assistance the President would provide and thus they did not (and could not) calibrate their import relief recommendations to take account of that level.

115. The USITC plurality apparently considered that leaving imports at their high-water mark (1998 levels) would not result in further injury and would place the industry in a position to recover from the injury it had already sustained. However, the USITC's injury analysis suggested that the industry had suffered progressively severe injury as a result of imports during both 1997 and interim 1998, and the plurality did not explain why injury would not continue to mount if imports continued at 1998 levels, or how, if the industry remained in its current state of injury, it could regain its competitiveness. The three other Commissioners examined the same evidence and concluded that the industry *would* sustain serious injury at 1998 import levels.¹¹⁸ The President was entitled to conclude that the views of those three Commissioners were correct.

116. There is no requirement under the Safeguards Agreement or Article XIX of the *GATT 1994* for a competent authority to recommend a remedy, and there is therefore no legal basis to require a Member to adopt that recommendation. Under Article 5.1 of the Safeguards Agreement, the authority to select and impose a remedy is vested in the Member. Creating a rule that would require a Member in all cases to impose a measure that is less than or equal to the competent authority's recommended remedy could lead Members to revoke their competent authorities' mandate to recommend remedies, thereby denying Members the benefits of their considered opinions.

117. Finally, if the competent authorities' views are to be regarded as definitive for purposes of assessing the degree of remedy required in any particular case, this would mean that application of the competent authorities' recommendation would be presumptively consistent with Article 5.1. That could result in Members applying safeguard measures that are inadequate or excessive.

¹¹⁸ USITC Report at I-40, I-49.

Basis for the US Safeguard Measure

1. Introductory Comments

118. Before addressing the factual basis and reasoning supporting the US safeguard measure, the United States offers two preliminary comments. First, while the United States is pleased to answer the Panel's question, we wish to reiterate that the burden is on New Zealand and Australia to make a *prima facie* case that the US safeguard measure fails to comply with the requirements of Article 5.1, not on the United States to prove that the measure *does* comply. Because Australia and New Zealand have failed to present a *prima facie* case, the United States is under no obligation to provide evidence and reasoning in support of the measure's consistency with Article 5.1.

119. Second, in evaluating the consistency of the measure with the Safeguards Agreement and Article XIX, the Panel should reject New Zealand's and Australia's pleas to interpret the relevant terms and provisions "narrowly" or "strictly". Their argument, which is based on the purportedly "exceptional" nature of safeguards remedies, ignores the Appellate Body's admonition in *Hormones* (at ¶ 104) that characterizing a treaty provision as an exception:

does not by itself justify a 'stricter' or 'narrower' interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation".¹¹⁹

120. In fact, the Appellate Body has not described Article XIX as an "exception." Rather, it is a right that Members may invoke in exceptional circumstances. When Members have satisfied the conditions necessary for the application of safeguard measures, an excessively strict or narrow reading of Article 5.1 would risk rendering those measures ineffective, thus undermining the operation of Article XIX and the Safeguards Agreement.

2. Discussion of the US Safeguard Measure

121. Before considering the safeguard measure itself, it is useful to recall the various remedy recommendations that the USITC forwarded to the President. First, a plurality of the Commissioners recommended a four-year tariff-rate quota with a 20 per cent *ad valorem* duty on imports over 78 million pounds in the first year (approximately 1998 levels), 17.5 per cent *ad valorem* on imports over 81.5 million pounds in the second year, and 15 per cent and 10 per cent *ad valorem* in the third and fourth years, respectively, on imports above the second-year levels.¹²⁰

122. The plurality believed that its remedy would increase industry revenues in the first year and that this degree of import relief, in combination with adjustment assistance, would give the industry time to improve its competitiveness.¹²¹ The plurality did not explain how maintaining lamb meat imports at record levels would generate higher revenues for the domestic industry.

123. The remaining three Commissioners recommended two different safeguard measures to address the threat of serious injury. Two Commissioners recommended that the President increase the rate of duty on *all* lamb meat imports for four years to 22 per cent *ad valorem* in the first year, 20 per

¹¹⁹ EC Measures Concerning Meat and Meat Products (*Hormones*), WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body, 16 January 1998, at ¶ 104.

¹²⁰ USITC Report at I-29.

¹²¹ USITC Report at I-36.

cent *ad valorem* in the second year, 15 per cent *ad valorem* in the third year, and 10 per cent *ad valorem* in the fourth year.¹²²

124. These Commissioners identified depressed domestic prices for lamb meat as the principal threat posed by the surge in imports and concluded that raising prices from then-current levels needed to be a “key focus” of an appropriate remedy. In the view of these Commissioners, “the industry would experience serious injury caused by imports if import levels and prices continue at now-existing levels, even if no further price declines occur”.

125. The two Commissioners estimated that under their proposed remedy prices would rise by approximately 17 per cent in the first year of relief, while import levels would fall to a level between 1997 and 1998 imports. They expected that their remedy would allow the domestic industry to increase production due to the higher prices and to supply more lamb meat at a given price due to efficiency gains. They also expected that the remedy would result in long-term price stability and contribute to stable (if not increasing) demand.

126. The sixth Commissioner recommended quotas over four years that, in his view, would help restore industry profitability by restricting imports to their pre-surge levels.¹²³ He proposed an initial quota at 52 million pounds (the average level of imports in 1995-1997), with increases to 56, 61 and 70 million pounds in the second through fourth years of relief, respectively.¹²⁴ In the view of this Commissioner, the plurality’s recommended remedy “would have virtually no discernable impact on the domestic industry over the four years” because it would only hold imports to 1998 levels for one year, and then allow imports to rise in line with projected increases.¹²⁵ In this Commissioner’s view, the tariff remedy proposed by the two other Commissioners provided less relief than was necessary to facilitate the industry’s adjustment.

127. As the foregoing demonstrates, the six USITC Commissioners all examined the same record of investigation and yet proposed three widely different remedy recommendations. The plurality recommended a tariff-rate quota. Two Commissioners recommended a straight tariff. One recommended a quantitative restriction. The various tariff and quota levels proposed as part of these recommendations differed considerably. In fact, the sole common denominators of the three proposals was import relief of four years duration and domestic adjustment assistance.

128. Thus, while each of the three remedy recommendations was aimed at achieving the same result (preventing serious injury and facilitating adjustment), the Commissioners differed on the minimum steps necessary to accomplish that result. This difference of opinion illustrates the point that decisions regarding the application of safeguard measures cannot be reduced to mathematical formulas, but rather are based on a mix of analysis, judgment, predictions, and policy preferences.

129. There are likely to be a wide range of reasonable remedy options from which a Member may choose in any given case. The remedy that the Member ultimately applies will reflect its views on a long list of considerations, including the nature of the injury the industry has sustained, which aspects of that injury the Member considers most important to address, predictions regarding the likely effect of particular forms, periods, and levels of relief, how various remedies will interact with any domestic relief under contemplation, factors affecting the industry’s near-term prospects, trends in macroeconomic factors, the effects of differing measures on consuming industries, and so forth.

¹²² USITC Report at I-39.

¹²³ USITC Report at I-48.

¹²⁴ USITC Report at I-47.

¹²⁵ USITC Report at I-49.

130. The safeguard measure that the United States ultimately applied to lamb meat imports is the product of a decision-making process of this kind. It can perhaps best be seen in perspective as falling within the range of views expressed by the six USITC Commissioners.

131. In form, the safeguard measure is most similar to the plurality recommendation in that it employs a tariff-rate quota and sets the in-quota amount at roughly 1998 import levels. However, the measure differs from the plurality recommendation in two respects.

132. First, the measure has a duration of three years, rather than four. In this respect, the measure is plainly less restrictive than the plurality recommendation.

133. Second, the measure includes an in-quota tariff while the plurality recommendation does not. All six USITC Commissioners had identified low prices as one of the principal reasons for the US industry's poor financial health.¹²⁶ In particular, the USITC found that the industry's financial performance had worsened largely due to falling prices¹²⁷ and that, as a result, firms in the industry had experienced difficulty in generating adequate capital to finance modernization of their domestic plants and equipment.¹²⁸ The plurality recommendation was designed to cap first year imports at 1998 levels, with increases over the next three years. In the plurality's view, the import cap would generate higher revenues for the domestic industry. But the plurality did not explain how that could be the case given that the industry had experienced threat of serious injury at 1998 import levels.

134. The safeguard measure seeks this same result -- revenue enhancement -- but in a way more plausibly calculated to achieve it. In particular, the measure increases duty rates on the in-quota amount with the object of generating a modest near-term price increase.¹²⁹ The measure is thus structured to provide limited relief from low prices, thereby making it possible for the industry to return to profitability. That objective is consistent both with preventing serious injury and with facilitating the industry's adjustment to import competition.

135. The high out-of-quota tariff component of the TRQ makes it likely that imports will not exceed their 1998 level (the highest import level ever) in the first year of relief.¹³⁰ The USITC concluded that increased lamb meat imports had directly captured market share from the domestic producers and that those imports were likely to have a negative impact on the industry's shipments, prices, and financial performance.¹³¹ Three of the six Commissioners found that the US industry would suffer serious injury if imports and prices remained at 1998 levels, even if there were no further price declines.¹³² The overall effect of the safeguard measure is expected to be a slight reduction in imports from 1998 levels, with import levels increasing in years two and three as the in-quota amount expands.

136. The United States accompanied the safeguard measure with a substantial programme of federal financial and regulatory assistance intended to facilitate the US industry's adjustment by providing up to \$100 million to assist with market promotion; product and production improvements; basic sheep research; a scrapie eradication programme; and a lamb surplus removal programme. Half of the \$100 million is being made available to the industry in the first year.

¹²⁶ USITC Report at I-23-24.

¹²⁷ USITC Report at I-20.

¹²⁸ USITC Report at I-21.

¹²⁹ See United States' First Written Submission at ¶ 217.

¹³⁰ Commissioners Miller and Hillman believed that the domestic industry "would experience serious injury caused by imports if import levels and prices continue at now-existing levels, even if no further price declines occur." USITC Report at I-40. Commission Koplan found, similarly, that a remedy set at existing import levels "would not stave off the threatened serious injury, much less provide the industry with the opportunity to make a positive adjustment to prepare for the import competition." *Id.* at I-49.

¹³¹ USITC Report at I-24.

¹³² USITC Report at I-40, I-49.

137. In summary, the US safeguard measure is commensurate with the goals of preventing the threat of serious injury facilitating the industry's adjustment in this case. In its form and scope, the measure is similar to the remedy proposed by the USITC plurality except that it corrects for the plurality remedy's failure to address low prices in the near term. It addresses the high volume of imports and low prices that the USITC identified as responsible for the threat of serious injury to the US lamb meat industry.

138. The measure avoids the high across-the-board tariff levels that two Commissioners proposed and the possibility that the price increases they would have generated could have significantly depressed domestic consumption. Moreover, as noted above, those Commissioners estimated that the tariffs they proposed would roll import levels back to between 1997 and 1998 volumes. By contrast, the US safeguard measure was expected to generate a more modest import reduction.¹³³ In addition, the safeguard measure eschews the substantial reductions in import quantities that the sixth Commissioner proposed.

139. The safeguard measure is fully degressive, with tariff levels falling and quota levels increasing in the second and third years. The remedy has a duration of three years, a year shorter than proposed in each of the three USITC recommendations. Given its relatively short duration, the degree of trade restriction embodied in the measure is no more than that minimally necessary to restore a modicum of profitability to at least some producers during that period.

Question 18

In *Korea–Dairy*, the Appellate Body stated that Article 5.1 does not require a Member to explain at the time of the determination why the safeguard measure chosen was necessary unless that measure is imposed in the form of a *quantitative restriction* that reduces imports below the last representative three-year average level.

- (a) **What is the implication of this ruling for the case of the imposition of a tariff rate quota?**

Answer 18 (a)

140. The implication of the Appellate Body's ruling is that there is no need to provide advance justification for a tariff-rate quota (TRQ), and no need to justify this TRQ in particular.

141. In *Korea–Dairy* (at ¶ 100), the Appellate Body rejected the Panel's broad finding that Members that apply safeguard measures are required to explain in their recommendations or determinations how they considered the facts before them and why they concluded that the measure was necessary to remedy serious injury and facilitate adjustment. The Appellate Body found (at ¶ 99) that Article 5.1 imposes a justification requirement *only* for safeguard measures that take the form of quantitative restrictions that reduce the quantity of imports below the average of imports in the last three representative years.

142. TRQs are a type of tariff measure in which the tariff is applied at different rates based on import levels.¹³⁴ TRQs are not "quantitative restrictions" as that term is understood in GATT practice, which has distinguished between the two. A primary example of this difference can be seen in the tariffication provisions of the WTO *Agreement on Agriculture*.¹³⁵ One of the main points of that

¹³³ See United States' First Written Submission at ¶ 219.

¹³⁴ The United States does not understand Australia or New Zealand to be arguing that Article 5.1, second sentence, applies in this case.

¹³⁵ See WTO Agreement on Agriculture, Art. 4.2 & n.1.

agreement was to require the conversion of quantitative restrictions to TRQs and to distinguish between them in terms of WTO obligations. Similarly, when the drafters of *GATT* Article XIII (which governs the administration of quantitative restrictions) sought to apply its provisions not just to quantitative restrictions but to TRQs as well, they felt constrained to say so explicitly in the final paragraph of that article.¹³⁶ Because TRQs and quantitative restrictions are understood in *GATT* practice to be different types of measures, the obligation in Article 5.1 to justify quantitative restrictions that reduce imports below the average of imports in the last three representative years does not apply to TRQs.

143. In any event, even if there *were* such an obligation for TRQs, there would be no need to justify the TRQ applied in this case, because the in-quota amount of the tariff is set at 31,851,151 kilograms of imports in the first year of the TRQ, thus substantially exceeding the 1995-1997 average (approximately 21,387,924 kilograms)¹³⁷, and in-quota levels in the second and third remedy years are even higher. Moreover, if the 1997 surge year is excluded as unrepresentative, the average in the last three representative years (1994-1996) would be only 18,701,821 kilograms. The Appellate Body's ruling in *Korea-Dairy* (at ¶ 99) should therefore be conclusive on this point: "a Member is not obliged to justify in its recommendations or determinations a measure in the form of a quantitative restriction which is consistent with 'the average of imports in the last three representative years for which statistics are available'".

- (b) **How does the Appellate Body's ruling in respect of Article 5.1 relate to (i) Article 3.1 which requires the publication of a report setting out "findings and reasoned conclusions reached on all pertinent issues of fact and law", including "whether the application of a measure would be in the public interest"; (ii) Article 7.2 which requires an investigation and determination by the competent authorities that a measure continues to be necessary and that the industry is adjusting, before that measure can be extended; and (iii) Article 12.2 which stipulates notification to the WTO Committee on Safeguards of the safeguard measure to be applied?**

Answer 18(b)

144. Article 5.1 is the only provision of the Safeguards Agreement that requires a Member to provide written justification for the particular safeguard measure it applies, and then only for a certain class of quantitative restrictions not at issue here. Nothing in Articles 3.1, 7.2, or 12.2 conflicts with the Appellate Body's ruling that no additional justifications are required.

(i) **Article 3.1**

145. 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. The subject matter of the reports referred to in Article 3.1 are the findings and conclusions the competent authorities reach based on the investigation they conduct pursuant to that article.

146. The first sentence of Article 3.1 makes plain that a Member may apply safeguard measures only *after* the Member's competent authorities have concluded their investigation:

¹³⁶ In *Korea-Dairy*, the Appellate Body noted (at ¶ 96) that the obligation to ensure that a measure is "commensurate" applies "whether it takes the form of a quantitative restriction, a tariff *or* a tariff rate quota." (emphasis added). This is a further indication that the Appellate Body distinguishes between quantitative restrictions and TRQs.

¹³⁷ See USITC Report at II-19.

A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member . . .

147. Since the investigation must conclude before a Member applies a safeguard measure, the competent authorities would not be in a position to know – much less justify – the safeguard measure that the Member ultimately decides to apply. Equally, the Member would not be in a position to decide what safeguard measure to apply (if any) until the competent authorities have finished their investigation and presented their report setting forth their basis for finding injury or threat thereof.¹³⁸ In addition, the competent authorities may not be in a position to know when they conclude their investigation what type of an assistance package the Member will be able to provide to the domestic industry, and the nature of the assistance package will likely affect the Member’s decision on an appropriate measure. Accordingly, Art 3.1 does not – and could not – call on competent authorities to justify in the reports on their investigations the measures that Members ultimately decide to adopt.

148. Article 3.1 establishes the procedural conditions that a Member must meet before applying a safeguard measure. The Member’s competent authorities must conduct an “investigation” that meets certain specified transparency and due process standards (public notice, hearings, procedures for submitting evidence and rebuttals, opportunity to speak for or against the application of safeguard measure, and so forth). By its plain terms, the subject matter of Article 3.1 is the procedural conditions necessary to justify the application of a safeguard measure, rather than the nature of the measure itself.

149. The subject matter of the competent authority’s investigation is whether the conditions for the application of safeguard measures, as described in Article 2.1 and elaborated on in Article 4.2(a), exist. Article 2.1 requires Members to have “determined” that certain conditions are present before applying safeguard measures. Article 4.2(a) makes clear that “the investigation” the competent authorities are required to conduct is focused on the question of whether those conditions exist:

In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate . . .

150. Thus, the context for Article 3.1 make clear that the investigation referenced in that article is not the nature of the safeguard measure that the Member ultimately adopts, but the procedural preconditions for applying a safeguard measure in the first place. If the competent authorities meet the substantive and procedural conditions specified in Articles 2.1, 3.1, and 4, no further justification for applying a safeguard measure is required.

151. Article 3.1 states that the investigation by the competent authorities “shall include . . . public hearings or other appropriate means in which importers . . . could present evidence and their views, including . . . their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest”. This requirement does not mean that the competent authorities must justify in their report the eventual measure that the Member applies. Article 3.1, second sentence, plainly refers to views regarding the appropriateness of applying “*a* safeguard measure” (emphasis added), rather than “*the*” safeguard measure.

152. Questions regarding whether the “public interest” would be served by the application of a safeguard measure are simply another facet of the competent authority’s investigation concerning whether the Member would be justified in applying a safeguard measure of some kind. Article 3.1, second sentence, contemplates that the competent authorities will hear views regarding whether

¹³⁸ In this context, it should be noted that the Safeguards Agreement draws a distinction between “Members” (who apply safeguard measures) and competent authorities who conduct investigations. See, e.g., references in Articles 2.1, 3.1, and 5.1.

applying a safeguard measure in the particular circumstances would be good public policy. It does not, and could not, require the competent authorities to hear views regarding the particular safeguard measure the Member decides to apply after the competent authorities conclude their investigation.

153. The “issues of fact and law” referenced in Article 3.1 are those that arise in the course of the competent authority’s investigation. As demonstrated above, “the investigation” concerns the question of whether increased imports have caused or are threatening to cause serious injury to a domestic industry. The investigation called for under Article 3.1 need not address the question of what particular safeguard measure the Member should apply¹³⁹ and, as demonstrated above, the competent authority is not in a position to examine the measure the Member actually decides to adopt. Thus, the reasons for the Member’s ultimate safeguard measure do not figure among the “pertinent issues of fact and law” that the competent authorities must include in their reports under Article 3.1. In any event, considerations of “public interest” are questions of policy, not issues of law or fact.

(ii) Article 7.2

154. Article 7.2, which establishes conditions for extending safeguard measures, does not require Members to justify their safeguard measures. Article 7.1 establishes as a general rule that the period of a safeguard measure shall not exceed four years. If a Member wishes to extend a measure beyond that period of time, Article 7.2 imposes an additional obligation for the competent authority to reexamine the situation of the domestic industry. Even if Article 7.2 were interpreted to give rise to an obligation to “justify” the *extension* of a safeguard measure, a question that we are not addressing here, it does not create an obligation to justify the measure itself.

155. When a competent authority determines whether a basis exists to extend a measure under Article 7.2, it is in essence predicting the effect on the domestic industry if the measure were revoked. To make this determination, it is not necessary for the competent authority to know what the Member’s reasons were four years earlier for choosing the particular measure it did. Rather, it simply examines the remedy that is already in place.

(iii) Article 12.2

156. Similarly, nothing in Article 12.2 suggests that Members must justify their safeguard measures. Article 12.2 requires Members to provide the Committee with “all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization”. The types of information listed in Article 12.2 are all factual in nature, and do not require legal or economic judgments or conclusions of the type that would be needed to justify a safeguard measure under Article 5.1.

157. Given the list of examples, the “pertinent information” called for in Article 12.2 is of a type that would inform the Committee of particular *facts* arising either out of the competent authority’s investigation (product, evidence of serious injury) or the decision to apply a safeguard measure (form of the measure, its duration, and so forth). A “justification” by contrast would not be a factual description, but rather a kind of argumentation. Article 12.2 specifically requires Members to provide “evidence” of serious injury or threat thereof, but does not mention “evidence” of compliance with Article 5.1. This suggests that the drafters did not view such evidence as “pertinent information” and adds to the conclusion that Article 12.2 does not impose a justification requirement.

(c) In the light of the transparency and notification requirements under the Safeguards Agreement which at a minimum apply to the investigation, how does

¹³⁹ In this respect, the USITC practice of soliciting public views on an appropriate remedy goes beyond what Article 3.1 requires.

the United States substantiate its apparent view that the Safeguards Agreement effectively contains no transparency and explanation requirements concerning the application of Article 5.1? How in your view should the burden of proof be allocated under Article 5.1?

Answer 18(c)

158. The United States disagrees with the premise of the panel's first question. The Safeguards Agreement does contain transparency and explanation requirements concerning the application of Article 5.1, in that Article 12.2 requires that a Member notifying a safeguard measure provide a "precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization".

159. This transparency requirement marks an important advance from the situation that pertained in the past. The notification requirements in Article XIX of the *GATT 1947* were minimal, amounting to little more than the need to "give notice" of the intention to take action under the article and to give other parties an opportunity to consult. There were, of course, no notification requirements whatsoever for "grey-area" measures. The Safeguards Agreement addresses this situation by establishing a minimum level of required transparency that applies to *all* safeguard measures.

160. Moreover, Article 5.1, second sentence, contains a justification requirement for certain safeguard measures. Article 5.2(b) contains a similar justification requirement for "selective" allocation of quantitative restrictions. The fact that the drafters of the Safeguards Agreement felt a need to include these particularized justification requirements in Article 5 suggests that they did not consider that any other provision of the Safeguards Agreement imposed a general justification requirement.

161. Finally, given the requirement in Article 3 to publish a report of the competent authority's investigation (which must include findings and reasoned conclusions on the injury factors contained in Article 4.2(c)) and the requirement in Article 12.2 to provide a precise description of the safeguard measure, there is no compelling need for Members also to provide written justifications of their safeguard measures. 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.

162. Regarding the Panel's second question, it is well established that the complainant has the burden of presenting a *prima facie* case of noncompliance with the terms of a covered agreement.¹⁴⁰ Therefore, in this case, the burden is on Australia and New Zealand to demonstrate that the US safeguard measure was *not* applied "only to the extent necessary to remedy or prevent serious injury and to facilitate adjustment." The United States discussed its view of an appropriate analytical framework at ¶ 210 of its first written submission. If Australia and New Zealand were to meet their burden, the United States would then be obliged to bring evidence and argument to rebut their *prima facie* case. In no event, however, would the United States be obliged to "justify" the US measure. New Zealand and Australia have not begun to meet their burden on this issue, which is not surprising given the restrained nature of the measure the United States put in place.

¹⁴⁰ See Report of the Appellate Body in *Wool Shirts* (at 16) (stating that it "was up to India to present evidence and argument sufficient to establish a presumption that the transitional safeguard determination made by the United States was inconsistent with its obligations under Article 6 of the ATC. With this presumption thus established, it was then up to the United States to bring evidence and argument to rebut the presumption."). See also *id.* at 17 ("[W]e find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the presumption that the mere assertion of a claim might amount to proof. . . .")

163. Australia's and New Zealand's argument that the United States was required to "justify" its safeguard measure is in essence an improper attempt to shift the burden of proof under Article 5.1 to the United States. Their approach in this regard is reminiscent of the Panel's conclusion in *Hormones* that the *SPS Agreement* allocated the "evidentiary burden" to the Member imposing an SPS measure. The Appellate Body (at ¶99 *et seq.*) rejected the Panel's conclusion on the grounds that:

[i]t does not appear to us that there is any necessary (i.e. logical) or other connection between the undertaking of Members to ensure, for example, that SPS measures are "applied only to the extent necessary to protect human, animal or plant life or health . . .", and the allocation of burden of proof in a dispute settlement proceeding. Article 5.8 [of the SPS Agreement] does not purport to address burden of proof problems; it does not deal with a dispute settlement situation. . .¹⁴¹

164. Like Article 5.8 of the SPS Agreement, Article 5.1 of the Safeguards Agreement "does not purport to address burden of proof problems; it does not deal with a dispute settlement situation". Therefore, the United States submits that the Appellate Body's ruling with respect to Article 5.8 of the SPS Agreement is equally valid with respect to Article 5.1 of the Safeguards Agreement. As the Appellate Body stated in *Wool Shirts* (at 19), "a party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim".

Question 19

In its first submission, in paragraphs 210 *et seq.* the United States proposes a four-step test for examining compliance with the requirements of Article 5.1 and applies the first three steps thereof to the lamb safeguard measure. Could the United States complete the application of its test with respect to item (iv), i.e., an assessment of "whether the measure, in its totality, is more restrictive than required both to prevent serious injury from occurring and to assist the industry in adjusting to import competition"? Where in its submission or any published source can information be found on that item, including economic modelling, if any?

Answer 19

165. Please see response to Question 17. The United States would add two additional points on the specific questions posed here.

166. While Article 5.1 plainly prohibits Members from applying measures that are manifestly excessive, it cannot be interpreted as imposing a requirement to identify and apply a hypothetically perfect import remedy. Because it is an uncertain enterprise, in which Members are called upon to make predictions about the economic effect of a measure that has not yet been proposed, the application of a safeguard measure simply is not capable of that degree of fine tuning. This point was recognized by the Committee that reviewed the United States' application of an Article XIX measure in the case on *Hatters' Fur*:

the Working Party considered that it is impossible to determine in advance with any degree of precision the level of import duty necessary to enable the United States industry to compete with overseas suppliers in the current competitive conditions of the United States market, and that it would be desirable that the position be reviewed

¹⁴¹ *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body, 16 January 1998, at ¶ 102.

by the United States from time to time in the light of experience of the actual effect of the higher import duties . . .¹⁴²

167. The Working Party's observation on the impossibility of predicting the future with any degree of precision raises another factor that militates against an overly rigid approach to interpreting Article 5.1: Article 7.4 of the Safeguards Agreement requires Members progressively to liberalize their safeguard measures over time and, by corollary, not to increase them – even if events after the measures are imposed indicate that they are failing to prevent or remedy serious injury and facilitate adjustment. New Zealand and Australia have urged a reading of Article 5.1 that would require Members to apply theoretically ideal safeguard measures, with import restraints set at levels just shy of the line of ineffectiveness. That reading would risk frustrating the purpose of the Safeguards Agreement and Article XIX of *GATT 1994* by withholding the latitude that Members must have to ensure that the measures they apply have a real prospect of success.

168. Finally, the United States notes the Panel's reference in its question to the economic model that the United States used in attempting to predict the effects of its safeguard measure. Article 4 of the Safeguards Agreement establishes that an injury finding requires the examination of a number of factors, none of which is dispositive, and all of which may respond differently to a particular type of safeguard measure. Consequently, no amount of modelling can establish the necessity or lack thereof of any particular measure. While the United States did use a model to test the possible effects of its measure, nothing in Article 5.1 required modelling or makes the results of such models a sound basis for judging a measure's compatibility with that article.

169. Given that the application of safeguard measures is fundamentally a predictive -- and thus necessarily speculative and imprecise -- exercise, Article 5.1 cannot be read to require Members to achieve scientific exactitude in calibrating those measures. No economic model is infallible – there are simply too many economic variables (changes in exchange rates, consumer tastes, macroeconomic or fiscal conditions, technology) for a model to serve as anything other than an imperfect tool in deciding how a particular measure should work if all other variables are held constant.

170. In sum, safeguard measures cannot be applied with scientific certainty, and Article 5.1 cannot be fairly read to require it. Rather, as the United States stated in its first written submission, the proper inquiry under Article 5.1 is whether there is an evident mismatch between the safeguard measure, taken in its totality, and the finding and determinations set out in the competent authority's report. The burden of demonstrating a failure to comply with Article 5.1 is on New Zealand and Australia. To-date, they have failed to meet their burden.

Question 20

Assuming that the application of a safeguard measure other than a quantitative restriction has to be justified under Article 5 if it is challenged as exceeding the extent necessary to prevent threat of serious injury and to facilitate adjustment, (i) should such justification be based on information contained in the published report, (ii) would it suffice to show that the justification presented is based on information available to the competent authority at the time of the determination, or (iii) could a justification be based on information submitted *ex post* during a WTO dispute?

Answer 20

171. The United States believes that it will be possible to discern in most (if not all) cases whether there is a substantial mismatch between the safeguard measure applied and the relevant findings and

¹⁴² Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade, GATT/CP/106, report adopted on 22 October 1951, ¶ 35.

determinations in the competent authority's report, and therefore whether the measure is "commensurate with the goals of preventing or remedying serious injury and facilitating adjustment".¹⁴³ However, it is up to the complainant to establish a *prima facie* case that such a mismatch exists, at which time the defendant will be obliged to come forward with evidence and argument sufficient to rebut the *prima facie* case.

Question 21

Is it the US interpretation of Article 5 that:

- (a) **this article allows Members to freely choose between different types of safeguard measures (e.g., tariff surcharges, tariff rate quotas, quantitative restrictions)?**

Answer 21 (a)

172. As a preliminary matter, the United States notes that New Zealand and Australia have not questioned the United States' selection of a TRQ, and indeed have suggested that they approve of the USITC plurality's recommended safeguard measure, which also took the form of a TRQ.

173. Turning to the Panel's question, the United States considers that a Member is permitted to choose between tariff surcharges, tariff rate quotas, and quantitative restrictions provided that the selected measure is applied "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment". This conclusion is supported by the second sentence of Article 5.1, which states that "if a quantitative restriction is used," thereby demonstrating that a Member has discretion in choosing among measures.

174. Article 6 provides further support for this conclusion, since it states that provisional measures "should take the form of tariff increases . . . ". Article 5, concerning definitive safeguard measures, contains no parallel provision. Plainly, the drafters of the Safeguards Agreement knew how to limit the universe of permissible measures when they wanted to do so. The fact that they did not do so in Article 5 reflects that they did not intend to impose such a limitation as to definitive measures.

175. It is worth observing that early in the negotiation of the Safeguards Agreement some parties argued that safeguard measures should be limited to tariff increases.¹⁴⁴ The first "chairman's draft" reflected a compromise view, stating that safeguard measures "should preferably take the form of tariff increases, but may also take the form of quantitative restrictions".¹⁴⁵ In the final text, the preference for tariff increases was deleted, apparently in favour of the admonition in the third sentence of Article 5.1 that Members should choose measures "most suitable" for the achievement of the objectives in the remainder of the paragraph.¹⁴⁶ The outcome of the negotiations on this point reflected Member practice in choosing among a wide variety of safeguard measures.¹⁴⁷

176. Finally, in *Korea–Dairy*, the Appellate Body stated (at ¶ 96) that "[w]hether it takes the form of a quantitative restriction, a tariff or a tariff rate quota, the measure in question must be applied

¹⁴³ *Korea–Dairy*, Report of the Appellate Body at ¶ 96.

¹⁴⁴ See, e.g., *Elements for a Comprehensive Understanding of Safeguards*, Communication from Brazil, MTN.GNG/NG9/W/3, ¶ 6 (25 May 1987).

¹⁴⁵ MTN.GNG/NG9/W/25 at 4.

¹⁴⁶ Compare Negotiating Group on Safeguards, Draft Text of an Agreement, MTN.GNG/NG9/W/25/Rev. 3 (31 October 1990), ¶ 6 (containing the preference for tariff increases but not referencing the "most suitable" measures) with Safeguards Agreement, Art. 5.1.

¹⁴⁷ See Guide to GATT Law and Practice (GATT Analytical Index), vol. I, at 522-23 (discussing the wide variety of safeguard measures notified under Article XIX).

“only to the extent necessary . . . ”. This suggests at a minimum that the Appellate Body views these three types of measures as permissible under Article 5.

- (b) once a measure other than a quantitative restriction has been chosen, if challenged by another Member, the Member imposing the safeguard measure has to show that, in its totality, e.g., the size of the tariff rate quota, its duration, the in-quota and out-of-quota tariffs, etc., the measure is no more restrictive than required to achieve the dual objectives of Article 5.1?

Answer 21(b)

177. The burden is on the complaining party to demonstrate that the measure was *not* applied “only to the extent necessary to prevent or remedy the serious injury and to facilitate adjustment”. If the complainant establishes a *prima facie* case that the measure was not applied “only to the extent necessary”, the defendant will then be obliged to provide facts and evidence sufficient to rebut the *prima facie* case.

178. As the Appellate Body stated in *Wool Shirts* (at 16), “it was up to India to present evidence and argument sufficient to establish a presumption that the transitional safeguard determination made by the United States was inconsistent with its obligations under Article 6 of the ATC. With this presumption thus established, it was then up to the United States to bring evidence and argument to rebut the argument”. To paraphrase the Appellate Body (*id.* at 19-20), the Safeguards Agreement is a fundamental part of the rights and obligations of WTO Members. Consequently, a party claiming a violation of a provision of the Safeguards Agreement must assert and prove its claim.

Question 22

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 22

179. In the view of the United States, a Member applying a safeguard measure is not obliged to apply an “effective” measure. While a Member presumably will seek to do so, Article 5.1 imposes no such legal obligation. A Member may choose to apply a measure that may not be fully effective if, for example, the Member concludes that the public interest, or broader economic concerns, supports such an approach. In addition, since a Member may elect to apply both a safeguard measure and domestic adjustment measures, it is possible that the import relief may not be fully “effective” on its own.

180. As the United States explained in its first written submission (at ¶¶ 182-191), a Member is not obliged to apply the single “least trade restrictive measure”.

181. Finally, in *Korea-Dairy*, the Appellate Body stated that a safeguard measure should be “commensurate” (or, more properly for purposes of this proceeding, not “incommensurate”) with the goals of preventing or remedying serious injury and facilitating adjustment. That appears to be a somewhat more appropriate way to describe the standard that Article 5.1, first sentence imposes than the concept of “proportionality.” The latter might be understood as suggesting that remedy decisions can be reduced to simple mathematical exercises, while the former better captures the complexities and judgments inherent in selecting a safeguard measure.

Is the exclusion of Canada, Mexico and Israel from the safeguard measure consistent with the Safeguards Agreement and GATT 1994?

Question 23

Is it factually correct that the United States included imports from NAFTA countries in its analysis of threat of serious injury and causation, and yet excluded those imports from the application of the measure? If not, please explain. Please indicate whether the approach taken by the United States in this case is consistent with the "parallelism principle" as endorsed by the Appellate Body in *Argentina - Footwear*, and if so, please indicate whether this is because (i) NAFTA Article 802 would exclude imports from other NAFTA countries *de jure* from the injury and causation investigation; or (ii) because the imports from other NAFTA countries were negligible in this case; or for some other reason. Was the decision to exclude imports from certain sources based on a purely static analysis of import shares, or did the USITC also take into account the potential increase of imports from sources of supply that were exempted from the application of the safeguard measure relative to imports from sources that were subject to the safeguard measure?

Answer 23

182. As a factual matter, the only lamb meat imports from Mexico during the investigatory period were 202,000 pounds in 1995, accounting for approximately 0.4 per cent of total imports in that year. There were no imports from Mexico during the final three years of the investigatory period, and therefore no imports to include in the USITC's analysis of threat of serious injury and causation. Similarly, imports from Canada ranged from a low of approximately 0.005 per cent of total imports (in 1993) to a high of approximately 0.3 per cent of total imports (in 1997).

183. Thus, imports of lamb meat from Canada were negligible throughout the investigatory period. At no time during 1993-98 did imports from Mexico and Canada collectively exceed even one-half of one per cent of total imports. Thus, as a practical matter Canadian and Mexican imports did not figure into the USITC's analysis of the effect of increased imports – for the simple reason that they remained at negligible levels throughout.

184. The United States does not understand the Appellate Body to have established a broad requirement of "parallelism" given the fact-specific nature of the *Footwear* dispute. Nevertheless, the procedures contemplated by NAFTA Article 802, and employed by the United States in the case of its lamb meat safeguard, satisfy the purpose of the "parallelism" notion the *Footwear* Panel articulated. That idea is to ensure that when a Member attributes serious injury to increased imports originating in the territory of a country that is a party to a customs union (or FTA, in this case), those imports should be included in the safeguard measure the Member determines to apply. NAFTA Article 802, and US law implementing that provision, provide for the inclusion of FTA imports in a US safeguard measure in such cases.

185. In the case at issue, due to the fact that imports from Canada and Mexico were either zero or considerably less than one per cent in each year investigated, the United States could not have acted inconsistently with any "parallelism" principle.

Request for information

Question 24

Please provide the following documents:

- (a) The confidential version of the USITC's determination (i.e., pages I-7 to I-27 of the USITC report).
- (b) The following tables from Section II of the USITC's report: Tables 3, 4, 8, 9, 14, 16, 18, 21, and 38-43.

Please indicate what sort of procedures would be necessary in your view to protect the business confidential information contained in the above -requested documents.

Answer 24

186. The United States proposes that the panel accept the requested information in indexed form. In brief, the United States proposes to assign an index of 100.0 to the first number in a series and express each subsequent number as a ratio to the first, multiplied by 100. While such an approach is not available in all proceedings, the USITC investigative staff has concluded that in this case almost all of the requested information can be so converted and provided to the panel without risking disclosing any firm's confidential information. Accordingly, by following this method, the United States can provide the panel the substance of the data requested in a form that need not be subject to special confidentiality procedures. The indexed numbers would permit the panel to recognize trends and calculate per cent changes between any two periods, consecutive or non-consecutive. This procedure has been applied to all data in the requested tables, and the results of that indexing accompany this submission. As to the requested information in the report, in most instances, confidential data are percentage changes based on data in the tables. The Panel can calculate these percentage changes from information obtained from the USITC's indexing of the tables.

187. This submission allows the Panel access to the requested data without requiring the competent authority, as required by Article 3.2 of the Safeguards Agreement, to seek consent for disclosure of the actual confidential data to the Panel. USITC investigative staff have expressed concern that making such requests will impede the USITC's ability to obtain updated confidential data as part of the agency's "mid-point review" of the safeguard action on lamb meat. Section 204 of the Trade Act of 1974, as amended, requires the USITC to monitor developments with respect to any safeguard action so long as it remains in effect.¹⁴⁸ Specifically, the USITC is to monitor the progress and efforts made by the domestic industry to make a positive adjustment to import competition under the safeguards action¹⁴⁹, and, if the action remains in effect for more than three years, the USITC is to prepare a report on its findings.¹⁵⁰ The USITC is to submit its report to the President and the Congress no later than the date that is the mid-point of the initial period during which the action is in effect.¹⁵¹

188. USITC staff are beginning investigative work in connection with the "mid-point review" of the safeguard on lamb meat. They believe that asking companies who submitted information in confidence to the USITC during the original investigation to disclose that information in the Panel proceeding will have a chilling effect on the agency's ability to gather new information. This is particularly the case because disclosure in unindexed form of much of the data the panel requested would require consent from companies, including importers and foreign producers, who, in the original investigation, did not support the requested relief. Many were already reluctant to provide confidential business information. Consequently, there is reason to believe that the necessary consents might well not be forthcoming and, even if they were, would be liable to lead firms to resist making further disclosures to the USITC. In brief, the United States believes that submitting the

¹⁴⁸ 19 U.S.C. § 2254(a)(1), attached hereto as US Exhibit 40.

¹⁴⁹ 19 U.S.C. § 2254(a)(1).

¹⁵⁰ 19 U.S.C. § 2254(a)(2), attached hereto as US Exhibit 40.

¹⁵¹ 19 U.S.C. § 2254(a)(2).

requested information to the Panel in indexed form optimally satisfies the Panel's request while not compromising the competent authority's ability to conduct further investigative efforts.¹⁵²

189. If the Panel believes that accepting the requested information in indexed form is not satisfactory, then the United States respectfully suggests that procedures similar to those that the Panel in the *Wheat Gluten* dispute proposed on February 24, 2000 would be most likely to enable the United States to obtain the necessary consent from the information submitters.¹⁵³

¹⁵² The indexed information is attached hereto as US Exhibit 41.

¹⁵³ See Fax from Jasper Wauters, Rules Division, to Mr. J. J. Bouflet and Mr. D. Brinza, dated 24 February 2000. The proposal suggested in pertinent part that:

No more than two representatives of the United States would bring the requested information to a designated location at the premises of the WTO in Geneva on [date]. The Panel, two professional staff of the WTO Secretariat, and no more than two representatives of the European Communities would review the information exclusively in camera. No photocopies of the information would be permitted. The Panel, the two professional staff of the WTO Secretariat, and the representatives of the European Communities may take written summary notes of the information for the sole purpose of the Panel process. These individuals would be under an obligation not to disclose the information, or to allow it to be disclosed, to any person. Any such notes would be destroyed at the conclusion of the Panel. While the Panel would be under an obligation not to disclose the information in its report, it could make statements of conclusion drawn from such information.

LIST OF US EXHIBITS

***United States – Safeguards Measures on Imports
of Lamb Meat from New Zealand and Australia***

<u>US Exhibit</u>	<u>Description</u>
20.	USITC Hearing Transcript at 164
21.	57 Stat. 833 (1943), E.A.S. 311 (effective 30 January 1943)
22.	Reciprocal Trade Agreements Act of 1934
23.	John Jackson, <i>World Trade and the Law of GATT</i> 553 (1969)
24.	Exec. Order No. 9832 of 25 February 1947
25.	<i>Extending Authority to Negotiate Trade Agreements, Hearings before the Committee on Finance, United States Senate</i> , H.R. 6556, at 128 (1948)
26.	United States Tariff Commission, <i>Hand-Blown Glassware</i> , Report to the President on Investigation No. 22 Under Section 7 of the Trade Agreements Extension Act of 1951, as amended, at 51-52 (1953)
27.	<i>Fresh Tomatoes and Bell Peppers</i> , Inv. No. TA-201-66, USITC Pub. 2985 (Aug. 1996), at I-9-10
28.	<i>Apple Juice</i> , Inv. No. TA-201-59, USITC Pub. 1861 (June 1986), at 5-10
29.	<i>Certain Canned Tuna Fish</i> , Inv. No. TA-201-53, USITC Pub. 1558 (Aug. 1984), at 5-7
30.	<i>Webster's Third New International Dictionary (Unabridged)</i> at 1810 (1981)
31.	<i>Webster's New Collegiate Dictionary</i> at 918 (1977)
32.	<i>Webster's Ninth New Collegiate Dictionary</i> at 838 (1985)
33.	<i>Webster's Third New International Dictionary (Unabridged)</i> at 355, 356, 1317 (1981); <i>New Shorter Oxford English Dictionary</i> (1993) at 355, 356.
34.	<i>Webster's Ninth New Collegiate Dictionary</i> at 217, 695 (1985)
35.	Testimony of Joseph Casper, transcript of injury hearing at 22
36.	Testimony of Harold Harper, transcript of injury hearing at 30
37.	19 U.S.C. 2252(b)(1)(B)
38.	Petition For Relief From Imports of Lamb Meat Under Section 201 of the Trade Act of 1974, dated 30 September 1998, at 4, 5
39.	19 C.F.R. § 206.14(b)(3)

40. 19 U.S.C. § 2254(a)(1), (2)

41. Indexed Tables

42. Media Release of 7 July 1999 by Deputy Prime Minister and Minister for Trade Tim Fischer.

ANNEX 3-8

SECOND SUBMISSION OF THE UNITED STATES

(29 June 2000)

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I. INTRODUCTION

1. Australia and New Zealand have failed to demonstrate that the United States' safeguard measure on lamb meat is inconsistent with US obligations under the *Agreement on Safeguards* and Article XIX of the *GATT 1994*. In its first written submission, and in its response to the Panel's written questions, the United States demonstrated that the findings and economic conclusions of the USITC in this matter were carefully reasoned and amply articulated, and that the safeguard measure applied by the United States is fully in accordance with US obligations under the Safeguards Agreement and the *GATT 1994*. The United States also demonstrated that it fully satisfied the notification and consultation provisions of the Safeguards Agreement.

2. The United States does not intend to duplicate its earlier arguments in this second written submission. Instead, this submission will focus on issues raised by New Zealand and Australia in their first oral statements and in their responses to the Panel's Questions.¹ For the Panel's convenience, this submission is structured in accordance with the order of the Panel's questions to the United States.

II. THE "UNFORESEEN DEVELOPMENTS" PROVISION OF ARTICLE XIX:1 OF THE GATT 1994 WAS FULFILLED

3. The Appellate Body has confirmed that the reference to "unforeseen developments" in the first clause of Article XIX:1(a) does not establish an independent condition for the application of safeguards measures. Therefore, contrary to the arguments of Australia and New Zealand, the USITC was not required to make a finding of "unforeseen developments" in its report. The Panel should reject their attempt to read such a requirement into the text.

A. ARTICLE XIX DOES NOT REQUIRE A FINDING OF "UNFORESEEN DEVELOPMENTS"

4. The United States has explained at length why Article XIX:1(a) does not require competent authorities to make a specific finding of "unforeseen developments."² Basic rules of treaty interpretation affirm the United States' view.

5. Article 31 of the *Vienna Convention* states that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Moreover, in accordance with Article 31.3, a treaty interpreter shall also take into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."³ As the International Law Commission observed:

The importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.⁴

¹ In particular, although it was one of the issues that the Panel identified as crucial at the First Substantive Oral Session, this submission will not further discuss the representativeness of the USITC's data. The United States has addressed that issue at length in both its First Written Submission and its response to the Panel's questions, and Australia and New Zealand have raised no new arguments on the matter.

² See US Responses to Questions by the Panel at ¶¶ 1-8, 14-27.

³ *Vienna Convention*, Art. 31.3(b).

⁴ *Report of the International Law Commission on the Work of its Eighteenth Session*, Yearbook of the International Law Commission, 1966, vol. II, at 221, attached hereto as US Exhibit 43.

Subsequent practice by GATT Contracting Parties confirms that the reference to “unforeseen developments” in Article XIX was not meant to require a finding on this subject as a precondition for the application of safeguard measures.

6. In 1973, the GATT Secretariat prepared a factual note that discussed existing safeguard provisions, including the safeguard provision embodied in GATT Article XIX.⁵ The Secretariat explained that “a contracting party having recourse to Article XIX must show that:

- (a) the product in question is being imported in increased quantities;
- (b) the increased imports are the result of unforeseen developments and of the effect of obligations under the GATT; and
- (c) the imports 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

7. The Secretariat observed, however, that:

The most important case for the interpretation of these conditions is the first recourse to Article XIX by the United States on women’s fur felt hats and hat bodies . . . It is fairly clear from this and subsequent cases that the conditions under (b) above do not, in fact, place any significant constraint on the freedom of action of a contracting party wishing to invoke the Article. The conditions under (a) and (c), on the other hand, limit this freedom of action.”⁷

8. Illustrative of the Secretariat’s observation that the GATT Contracting Parties did not view the “unforeseen developments” language of Article XIX as constraining their application of safeguard measures is the safeguard practice of Australia and New Zealand. A table prepared by the GATT Secretariat in 1995 indicates that Australia was responsible for 38 of the 150 Article XIX actions notified to the Secretariat between 1950 and 1995.⁸ Based on an examination by the United States in connection with this proceeding, in 37 of those 38 cases Australia failed to identify any “unforeseen developments” underlying its action.

9. Similarly, the single safeguard action notified by New Zealand (in 1975) makes no mention of “unforeseen developments”. Thus, practice by the complainants themselves suggests that they perceived no need for their competent authorities to stake their affirmative determinations under Article XIX on a finding of “unforeseen developments”. Indeed, as New Zealand observes in response to Panel Question one:

[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.’⁹

⁵ Safeguards, Factual Note by the Secretariat, Revision, COM.IND/W/88/Rev.1 (18 January 1973).

⁶ *Id.* at ¶ 6.

⁷ *Id.*

⁸ See *Guide to GATT Law and Practice*, vol.I, at 539-559 (1995) (GATT Analytical Index).

⁹ New Zealand’s Response to Panel Question One at 2.

10. United States practice under Article XIX has been similar. As noted by a US negotiator of the ITO Charter and GATT 1947 in connection with the *Hatters' Fur* case:

“ . . . At that time one of the difficulties facing the United States hat industry was the increasing practice of going without hats. Czechoslovakia and other countries argued that this trend, as well as the increase in imports presumptively resulting from the tariff concession, could reasonably have been foreseen and hence that the escape clause was not applicable. The answer to this argument is simple: under United States trade-agreements procedures, whatever may be the practices of other countries, trade-agreements concessions are not made if future developments such as to cause injury to flow from the concession are in fact foreseen. Therefore, the reference to “unforeseen developments” in GATT was meaningless as far as United States obligations were concerned . . . ”¹⁰

11. The negotiating history of the Safeguards Agreement demonstrates that the Negotiating Group on Safeguards did not intend to change the prevailing view that safeguards measures need not be based on a finding of unforeseen developments. The initial Chairman's draft text included among the conditions for applying safeguards measures a requirement that the increase in imports must have been “unforeseen”.¹¹ In the Chairman's 15 January 1990 revised text, the term “unforeseen” was replaced with the term “unexpected”.¹² In a 23 January 1990 submission, Mexico proposed certain modifications to the draft text, including the reinsertion of “unforeseen” for “unexpected” and a rephrasing of the entire sentence to read as follows:

there has been an unforeseen, sharp and substantial increase in the quantity of such product being imported; **as a result of unforeseen developments and of the effect of the obligations, including tariff concessions, incurred by a contracting party under the General Agreement;**¹³

12. Mexico's proposed changes were not adopted. Indeed, in a subsequent meeting of the Negotiating Group, it was proposed that the term “unexpected” be deleted entirely.¹⁴ The term was dropped in the Chairman's July 1990 draft text, and it did not reappear.

13. In summary, the practice of the Contracting Parties under the GATT 1947 reflected an understanding that safeguard measures under Article XIX did not need to be based on findings of “unforeseen developments.” The decision of the Negotiating Group not to carry the “unforeseen developments” language of Article XIX:1(a) forward into the Safeguards Agreement was consistent with this long-established practice. Based on that practice, there is no reason to conclude that

¹⁰ J. Leddy, “The Escape Clause and Peril Points under the Trade-Agreements Program,” pp. 124-173 in W.B. Kelly (ed.), *Studies in United States Commercial Policy* (1963), at p. 136, attached hereto as US Exhibit 44. Mr. Leddy notes: “One may wonder why, if the phrase is meaningless, it was inserted in the escape clause in the first place. The best explanation seems to be that the administrators of the trade-agreements program who were responsible for originating the clause in 1942 were fearful that omission of the phrase might lead Congress to believe that injury from tariff concessions was anticipated. In short, the words were a form of semantic window dressing.” *Id.* at n.34.

¹¹ See, e.g., Negotiating Group on Safeguards, Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25, at ¶ 4 (27 June 1989).

¹² See, e.g., Negotiating Group on Safeguards, Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25/Rev.1, at ¶ 4 (15 January 1990).

¹³ *Negotiating Group on Safeguards, Communication from Mexico*, MTN.GNG/NG9/W/28, at ¶ 4(a) (23 January 1990) (emphasis in original).

¹⁴ See Negotiating Group on Safeguards, Meeting of 29 and 31 January, 1 and 2 February 1990, Note by the Secretariat, MTN.GNG/NG9/NG9/14, comments on ¶ 4(a) (6 March 1990).

Article XIX should be interpreted in a manner today that would require an “unforeseen developments” finding as a precondition for the imposition of a safeguard measure.

B. COMPLAINANTS FAIL TO CHALLENGE THE FACTS DEMONSTRATING THE EXISTENCE OF UNFORESEEN DEVELOPMENTS

14. The submissions of Australia and New Zealand in response to the Panel’s written questions are striking in the extent to which, both by affirmative statements and by their omissions, they support the United States’ position that the USITC’s report demonstrates the existence of unforeseen developments. As the United States has previously noted, the USITC found that the mix in imported products shifted, particularly in 1997 and interim 1998, from frozen lamb meat to fresh or chilled lamb meat, and to larger cuts. The imported products became more similar to those produced by the US industry and consequently more likely to displace domestic lamb meat in the domestic market and depress US prices. These changes in market conditions were contrary to what prior conditions would have indicated.¹⁵

15. Although New Zealand asserts that “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,”¹⁶ it fails to address the facts cited by the United States as showing that the standard even as New Zealand has articulated it has been met. As the USITC’s analysis demonstrates, the change in the nature of imports allowed them *both* to increase *and* to do so in conditions under which they would have a greater impact on the US industry.

16. For the same reason, Australia is simply wrong in stating that the unforeseen developments alleged here “would apply in any increase in imports.”¹⁷ It is not true that imports increase only when there has been a change in their nature which permits them to supplant domestic production that they previously complemented. The United States agrees, however, with Australia’s observation that the circumstances establishing “unforeseen developments” will differ from case to case.¹⁸ In this case, the uncontested findings of the USITC establish such developments.

17. Australia and New Zealand in fact contest none of the findings that underlie the United States’ analysis. Although New Zealand claims that the extent of fresh or chilled lamb meat from New Zealand in particular did not rise by the end of the period to above the proportion that fresh or chilled imports from New Zealand had reached in 1990, it does not contest that the USITC’s conclusion was correct when one views increased imports *as a whole* (which is the relevant inquiry under Article 2 of the Safeguards Agreement). It also does not contest that between 1995 and 1997 imports of fresh or chilled lamb meat increased by 101 per cent, while imports of frozen lamb meat increased by only 11 per cent during this same period.¹⁹ Nor does it contest that foreign exporters projected that the major portion of their 1999 increase would be in the form of fresh or chilled lamb meat.²⁰

18. Failing to contest the unforeseen developments cited by the United States on the facts, Australia and New Zealand instead argue that the United States cannot rely on the USITC report because it did not reach a separate legal conclusion concerning unforeseen developments.²¹ New Zealand specifically asserts that Article 3.1 of the Safeguards Agreement required the USITC to

¹⁵ See United States First Written Submission at ¶¶ 47 to 60.

¹⁶ New Zealand’s Response to Panel Question 3 at 6.

¹⁷ Australia’s Response to Panel Question 4 at 5.

¹⁸ See Australia’s Response to Panel Question One at 1.

¹⁹ USITC Report at I-31.

²⁰ USITC Report at I-22.

²¹ Australia’s Response to Panel Question Two at 2-3; New Zealand’s Response to Panel Question Two at 5.

include its “findings and reasoned conclusions” of unforeseen developments in its report.²² As the United States has previously noted, this allegation is beyond the scope of this proceeding. In their first written submissions, the complainants raised claims under Article 3.1 only with respect to the US safeguard measure itself, not with respect to the USITC’s treatment of unforeseen developments.

19. Moreover, the Appellate Body made clear that “unforeseen developments” is not a separate condition for the imposition of safeguard measures that must be the subject of distinct legal conclusions. As the panel noted in its second question to Australia and New Zealand, the Appellate Body in *Korea-Dairy*²³ and *Argentina-Footwear*²⁴²⁵ 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.” To the extent there is a requirement to demonstrate the circumstances of ‘unforeseen developments’ as a matter of fact, the USITC report was replete with evidence demonstrating such circumstances. The USITC report recounts in detail the unforeseen changes in market conditions that resulted in increased imports of fresh or chilled lamb meat entering the US market after 1995. The unforeseen developments which led to increased quantities of imported lamb meat, and the change in the conditions under which they were imported, were discussed at length in the USITC report.

20. In response to the Panel’s third written question, Australia claims that “to demonstrate” unforeseen developments (as opposed to “discerning” them) means “to ‘establish by logical reasoning or argument, or by practical proof; prove beyond doubt.’”²⁵ Australia is simply attempting to insert into the Safeguards Agreement a new “burden of proof” that must be met to demonstrate unforeseen developments. The Appellate Body in *Korea-Dairy* and *Argentina Footwear* resolved that unforeseen developments constitute a “circumstance,” not an independent condition based on a new legal requirement that must be read into the Safeguards Agreement. The USITC report demonstrated the existence of circumstances constituting unforeseen developments. No further showing is required.

III. THE DEFINITION OF "DOMESTIC INDUSTRY" USED IN THE USITC'S INVESTIGATION WAS CONSISTENT WITH THE SAFEGUARDS AGREEMENT AND GATT 1994

21. The United States has previously addressed the legal basis for the USITC’s domestic industry finding. It will not repeat those arguments here, as New Zealand’s and Australia’s latest submissions have not raised any new contentions not previously addressed. Suffice it for present purposes to note that the arguments of New Zealand and Australia simply assume the correctness of their result, and that Australia in particular has not established why its current argument, as opposed to the position it took in *Canada -- Manufacturing Beef*²⁶, and the conclusion that its own competent authority reached in a 1998 safeguard investigation in *Pig and Pigmeat*, is correct.

22. Once again, Australia and New Zealand contest little of the factual basis for the United States’ definition of the domestic industry. They do not contest the facts on which the USITC found a continuous line of production from the raw product, live lambs, to the processed product, lamb meat.²⁷ Nor do they contest most of the findings underlying the USITC’s finding of a coincidence of economic interest between lamb growers and processors. They do not contest that the value added by

²² New Zealand’s Response to Panel Question Two at 5.

²³ *Korea-Dairy -- Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, Report of the Appellate Body adopted 14 December 1999, at ¶ 85.

²⁴ *Argentina-Footwear -- Definitive Safeguard Measure on Imports of Footwear*, WT/DS121/AB/R, Report of the Appellate Body adopted 14 December 1999, at ¶ 92.

²⁵ Australia’s Response to Panel Question 3, at 3.

²⁶ *Canada -- Imposition of Countervailing Duties on Imports of Manufacturing Beef From the EEC*, SCM/85, 13 October 1987, at ¶ 4.1 (Manufacturing Beef).

²⁷ USITC Report at I-13.

growers and feeders accounts for about 88 per cent of the wholesale cost of lamb meat or that packers and breakers are largely finishers.

23. Although Australia contests any implication by the United States that there is a high degree of vertical integration throughout the four industry segments constituting the industry²⁸, neither Australia nor New Zealand alleges there is no integration. The USITC found that "some lamb meat operations are vertically integrated, which also supports a finding of a coincidence of economic interests between different industry segments."²⁹ It is not in dispute that some growers both feed and slaughter lambs.³⁰ A major lamb packer is also an owner of a major feeder and a major breaker operation.³¹

24. Complainants' chief objection is that this one packer opposed the petition. That fact, however, in no way detracts from the objectivity of the USITC's findings. The chief executive officer of that firm, Transhumance Holding Company, testified before the USITC that:

Transhumance is the largest US packer, slaughtering and processing lamb, the largest marketer of US lamb, one of the largest US lamb feeders, and an importer of chilled lamb from Australia. Last year, [one Transhumance subsidiary] slaughtered and distributed the meat from more than 900,000 US lambs, thereby bringing to market approximately 30 per cent of the domestic industry's production.³²

25. In short, Transhumance's own operations represent an extensive degree of vertical integration. The fact that it opposed the petition (having interests in Australian imports), as the USITC noted³³, does not change the objectively observable facts.

26. As the USITC also noted, no representatives of any of the four industry segments (including Transhumance) testified that the economic interests of packers and breakers diverged from those of growers and feeders. To the contrary, the testimony before the USITC was unanimous. The USITC quoted testimony of a rancher to the effect that "lower import prices forced processors to reduce prices for the carcasses they bought from packers, who in turn had to reduce the prices they paid to feedlots for live lambs."³⁴ The USITC cited similar testimony from witnesses at other stages in the production process.

27. As counsel for petitioner stated at the injury hearing during the investigation,

What is helpful, from my perspective, is that all the data reinforce one another; that no matter where in the chain you look, you will find injury or serious injury. The only question is at what time you look. . . . So, frankly, I think it -- Your -- analysis has to be almost temporal, as opposed to focusing on -- particular segments. If you focus on

²⁸ Australia's Responses to Panel Question Five, at 6.

²⁹ USITC Report at I-13.

³⁰ USITC Report at II-12.

³¹ USITC Report at I-14.

³² USITC Transcript of Injury Hearing at 258-259, attached hereto as US Exhibit 45.

³³ USITC Report at I-14.

³⁴ USITC Report at I-14, n.50. *See also* similar testimony of Joseph Casper, Vice President, Chicago Lamb & Veal Co., a breaker, transcript of injury hearing at 22, US Exhibit 35; testimony of Harold Harper, owner of a feedlot operation, transcript of injury hearing at 30, US Exhibit 36 ("Here is how it happened. In the fall of '97, I bought lambs for approximately \$1 a pound. However, when I went to sell the lambs in the winter of '97 and '98, I could only get 40 and 60 cents a pound. Why? Because the packer that I had traditionally supplied with lambs was forced to reduce his prices to me because his customer, the processor, had to lower his prices substantially to compete with imports. The impact of the incredibly low prices offered by importers was felt throughout the distribution chain as each sector was compelled to demand price breaks from their suppliers to try to remain competitive.")

the period from the fall of '97 to the present and you understand the chain . . . that's the overlay you need to do the analysis.³⁵

28. As the United States reflected in its responses to the Panel's questions, in the 1997-98 period, operating results for all industry segments fell as imports surged. As will be discussed further below, Australia and New Zealand seek, without legal basis, to disregard the facts pertinent to this surge period.

29. Indeed, the Australian authority appears to take substantially the same approach as the USITC in deciding whether to include growers in the industry producing the processed product, and in fact included growers in the industry producing the processed product in a 1998 investigation. In that investigation, the Australian authority (the Productivity Commission) found that the domestic processed product was like or directly competitive with the imported processed product, and then concluded that the domestic industry included pig producers as well as primary processors of pigmeat.³⁶

30. Finally, the United States notes that Australia, in its response to the fifth written question from the Panel, erroneously states 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."³⁷ Based on USITC questionnaire responses received from 70 growers and grower/feeders, approximately 20 per cent indicated they were both growers and feeders. In its response to the same question, Australia also incorrectly infers that certain packer/breaker activities of growers and feeders were not part of the USITC's questionnaire survey. In fact, growers and/or feeders who were also packers and/or breakers did respond to the USITC's questionnaires.³⁸

IV. THE USITC DEMONSTRATED THAT THE DOMESTIC INDUSTRY FACED A "THREAT OF SERIOUS INJURY" DUE TO "INCREASED IMPORTS"

A. COMPLAINANTS' ARGUMENTS TO THE CONTRARY IGNORE THE REQUIREMENT TO EXAMINE THE MOST RECENT TRENDS AND ARE BASED ON ALTERNATIVE THEORIES NEITHER REQUIRED BY THE SAFEGUARDS AGREEMENT NOR SUPPORTED BY THE EVIDENCE OF RECORD

31. Australia's and New Zealand's arguments about the USITC's threat of injury determination disregard the standard of review applicable in this proceeding and the substantive requirements of the Safeguards Agreement. Much of their argumentation is devoted to developing an alternative view of the evidence. As will be shown, that alternative view would bypass the analysis required by the Safeguards Agreement and posits the existence of facts for which there is no evidence. Even if complainants' views of the facts were potentially correct, the fact that another finder of fact might reach a different conclusion does not establish that a country's competent authority violated the Safeguards Agreement.

32. In particular, Australia and New Zealand continue to ignore the impact that the surge in lamb meat imports had on the US lamb meat industry in 1997 and interim 1998 and projections for an acceleration of that surge in 1999. Both complainants continue to urge the Panel to find that the USITC should have relied on trends all the way back to 1993.^{39,40} Neither complainant, however,

³⁵ USITC Transcript of Injury Hearing at 130-131, attached hereto as US Exhibit 45.

³⁶ Productivity Commission, *Pig and Pigmeat Industries: Safeguard Action Against Imports*, Rept. No. 3 (11 November 1998), at xxi, attached hereto as US Exhibit 46.

³⁷ Australia's Response to Panel Question 5 at 6.

³⁸ USITC Report at II-12.

³⁹ Indeed, New Zealand in its response to Question 8 bases part of its reasoning on events that allegedly occurred in the US lamb meat market between the mid-1970's and 1993, a period that is totally outside the

explains how such reliance is consistent with the finding by the Appellate Body in *Argentina – Footwear* that the increased imports of relevance under the Safeguards Agreement must be recent and that reliance on trends over an extended period may be improper. Moreover, these arguments disregard the fact that the USITC's determination concerned the *threat* of serious injury in the imminent future. The most recent trends are clearly most relevant to that inquiry, even if complainants were correct that such trends could be disregarded for serious injury determinations.

33. While the USITC examined conditions over the whole period that it investigated, its findings concerning the earlier part of the period provided background for its examination of the changes of conditions in the most recent period, changes that complainants' long-term analyses disregard. For example, evaluating contentions that the industry's difficulties were caused by a long-term decline in demand, the USITC found US lamb meat consumption was stable in 1997 and interim 1998.⁴¹ It also found growers had largely absorbed the effects of the termination of Wool Act payments, showing signs of recovery by 1996, and that the termination of such payments would have diminishing effects in the imminent future. Failing to address these findings, the complainants fall into self-contradictory contentions. As the Panel suggests in its Question 8, the arguments made by New Zealand and Australia to the effect that a decline in domestic demand for lamb meat caused domestic production to fall contradict their argument that domestic producers were unable to meet strong domestic demand and this caused imports to increase.

34. Moreover, their second argument, that imports did not displace domestic lamb meat, contradicts admissions made by Australia that imports displaced one-third of the decline in US production. The fact that US lamb meat prices fell sharply in 1997 and prices continued to be depressed in interim 1998, while imports surged, is further evidence of such displacement. While New Zealand and Australia acknowledge that lamb meat prices in the US market fell in 1997 at the same time that the surge in imports occurred, they never attempt to provide a credible explanation of why lamb meat prices in the US market fell sharply in 1997 and remained depressed in interim 1998. Their only explanation is that prices were higher previously and that the decline might be the result of a lamb cycle. The USITC, however, found no evidence of such a cycle and noted that no party argued that it existed.⁴² Complainants do not point to any evidence contradicting the USITC's finding; they simply invent an alternative theory out of whole cloth.

35. Similarly unfounded on any evidence is the new claim that Australia now advances in its response to the Panel's Question 8. Australia alleges that US lamb production has declined because the grower segment is "inefficient with high costs, low returns and consequently low investment relative to other US agriculture production systems", and that as a result US lamb production resources shifted to other uses, "especially beef production." Australia did not raise these claims in either its first written submission or its first oral statement, nor has Australia cited in its response to question 8 any support in the USITC's record for such claims. In fact, Australia's new theory that lamb production shifted to other uses is contrary to evidence in the USITC's report, which indicates that sheep and lambs are the only suitable agricultural crop in many areas of the West, where production is concentrated.⁴³ Accordingly, the Panel should disregard these new claims.

period of the USITC's investigation and beyond the three-year period that New Zealand says that its authority examines.

⁴⁰ Australia's position here is contrary to actual practice in Australia, where the competent authority, in its only safeguard investigation conducted since the Uruguay Round Agreements entered into force, made an affirmative determination of *present* serious injury based principally on developments over the most recent 12 months. The authority based its determination, made in November 1998, on a decline in prices since October 1997 and a decline in the condition of the domestic industry during the first half of 1998. Productivity Commission, *Pig and Pigmeat Industries: Safeguard Action Against Imports*, Inquiry Report No. 3 (11 November 1998) at xxiii, attached hereto as US Exhibit 46.

⁴¹ USITC Report at I-22.

⁴² USITC Report at I-14.

⁴³ USITC Report at II-11.

36. New Zealand likewise raises a new and untimely claim in its response to Question 11 that the decline in capacity utilization in the packing segment of the industry “must have been solely due to the expansion of capacity.” New Zealand states that this was “probably” occurring in the largest firms as they sought to increase their market share. In fact, however, the USITC found that packer capacity fell over the period of investigation.⁴⁴ Thus, the fact that capacity utilization in interim 1998 reached its lowest level in the period of investigation cannot have been the result of capacity increase. New Zealand offers no evidence in support of its claim: its claim is based on sheer speculation.

37. Australia paints a similarly bold picture that ignores all details when, in its response to Question 9, it makes the sweeping assertion that “any” decline in the apparent profitability of domestic lamb growers was “entirely” due to the termination of the Wool Act payments. Australia makes this allegation without reference to any particular year or years or supporting data. Australia’s argument simply disregards the USITC’s findings examining the changes over time in the effects of the termination of Wool Act payments. In particular, Australia does not address the USITC’s finding that the termination of the Wool Act payments would have decreasing effects in the imminent future and consequently could not explain likely imminent deterioration in the industry’s position. Its arguments are therefore irrelevant as challenges to the competent authority’s threat determination.

38. New Zealand’s argument in response to Panel Question 8 that the end of Wool Act payments caused a shortfall in domestic supply which in turn stimulated an increase in imports both fails to address the basis for the USITC’s threat of injury findings and contradicts the testimony of New Zealand producers before the USITC. A representative of those producers clearly disavowed at the USITC injury hearing any connection between the phase-out of Wool Act payments and the increase in imports in 1997-98. Mr. Malashevich, an economic consultant representing Meat New Zealand, stated:

We, too, believe that the phase-out of Wool Act subsidies over the 1993-96 period very clearly was a cause of arguably serious injury to the industry at that time. But significantly, any such injury caused by the phase-out occurred before the increase in imports about which Petitioners are now complaining. There is a disconnect in time between the increase in imports complained of and when the damage occurred to the industry.⁴⁵

39. Thus, New Zealand now presents as if it were a fact a causal connection that its industry’s experts specifically rejected before the USITC.

40. Moreover, New Zealand’s current argument does not take into account the specific facts about pricing and projected import volumes on which the USITC threat determination relied. As the USITC found, prices fell in the course of 1997 as imports rose.⁴⁶ New Zealand does not explain how this would have occurred if the increased supply were simply filling a shortage in the marketplace.

41. Indeed, despite the fact that prices by interim 1998 were lower than in comparable quarters in 1996 and the first half of 1997, the USITC found that Australian and New Zealand firms projected that their exports to the United States in 1999 would be 21 per cent above their projections for 1998.⁴⁷ Thus, the facts cited by the USITC do not support the conclusion that in the imminent future, imports would be drawn into the United States market by rising prices due to shortages. Rather, New Zealand and Australian firms expected their imports to the United States to rise at an accelerating rate despite a fall in United States prices.

⁴⁴ USITC Report at I-20.

⁴⁵ USITC Transcript of Injury Hearing at 217, attached hereto as US Exhibit 45.

⁴⁶ USITC Report at I-24.

⁴⁷ USITC Report at I-23.

42. To the extent that complainants attempt to address the 1997-98 period, their arguments are misleading. Indeed, New Zealand's attempt in response to Panel Question 11 to minimize the extent of increased imports in 1997-98 confirms the USITC's findings about import trends. New Zealand observes that the share of the domestic market captured by imports rose from 11.2 per cent in 1993 to 23.3 per cent in interim 1998. New Zealand then observes that 45 per cent of that increase occurred during 1993-1996, and 55 per cent in 1997 and interim 1998. The 5.4 per cent increase over the three years 1993-96 represents a 1.15 per cent per year growth in import penetration. In contrast, the 6.5 per cent increase over the following year and three-quarters represents almost a 4 per cent per year growth in import market share.

43. As New Zealand's own figures demonstrate, imports took market share during the 1997-98 period at more than three times the rate that they had done previously. In fact, since this accelerating rate of increase is from a larger and larger and larger base, the market share increase reflects that imports were increasing in ever greater quantitative terms as well. Thus, insofar as New Zealand uses its calculations to attempt to show that the USITC should not have concentrated on 1997-98 as reflecting a surge in imports, the figures that it introduces demonstrate the reasonableness of the USITC's conclusions.⁴⁸ Moreover, as is reflected in the Annex that New Zealand introduced in the Panel's first oral session, New Zealand ignores the change in conditions that led increased imports later in the investigative period to have greater impacts on the US industry than imports early in the period.

44. In summary, complainants continue to fail to address the basis for the USITC's threat determination. To the extent that they proffer alternative explanations, those explanations are not based on evidence, are based on theories repudiated by representatives of their own industry, and in any event do not detract from the USITC's findings.

B. NEW ZEALAND'S EXHIBIT NZ13 IS INADMISSIBLE AS AN ATTEMPT TO HAVE THIS PANEL ENGAGE IN *DE NOVO* REVIEW AND DEMONSTRATES NEW ZEALAND'S FAILURE TO ADDRESS THE USITC'S FINDINGS CONCERNING THE CHANGE IN THE IMPACT OF IMPORTS

45. Like complainants' other arguments, New Zealand's Exhibit NZ13, the Annex to its First Oral Statement, fails as a challenge to the USITC's threat of injury determination because it ignores the findings supporting that determination. In particular, it fails to take into account the change in the mix of imported product that the USITC found led imports to take greater market share from the US industry and depress prices for the US product. Before addressing that exhibit's analysis on the merits, however, the United States renews and expands its objections to the acceptance of NZ13 as evidence in this proceeding.

1. The factual conclusions drawn by Exhibit NZ13 are inadmissible before this Panel

46. As the United States argued at the first oral session when New Zealand sought to introduce NZ13, the Panel may not properly entertain the factual analysis which that exhibit purports to present. Since the exhibit was never submitted to the USITC, accepting it in this proceeding would be prejudicial and contrary to the applicable standard of review.

47. As the Appellate Body recently confirmed, in examining a serious injury determination, a Panel must address three questions: (1) whether the competent authority considered all relevant facts,

⁴⁸ If New Zealand intends by this discussion to suggest that the USITC erred in finding the 1997-98 surge to reflect "increased imports" within the meaning of Article 2 of the Safeguards Agreement, the United States objects to the introduction of such an issue, which was not identified in New Zealand's Panel Request nor in its First Written Submission.

including each factor listed in Article 4.2(a); (2) whether its published report contains an adequate explanation of how the facts support the determination made; and (3) whether the determination made is consistent with the Safeguards Agreement. A panel should not conduct a *de novo* review, and it is accordingly inappropriate for a panel to attempt to conduct its own assessment of the raw data reviewed by the competent authority during its investigation.

48. The *Korea-Dairy* panel, whose application of the standard of review the Appellate Body endorsed, articulated (at ¶ 7.30) the consequences of the fact that review in the WTO is not *de novo* for arguments based on evidence not before the competent authority. As that panel stated, “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 has collected.” In short, the question before the Panel is the adequacy of the ITC’s determination as it was made at the time, and the Panel’s review is limited to the record that the ITC gathered in its investigation. New Zealand’s presentation of new economic analysis based on information from outside the USITC’s record is a clear and deliberate violation of that principle.

49. These decisions are in keeping with Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”), which states that 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” The “facts” that are the subject of a WTO panel proceeding are different from the “facts” that are the subject of a competent authority’s investigation under the Safeguards Agreement. A competent authority determines whether a domestic industry has been seriously injured by increased imports. A panel resolves a dispute between Members about whether, in doing so, the competent authority violated the Safeguards Agreement. The “facts” examined by the competent authority concern the economic condition of the domestic industry. The “facts” to be examined by a panel concern whether the Member’s actions complied with the Safeguards Agreement. Since, under the Safeguards Agreement, injury determinations are made by competent authorities, the facts before the Panel concern what the competent authority did and the findings it made.

50. Under these principles, NZ13 and the arguments based on it are inadmissible and inapposite for a number of reasons. New Zealand seeks to present to this Panel analysis based on evidence that it concedes was not before the USITC. For example, New Zealand concedes that certain data used in constructing its analysis for graph 3 in NZ13 was downloaded by New Zealand from the web sites of the US Bureau of Labor Statistics, the US National Agricultural Statistical Service, and the US Department of Agriculture. New Zealand does not indicate when such data were downloaded, or even whether such data were available at the time of the USITC investigation.

51. Even assuming the data were publicly available, it does not excuse New Zealand’s failure to submit the data to the USITC in the first instance. In accordance with Article 3.1, all interested parties (which in the United States included New Zealand and Australia) had the opportunity to present evidence and argument to the USITC. Article 3 makes clear that it is Members’ competent authorities that are authorized to conduct investigations of whether increased imports have caused serious injury. There is nothing in the DSU that suggests that it was intended to operate in derogation of the fact-finding responsibilities reserved by the underlying WTO Agreements to the Members and their competent authorities.

52. Article 3 likewise establishes conditions for these investigations, including notice and public hearings, that guarantee interested parties, including both domestic and foreign commercial interests, the opportunity to present evidence and comment on the other presentations and evidence received by the competent authority. The government-to-government procedures established in the DSU do not create any equivalent process in panels. Governments should not be allowed to bypass the process mandated by the Safeguards Agreement and present evidence for the first time to a Panel that they or their citizens could have presented to the competent authority. If Members know that they can

withhold such information from the scrutiny and evaluation of the interested parties and the competent authority during the investigation and then introduce it for the first time before a WTO panel, then it will be in a party's interest to engage in such strategic gamesmanship.⁴⁹ Countenancing such practices at the WTO will undermine proceedings before competent national authorities.

2. NZ13 fails to take into account the change in product mix that the USITC found changed the nature of the effects of imports

53. New Zealand's arguments based on NZ13 are similar to those that it and Australia have made in response to the Panel's questions in contending that viewing the facts in a different framework would have led the competent authority to a different result. Such argumentation is, however, inadequate to show a violation of the Agreement. New Zealand must show that a failure to use the framework it advocates is a failure under the Agreement to evaluate the relevant factors objectively.

54. The Agreement on its face does not mandate any particular approach to evaluating the relevant factors, enumerated or unenumerated. On its face, the Agreement does not require economic modelling. New Zealand's original argument was that the USITC had in an earlier investigation used an economic model to analyze the lamb industry. The United States pointed out in its first written submission that the earlier modelling was used by the USITC for a different kind of investigation, serving quite different purposes than those required by the Safeguards Agreement. New Zealand has not contested that response and provides no argument about why economic modelling, even if possible, is required.

55. Moreover, the purported economic analysis that New Zealand has obtained from the author of NZ13 is inapposite as a challenge to the USITC's determination because it ignores the findings of fact in the USITC's report. Because it does so, the author's conclusion that, with import prices rising faster than domestic prices after 1993, "it is absolutely untenable to believe that imports could have been the slightest reason of any economic difficulties", is an economic *non sequitur*. The USITC report makes why this is the case perfectly plain. Between 1995 and 1997, the mix of products being imported changed. Imports were dominated early in the period by smaller, frozen cuts that sold at low prices but occupied a niche that had little impact on sales of US products. The increase in imports was dominated by fresh or chilled product, increasingly of larger cuts, that had much more effect on US products. Import prices rose because a greater proportion of imports came as higher value product. Nevertheless, those products now competed with the comparable US product at prices lower than the US product, taking market share and pulling down prices.

56. In economic terms, New Zealand's purported economic analysis assumes, contrary to fact, that the price elasticity of substitution between imports and domestic product did not change from 1993 to 1997. By doing so, the analysis literally begs the question: it assumes the result that it wants to reach. As an argument against the USITC's determination, even if admissible, NZ13 is irrelevant.

57. Indeed, if one takes into account the economic fallacy that underlies NZ13, its admission that "comparing only 1997 and 1998 it might be claimed, as the US does, that the producer prices on the US market between these two years has, to some extent, possibly also been caused by imports", is compelling. The only reason that the exhibit gives for rejecting such a causal link is that import prices in 1998 were above 1993 levels. The findings of fact in the USITC report concerning the change in product mix, however, account for that relationship. Thus, the analysis in NZ13, which does not challenge the finding of fact, admits the existence of a causal link between imports and the threat of injury to the domestic industry.

⁴⁹ These are precisely the types of concerns that the underlay the Appellate Body's recent concerns and findings on a procedural issue in the FSC dispute. See United States – Tax Treatment for "Foreign Sales Corporations", WT/DS108/AB/R, Report of the Appellate Body at ¶ 166 (24 February 2000).

58. Finally, the economic analysis that New Zealand presents proves too much. It concludes that, because world market prices for agricultural products have a well-known tendency to fluctuate, one year of import price decline could not be said to be a threat of serious injury. The Appellate Body has held that, under the Safeguards Agreement, injury findings must be based on recent trends creating an emergency condition. New Zealand's position, taken on face value, would thus make safeguards unavailable generally for agricultural products. The Safeguards Agreement cannot rationally be interpreted to exclude the entire agricultural sector.

59. Indeed, the premise of the last paragraph of NZ13 – that the kind of price fluctuation observed here is normal in international agricultural industries – is inconsistent with New Zealand's other arguments in this case. New Zealand contends that the US industry's problems were due to internal problems in the US market. NZ13's suggestion that 1997-98 US lamb meat prices were consistent with a “well-known tendency” for “world market prices for agricultural products” to fluctuate contradicts its attempt to portray the US market as subject to unique conditions.

60. In this case, the USITC established why the conditions it observed were not simply cyclical and expected conditions in the market for lamb meat. New Zealand's observation, citing the cereal industry, that prices for other agricultural products may decline by more than 12 per cent in a year is an utterly irrelevant response to these findings. To the extent that New Zealand's argument is an attempt to create a legal presumption about level of harm that should be regarded as “non-threatening”, it has no support in the Safeguards Agreement and New Zealand cites none.

61. In short, NZ13 is (1) inadmissible since it is based on extra-record evidence, which is not a proper subject for Panel review under the Safeguards Agreement, (2) irrelevant because it fails to address the USITC's analysis, (3) inapposite because it assumes contrary to Article 4 that only one form of analysis is permissible and contradicts any reasonable interpretation of “threat of serious injury”, and (4) inconsistent with New Zealand's positions in this case. To the extent that NZ13 has any relevance whatsoever, it constitutes an admission by New Zealand supporting the USITC's conclusions about trends in 1997-98.

V. THE USITC'S CAUSATION DETERMINATION WAS CONSISTENT WITH THE SAFEGUARDS AGREEMENT AND THE GATT 1994

62. The parties' dispute concerning what showing of causation is appropriate when there are multiple causes of serious injury is, in the current case, academic. As the United States has demonstrated in its first written submission and answers to the Panel's questions, the USITC's findings establish that no other asserted factor could be regarded as a “factor . . . causing injury to the domestic industry at the same time” within the meaning of Article 4.2(b). As demonstrated above, the additional factors that complainants have asserted in this proceeding are disproved by unchallenged findings of the USITC or based upon an unfounded assumption that only trends over the entire period investigated may be examined. Accordingly, resolution of the dispute between the parties concerning the propriety of the United States' statutory test for causation is unnecessary for the resolution of this matter. Nevertheless, because of the importance of the issues that have been raised, the United States will extend its prior discussion of the causation standard, focusing here on the negotiating history to Article 4 of the Safeguards Agreement.

A. THE NEGOTIATING HISTORY OF THE SAFEGUARDS AGREEMENT DEMONSTRATES THAT THE DRAFTERS DID NOT INTEND TO CREATE A "SOLE CAUSE" OR IMPORT "ISOLATION" REQUIREMENT

63. In response to Question 13 from the Panel, New Zealand has confirmed its view that the Safeguards Agreement requires Members to “isolate” the effects of imports and determine that they

are the “sole” cause of serious injury or threat.⁵⁰ In addition, although it had not done so in its previous submissions, Australia now appears to endorse New Zealand’s position.⁵¹ The United States has discussed in its previous submissions why these arguments are wrong.⁵²

64. The United States’ most recent submission on this topic briefly discussed how the negotiating history of the Safeguards Agreement demonstrates that the drafters of the Safeguards Agreement did not intend to establish a “sole” cause or “isolation” requirement.⁵³ Given New Zealand’s confirmation of its views on this issue, and Australia’s adoption of New Zealand’s position, it is worthwhile to discuss the negotiating history in greater detail. As the United States explains in the following paragraphs, that history is devoid of any indication that the drafters of the Safeguards Agreement sought to impose a radical new causation paradigm of the type the complainants urge.

65. Section II of the Secretariat’s note of 28 April 1988, which the United States cited in its previous submission, memorializes the views of the Chairman of the Negotiating Group on Safeguards expressed at meetings on 7 and 10 March 1988, regarding how the negotiations should progress. On the issue of causation, he stated that:

After the subject matter [of the negotiations] was identified, the Group should then address related questions such as whether imports were to be considered as a cause, a substantial cause or a necessary cause of serious injury or threat thereof.⁵⁴

66. The Chairman plainly recognized that there might be varying views regarding the degree of causation that could be reflected in a revised Article XIX or new agreement on safeguards. Notably, however, the Chairman did not include “sole cause,” or an isolation requirement, among the field of possible choices.

67. Discussion of causation among delegations at the meeting reflected this same approach:

Many delegations said that it should be demonstrated that the cause of serious injury and threat thereof derived from sharp increases in imports, and that a major part of domestic producers were adversely affected. Some delegations said that the causal link between increased imports and the overall decline in the conditions of domestic producers had to be clearly established. One delegation said that if there were a multitude of causes, then it had to be established that increased imports was the principal cause, not just an important or substantive cause.⁵⁵

* * * * *

The Chairman summed up the discussions There seemed to be agreement that there should be a direct, demonstrable causal link of imports to injury, although there were various opinions on whether increase in imports should be an essential, substantial, or important cause.⁵⁶

⁵⁰ New Zealand’s Response to Panel Question 13 at 18.

⁵¹ Australia’s Response to Panel Question 13 at 16-17.

⁵² See United States’ First Written Submission at ¶¶ 112-122; US Responses to Questions from the Panel at ¶¶ 45-59, 71-78.

⁵³ See US Responses to Questions from the Panel at ¶ 52.

⁵⁴ Negotiating Group on Safeguards, Meeting of 7 and 10 March 1988, Note by the Secretariat, MTN.GNG/NG9/5, at ¶ 3 (22 April 1988).

⁵⁵ Negotiating Group on Safeguards, Meeting of 7 and 10 March 1988, Note by the Secretariat, MTN.GNG/NG9/5, at ¶ 14 (22 April 1988).

⁵⁶ *Id.* at ¶ 24.

68. The subsequent course of negotiations shows that the negotiating group declined to adopt any one of these various formulations of the necessary degree of causation and that it never considered establishing a "sole" cause or "isolation" requirement.

69. In a note dated 31 October 1988, the Secretariat provided a synopsis of proposals that delegations had presented to the group.⁵⁷ Proposals on the subject of injury (and causation) were set out in paragraphs 33 through 52 of the note. The United States has reproduced all of the potentially relevant proposals below. None of them evinced an intention to create a "sole cause" or import isolation requirement for serious injury:

34. The determination of serious injury or threat thereof shall depend on the establishment of a direct causal link between increased imports and an overall decline in the condition of domestic producers. In making such a determination, the relevant factors to be taken into account include, *inter alia*, output, sales, export performance, inventories, profits, productivity, return on investment, utilization of capacity, employment and wages. No one or several of these factors can necessarily give decisive guidance. However, serious injury cannot be deemed to exist where factors such as technological changes or changes in consumer preference or similar factors are instrumental in switches to like and/or directly competitive products made by the same domestic producers.⁵⁸

35. Factors such as market share, diversion of trade, technological changes and changes in consumer preferences, overall competitiveness of industry and its ability to generate capital, could also be included in determining injury on a case-by-case basis.⁵⁹

36. ... "Substantial cause" was defined as "a cause which is important and not less than any other cause."⁶⁰

* * * * *

38. It was unrealistic to set quantitative standards or automatic criteria for the determination of injury because not all factors were quantifiable and mathematical formulae could not be applied to all sectors of industry. Instead, economic factors and indices should be considered together with some subjective parameters. It was not possible to determine the order of priority for various factors when determining injury or threat thereof.⁶¹

* * * * *

43. The principal cause of serious injury or threat thereof must be increase in imports, while other economic factors relating to the sectors concerned should be taken into account in a comprehensive manner.⁶²

* * * * *

⁵⁷Negotiating Group on Safeguards, Synopsis of Proposals, Note by the Secretariat, MTN.GNG/NG9/W/21 (31 October 1988).

⁵⁸*Id.* at ¶ 34.

⁵⁹*Id.* at ¶ 35.

⁶⁰*Id.* at ¶ 36.

⁶¹*Id.* at ¶ 38.

⁶²*Id.* at ¶ 43.

46. If there were a multitude of causes, then it had to be established that increased imports was the principal cause, not just an important or substantive cause.⁶³

* * * * *

49. While the causal link between imports and injury is an essential feature of the objective criteria for action, there are limitations to what extent it is possible to objectively quantify the degree of injury attributable to imports and other factors affecting the industry in question. Consequently, there may be arguments in favour of establishing the causal link in individual cases primarily on the basis of sufficient factual information regarding both the development of imports and other factors applied to determine injury to be provided when notifying the introduction of safeguard measures.⁶⁴

70. On 27 June 1989, the Chairman of the Negotiating Group tabled a draft text of a safeguards agreement, based on proposals from the participants in the Negotiating Group.⁶⁵ Paragraph 4 of the text set out the basic conditions for applying a safeguard measure, including that “the competent national authorities of the importing contracting party have established that such increase is causing serious injury” Paragraph 8 of the draft stated that:

In the determination of whether or not serious injury or threat thereof exists, all relevant factors of an objective and quantifiable nature having a bearing on the position of the domestic industry shall be taken into account . . . ; but serious injury or threat thereof not causally linked to increased imports shall not weigh in the process of determination.

71. The reference in the text to the need for serious injury or threat of serious injury to be “causally linked” to increased imports should be read in the light of the Chairman’s earlier view, noted above (at ¶ 67), that the reference to “causal link” was not intended to fix the degree of causation that might be required.

72. A Secretariat note of 24 October 1989 summarized the Negotiating Group’s discussions on the draft text.⁶⁶ Among other things, the note observes that:

Several delegations said that the causal link between the increase in imports and serious injury needed to be more clearly established. Increased imports should be the principal and predominant cause of injury.

73. This summary makes clear that members of the Negotiating Group recognized that the language in the text related to the causal link did not by itself establish a particular degree of causation. Moreover, although some members wished to have the issue of degree of causation addressed, none proposed a “sole cause” or isolation requirement.⁶⁷

⁶³ *Id.* at ¶ 46.

⁶⁴ *Id.* at ¶ 49.

⁶⁵ Negotiating Group on Safeguards, Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25 (27 June 1989).

⁶⁶ Negotiating Group on Safeguards, Meeting of 11, 12 and 14 September 1989, Note by the Secretariat, MTN.GNG/NG9/12 (24 October 1989).

⁶⁷ *Id.* at ¶ 11.

74. On 15 January 1990, the Chairman tabled a revised version of his draft text in response to comments from delegations. The language regarding the causal link included in the revised draft was unchanged from the earlier, June 1989, version.⁶⁸

75. In March 1990, the Negotiating Group examined the revised text, paragraph by paragraph, and the Chairman invited delegations to make proposals for specific drafting suggestions.⁶⁹ The suggestions relating to the causation requirements in paragraphs 4 and 9 (formerly paragraph 8) of the draft text are set out below in their entirety. None of them suggests an intention to impose a sole cause or isolation requirement for imports:

Paragraph 4(b) "the competent national authorities of the importing contracting party have established that such increase is causing or is threatening to cause serious injury to the domestic industry that produces like or directly competitive products."

Suggestions:

- (i) Add "directly" before "causing or is threatening ...".
- (ii) Replace "or" by "and" in "like or directly competitive products".
- (iii) "an independent body has established, through a public domestic investigation and decision which included notice to interested parties, public hearings where importers and other interested parties could present evidence and their views, and a published report of the decision describing the factors considered, criteria applied and rationale used, that such increase is causing or is threatening to cause serious injury to the domestic industry that produces like or directly competitive products."
- (iv) Minimum domestic guidelines will have to be developed.
- (v) The "national authorities" should be an independent body.
- (vi) "the competent national authorities ... that such increase is direct and principal cause of the serious injury and threat thereof to the domestic industry that produces like or directly competitive products."

* * * * *

Paragraph 9 "In the determination of whether or not serious injury or threat thereof exists, all relevant factors of an objective and quantifiable nature having a bearing on the position of the domestic industry shall be taken into account, such as: output, inventories, utilization of capacity, productivity, employment, wages, sales, market share, exports, domestic prices, import and export prices, pace of import increase, return on investment, profits and losses. This list is not exhaustive; neither one of these factors alone, nor even several of them may necessarily be decisive in the process of determination; but serious injury or threat thereof not causally linked to increased imports shall not weigh in the process of determination."

⁶⁸Negotiating Group on Safeguards, Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25/Rev.1 (15 January 1990).

⁶⁹ Negotiating Group on Safeguards, Meeting of 29 and 31 January, 1 and 2 February 1990, Note by the Secretariat, MTN.GNG/NG9/14 (6 March 1990).

Suggestions:

- (i) First sentence remains as it is. First phrase of second sentence remains intact. Next phrase would be replaced by the following idea: "A minimum requirement for a finding of serious injury would be that certain, specified factors (such as lost sales and reduced profits, for discussion purposes) must be demonstrated. These factors would be necessary but not sufficient for injury to be found". Last phrase (on causality) should be clarified as follows: "Factors other than increased imports, in particular the prevailing market conditions in the domestic industry, shall be taken into account in determining whether injury is caused by increased imports".
- (ii) Paragraph 9 bis Consideration could also be given to indicators of the existence of serious injury such as the following: significant idling of productive capacity (including plants closures and significant under-utilization of production capacity); significant unemployment across the domestic industry; a significant number of firms carrying out domestic production operations at a reduced level of profit; and, significant decline in the proportion of the domestic market supplied by domestic products as compared to imports of a like or directly competitive product.
- (iii) Wages, domestic prices, import and export prices should be deleted.
- (iv) Add to the list "overall economic situation and consumption".
- (v) Modification of last phrase starting with "but serious": "The determination of principal cause shall be based on an examination of the effect of imports on one hand and on the other hand, all other relevant factors which, individually or in combination, may be adversely affecting the domestic industry".
- (vi) Replace last phrase starting with "but serious" by: "Furthermore, serious injury or threat thereof cannot be deemed to exist where factors such as technological change or changes in consumer preference or similar factors are instrumental in switches to like and/or directly competitive products made by the same domestic industry".
- (vii) Delete "Market share".
- (viii) Add "competitiveness" to the list of factors.

76. In July 1990, the Chairman tabled another draft text. While the relevant portions of the agreement were slightly restated in this version of the text, there continued to be no indication of an intention to establish a "sole" cause or isolation requirement, and the earlier proposal for imposing the notion of "principal cause" was not incorporated. Article 4 of the revised draft read as follows:

A contracting party may apply a safeguard measure only on the conditions that the importing contracting party has established, pursuant to the provisions set out in paragraphs 4 and 7 below, that a product is being imported into its territory in such increased quantities, actual or relative to domestic production, and under such conditions as to cause or threaten serious injury to the domestic industry that produces like or directly competitive products.

77. Article 9 (renumbered as Article 7) read:

- 7. (a) In the investigation to determine whether or not serious injury or threat thereof to a domestic industry exists under the terms of this Agreement, the competent authorities shall take into account 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.

- (b) No serious injury or threat thereof shall be found to exist unless this investigation demonstrates, on the basis of objective evidence, that there is a causal link between increased imports of the product concerned and such injury or threat.

78. Finally, on 31 October 1990, the Chairman of the Negotiating Group tabled a safeguards text with the statement that, "This text represents the level of agreement that could be reached at this stage."⁷⁰ This version of the text, which was sent forward and included in the Draft Final Act of the Uruguay Round circulated for the Brussels Ministerial Meeting, contained language identical to that found in Articles 2.1 and 4.2(b) of the final Safeguards Agreement:

A contracting party¹ may apply a safeguard measure to a product only if the importing contracting party 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. (a) In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.
- (b) The determination referred to in sub-paragraph 7(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.

79. The last sentence of this text was borrowed from Article 3.4 of the Tokyo Round Dumping Code and provided an elaboration of the "causal link" requirement that precedes it. The second sentence requires Members to ensure that they distinguish between different causes of injury rather than simply making the assumption that increased imports are responsible for all of the injury that the industry has experienced. Stated otherwise, the second sentence instructs Members that they should not jump from the establishment of the "causal link" between increased imports and serious injury to the conclusion that the sole source of the industry's injury is attributable to those imports.

⁷⁰ Negotiating Group on Safeguards, Draft Text of an Agreement, MTN.GNG/NG9/W/25/Rev.3 (31 October 1990).

80. In the course of the negotiations, no delegation suggested the introduction of a “sole cause” or “isolation” requirement. The parties could not agree on various proposals for imposing a specific modifier before “cause”, thus leaving the preexisting differences in approach intact. Therefore, the second sentence of Article 4.2(b) cannot be understood as incorporating a requirement to isolate the effect of imports to determine whether they were the sole cause of serious injury. Rather, an antecedent of the second sentence may be seen in a May 30, 1988, communication from the Nordic countries:

The causal link between imports and injury is reflected in Article XIX:1(a) by the reference to the "effect of the obligations incurred by a contracting party ...". While this causal link is an essential feature of the objective criteria for action, there are limitations to what extent it is possible to objectively quantify the degree of injury attributable to imports and other factors affecting the industry in question. Consequently, there may be arguments in favour of establishing the causal link in individual cases primarily on the basis of sufficient factual information regarding both the development of imports and other factors applied to determine injury to be provided when notifying the introduction of safeguard.⁷¹

81. The communication notes the impracticability of attempting to isolate the extent of injury attributable to particular causes. Instead, the Nordic countries proposed establishing the “causal link” between increased imports and injury by developing information on the range of factors that may be contributing to the overall injury the industry has experienced.

82. It is important to note that the safeguards regimes of other WTO Members – including Australia – reflect the US view that the Safeguards Agreement does not contain a “sole cause” requirement. For example, the Canadian global safeguards legislation requires that increased imports be “a principal cause” of serious injury or threat of serious injury.⁷² The definition of “principal cause” in the Canadian law is “an important cause that is no less important than any other cause of the serious injury or threat.”⁷³ This definition is virtually identical to the US definition of “substantial cause,” which is “a cause which is important and not less than any other cause.”⁷⁴

83. Similarly, under Article 70 of the regulations pertaining to the Mexican safeguards regime, safeguards may be applied only if imports constitute a “substantial” cause of serious injury or threat, not a “sole” cause.⁷⁵

84. Perhaps most instructive for purposes of this dispute is the causation analysis used by the Australian competent authority in a post-Uruguay Round safeguards investigation. In its November 1998 decision in *Pig and Pigmeat Industries: Safeguard Action Against Imports*, the Australian authority concluded as follows:

The [Productivity] Commission considers that increased imports from Canada since mid-1996 have caused serious injury to the industry as defined above. Moreover, the Commission considers that increased imports were the *primary cause* of low pig prices and negative rates of return (lower than could be expected given rebuilding of domestic production over 1997-98) in 1998, which, in turn, caused a significant

⁷¹ Negotiating Group on Safeguards, Communication by the Nordic Countries, MTN.GNG/NG9/W/16, at ¶ 10 (30 May 1988).

⁷² Canadian International Trade Tribunal Act, Sec. 20 (1994), attached hereto as US Exhibit 47.

⁷³ *Id.*, Sec. 19.01(1).

⁷⁴ 19 U.S.C. 2252(b)(1)(B), attached hereto as US Exhibit 48.

⁷⁵ Committee on Safeguards, Replies to Questions Posed by the United States Concerning the Notification of Laws and Regulations of Mexico Under Article 12.6 of the Agreement, G/SW/131, at 3, question 7 (circulated 27 February 1996).

overall impairment in the position of the domestic industry. There does not appear to be any other factor capable of explaining the large fall in demand for local pigmeat and consequent prolonged and pronounced fall in pigmeat prices which has occurred since October 1997.⁷⁶

This approach is strikingly similar to that of the USITC in its lamb meat investigation.

85. The United States, Canada, Mexico, and Australia were all active participants in the negotiation of the Safeguards Agreement. The fact that none of these countries adopted a “sole cause” or “isolation” causation standard after the conclusion of the Safeguards Agreement suggests that they did not understand the Agreement to impose such a standard.

86. In sum, the negotiating history shows that the framers of the Safeguards Agreement declined to establish a requirement regarding whether increased imports should be a “substantial” cause of injury, an “important” cause, a “necessary” cause, a “principal” cause, and so forth. Moreover, no proposal was advanced during the negotiations requiring increased imports to be the “sole cause” of serious injury, or imposing an “isolation” requirement. Ultimately, the Negotiating Group chose not to address the issue of degree of causation. Instead, the negotiators established an evidentiary framework for establishing injury and causation, listing the factors to be considered and requiring competent authorities to develop and report on objective evidence establishing the causal relationship between increased imports and serious injury or threat. This approach is consistent with the longstanding US statutory causation standard, “substantial cause.”

B. NEW ZEALAND PRESENTS NO COLOURABLE ARGUMENT WHY AN AUTHORITY MUST “ISOLATE” THE EFFECTS OF IMPORTS AND DETERMINE THAT THEY ALONE ARE THE CAUSE OF SERIOUS INJURY

87. The United States has discussed in Section IV.B of this submission why New Zealand’s exhibit NZ13 is inadmissible, and therefore not relevant to this proceeding. It is worth noting, however, that the analysis contained therein contradicts New Zealand’s position on the appropriate standard for causation under the Safeguards Agreement. The author of NZ13 admits therein that, in real world markets, it may not always be easy to distinguish between import growth and domestic supply considerations as causes of injury. Indeed, the author admits that developments in the real world can be a combination of both sets of factors. Although he asserts that a price analysis such as the one he proposes “can help” to identify which may have prevailed, he does not contend that it can help identify more than which was “the primary factor” or that it can do so reliably.⁷⁷

88. Thus, the most that the author of NZ13 claims is that economic analysis of the kind it advocates can help discern which of two purported causes of injury is primary.⁷⁸ Yet New Zealand claims that such an analysis would be legally inadequate, because it considers that the effects of increased imports must be “isolated” from other factors causing injury. The views of the author in NZ13 support the scepticism of the GATT panel in *United States -- Atlantic Salmon*, noted in the United States’ answers to the Panel’s questions, that an “isolation” analysis is practicable.

89. Accordingly, although New Zealand contends that the effects of increased imports must be “isolated” and, when viewed in isolation, found sufficient to cause serious injury, it has not alleged that there is a method for doing so in many cases (or that such a method, if available, is required by the Safeguards Agreement). New Zealand has failed to provide analysis of the ordinary meaning of the terms of the Agreement on which it relies for its insistence on an isolation analysis or the legal

⁷⁶ Productivity Commission, *Pig and Pigmeat Industries: Safeguard Action Against Imports*, Inquiry Report No. 3, at section 4.6 (11 November 1998) (emphasis added), attached hereto as US Exhibit 46.

⁷⁷ NZ13 at § 3.1.

⁷⁸ The author of NZ13 does not attempt to extend his analysis to multiple causes.

precedent applicable to the interpretation of the relevant provisions. In short, New Zealand has provided no basis for holding that the United States' interpretation of its obligations under Article 4.2 is incorrect.

C. AUSTRALIA PRESENTS NO COLOURABLE ARGUMENT WHY AN AUTHORITY MUST OBTAIN A "PROSPECTIVE ANALYSIS" OF EFFECTS OF IMPORTS IN ORDER TO REACH A THREAT DETERMINATION

90. Although it has contended that the USITC's determination is flawed for failure to rely on a "prospective analysis", Australia fails to respond to Panel Question 7 regarding how a prospective analysis might be conducted and which factors, if any, would be more important to a finding of threat. Instead, Australia merely asserts that the USITC effort was insufficient. Australia ignores the extensive evaluation in the USITC report with respect to the required factors and the evidence with respect to each of those factors, the evidence about projected further increases in imports made by Australian and New Zealand firms, and the effect that such increases are likely to have on US lamb meat prices and production.⁷⁹

91. Australia does not answer the question of which factors might be more important. Instead, it asserts that a safeguard measure should not be applied "[i]f 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." Australia does not state what prospective facts would be relevant to such an evaluation, or indicate a basis in the Safeguards Agreement for concluding that "firms in the domestic industry" have an obligation to come forward with such facts. Nor does Australia indicate how an authority might rely on such "prospective facts" supplied by firms in the industry without basing its determination "on allegation, conjecture or remote possibility" in violation of Article 4.1(b) of the Agreement.

92. Indeed, New Zealand's description of its steps in analyzing the evidence in making threat determinations contradicts Australia's position and supports the US position. At page 11 of its response to the Panel's questions, New Zealand states that its competent authorities:

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.

93. Thus, New Zealand, like the United States, relies primarily on demonstrable trends based on the evidence to extrapolate what will be done in the future. Both countries, then, take an approach contrary to the one that Australia claims is required.

VI. THE US SAFEGUARD MEASURE COMPLIES WITH US OBLIGATIONS UNDER ARTICLE 5.1 OF THE SAFEGUARDS AGREEMENT AND ARTICLE XIX OF THE GATT 1994

94. The United States has discussed (in its first written submission and its first appearance before the Panel) why New Zealand and Australia have failed to meet their burden of establishing a *prima facie* case that the US safeguard measure is inconsistent with Article 5.1 of the Safeguards Agreement.⁸⁰ Nothing in the complainants' responses to the Panel's questions regarding the US measure change the fact that their burden remains unmet.

⁷⁹ USITC Report at I-23-26.

⁸⁰ See United States' First Written Submission at ¶¶ 172-209 (15 May 2000); United States' Opening Statement to the Panel at ¶ 30 (25 May 2000).

A. BURDEN OF PROOF

95. In response to the Panel's Question 15, New Zealand concedes the burden is on Australia and New Zealand to demonstrate that the US safeguard measure is not being applied consistently with Article 5.1.⁸¹ Australia, on the other hand, argues that the burden of proof "depends on the obligation" and that, in this case, the United States has the burden of proving that its safeguard measure complies with Article 5.1.⁸² Australia's argument is similar to the conclusion of the Panel in *Hormones* that the *SPS Agreement* allocated the "evidentiary burden" to the Member imposing an SPS measure. The Appellate Body rejected this conclusion on the grounds that:

[i]t does not appear to us that there is any necessary (i.e. logical) or other connection between the undertaking of Members to ensure, for example, that SPS measures are "applied only to the extent necessary to protect human, animal or plant life or health . . .", and the allocation of burden of proof in a dispute settlement proceeding. Article 5.8 [of the SPS Agreement] does not purport to address burden of proof problems; it does not deal with a dispute settlement situation...⁸³

96. Like Article 5.8 of the SPS Agreement, Article 5.1 of the Safeguards Agreement "does not purport to address burden of proof problems; it does not deal with a dispute settlement situation." Therefore, the United States submits that the Appellate Body's ruling with respect to Article 5.8 of the SPS Agreement is equally valid with respect to Article 5.1 of the Safeguards Agreement. As the Appellate Body stated in *Wool Shirts* (at 19), "a party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim."

97. In the view of the United States, New Zealand and Australia have not begun to meet their burden of proof on this issue. Their claim that the US safeguard measure is inconsistent with Article 5.1 rests almost exclusively on the claim that the United States was precluded from applying any import relief that, in the complainants' view, is more trade restrictive than that the USITC plurality recommended. Thus far, the complainants have pointed to no provision of the Safeguards Agreement that requires a Member to apply import relief at the level recommended by the Member's competent authority, or demonstrated why the relief that the plurality recommended was adequate.⁸⁴

B. "NECESSARY" DOES NOT MEAN "LEAST TRADE RESTRICTIVE"

98. Both New Zealand and Australia are incorrect in reading into Article 5.1 of the Safeguards Agreement a "least trade restrictive" requirement as a matter of law. They appear to base their interpretation on the use of the word "necessary" in Article 5.1. As the United States has noted previously, in Article 5.1 the term "necessary" refers to the application of a measure, not the initial choice of the measure. Furthermore, there is no basis in the text of Article 5.1 to substitute "least trade restrictive" for the term "necessary," nor do the complainants offer any textual basis to support their interpretation.

99. The Appellate Body has made it clear on numerous occasions that the rights and obligations of WTO Members are to be found in the actual text of the WTO Agreement and not in layers of "interpretation" that are "read into" that text. As they have stated:

⁸¹ New Zealand's Response to Panel Question Fifteen at 19.

⁸² Australia's Response to Panel Question Fifteen at 18.

⁸³ *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body, 16 January 1998, at ¶ 102.

⁸⁴ New Zealand's claim that the United States violated Article 12.2 of the Safeguards Agreement is simply an attempt to make the United States "justify" its safeguard measure. The United States explained in its first written submission (at ¶¶ 269-78) that Article 12.2 imposes no such requirement.

“The legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation *neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended*.⁸⁵

100. Yet complainants ask the Panel to do precisely what the Appellate Body has cautioned against. They ask the Panel to impute into Article 5.1 words that simply are not there (“least trade restrictive”) and to import into the Safeguards Agreement concepts from other WTO texts (in particular, as noted below, the *Agreement on the Application of Sanitary and Phytosanitary Measures* and *Agreement on Technical Barriers to Trade*) that do not appear in the Safeguards Agreement and were not intended to be there.

101. In addition, the interpretation of treaty text is to begin with the ordinary meaning of the terms used, in their context and in light of the text’s object and purpose. If the ordinary meaning of the term “necessary” was “least trade restrictive” then it would appear redundant that the drafters of both the *Agreement on the Application of Sanitary and Phytosanitary Measures* (“SPS Agreement”) and the *Agreement on Technical Barriers to Trade* (“TBT Agreement”) included both the term “necessary” and a separate obligation that measures not be “more trade restrictive than” required or necessary⁸⁶ Accordingly, interpreting “necessary” as meaning “least trade restrictive” would not only be contrary to the ordinary meaning of “necessary”, it would also be contrary to the principle of interpretation known as the principle of treaty effectiveness whereby an interpreter is not to assume that terms in a text are purely redundant and have no meaning. The SPS and TBT Agreements also demonstrate that where WTO drafters intended to impose a “least trade restrictive” obligation, they did so explicitly. The absence of these terms in the Safeguards Agreement is significant and should not be ignored by the interpreter.

C. NEW ZEALAND AND AUSTRALIA HAVE FAILED TO ESTABLISH A *PRIMA FACIE* CASE

1. New Zealand’s arguments are based on a false premise

102. In response to a question from the Panel about how a Member could ever identify the single “least trade restrictive” safeguard measure⁸⁷, New Zealand now allows that there may be several measures in any given case that achieve the objectives set out in Article 5.1 and that “more than one” of these measures may be equally least trade restrictive.⁸⁸

103. As an initial matter, New Zealand’s claim that there may be more than one “equally least trade restrictive” safeguard measure is a *non sequitur*. The term “least” connotes an absolute: the *New*

⁸⁵India - Patent Protection for Pharmaceutical and Agricultural Chemical Products (AB-1997-5)(WT/DS50/AB/R), para. 45 (emphasis added).

⁸⁶For the SPS Agreement, compare Article 2.2 which contains language similar to Article 5.1 SA (“ensure that any sanitary or phytosanitary measure is applied only to the extent necessary...”) and Article 5.6 (“shall ensure that measures are not more trade-restrictive than required...”). For the TBT Agreement, compare Article 2.2’s prohibition on technical regulations being “unnecessary” obstacles to trade with its additional requirement that technical regulations “not be more trade-restrictive than necessary.”

⁸⁷See Question 16 by the Panel to New Zealand and Australia.

⁸⁸Notably, Australia disagrees with New Zealand’s claim that a Member is required to identify the least trade restrictive safeguard measure, noting that a Member “could not” make such a determination. See Australia’s Response to Panel Question Sixteen at 19.

Shorter Oxford English Dictionary defines the term as “Smallest; less than any other in size or degree; colloq. fewest”. It is not clear how several different measures could be “least” trade restrictive.

104. More importantly, New Zealand’s view that there may be several “least trade restrictive” potential safeguard measures is based on a false assumption. New Zealand assumes that Members can identify from among the potentially huge range of permutations and combinations of potential safeguard measures those that are at once:

- (1) trade-restrictive enough to meet the objectives of Article 5.1;
- (2) precisely equivalent in trade restrictiveness to other such measures; and
- (3) less restrictive than the entire remaining field of potential measures.

105. New Zealand assumes that Members can identify from among all potential safeguard measures those that perfectly straddle the line between excess trade restrictiveness and ineffectuality. That degree of scientific perfection is simply unachievable. That is because identifying an appropriate safeguard measure is an inherently uncertain enterprise. It requires Members to make forecasts of future market conditions and to predict firm behaviour in response to a measure that has yet to be imposed.

106. The Committee that reviewed the US measure in the *Hatters’ Fur* case recognized this point:

the Working Party considered that it is impossible to determine in advance with any degree of precision the level of import duty necessary to enable the United States industry to compete with overseas suppliers in the current competitive conditions of the United States market, and that it would be desirable that the position be reviewed by the United States from time to time in the light of experience of the actual effect of the higher import duties . . .⁸⁹

107. Not surprisingly, New Zealand provides no standards by which a Member could ferret out the least trade restrictive safeguard measure(s). In this proceeding, New Zealand has not identified the least trade restrictive measure(s) available to the United States but instead has condemned the US safeguard measure simply by comparing it to the USITC plurality recommendation. But New Zealand has never demonstrated why the USITC plurality recommendation (assuming, without agreeing with New Zealand, that it is less trade restrictive)⁹⁰ would have been both: (1) sufficient to

⁸⁹ Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade, GATT/CP/106, report adopted on 22 October 1951, ¶ 35.

⁹⁰ New Zealand argues that the US measure is more trade restrictive than the plurality’s proposed remedy despite the fact that the former is one year shorter in duration than the latter. New Zealand argues that the difference in duration is irrelevant since the United States is free under US law and the Safeguards Agreement to extend the measure by an additional year. As a preliminary matter, it should be noted that the President is also authorized under US law, and the Agreement, to shorten the duration of the measure. So it is possible that the US measure may ultimately prove even less restrictive than it is at the present. Both eventualities – lengthening and shortening the measure – depend on speculation about future events. If review of safeguards measures is to be meaningful, they must be judged in terms of the measure as imposed.

Furthermore, New Zealand is wrong in suggesting that the United States can simply “extend” the duration of the US measure. Under Article 7.2 of the Safeguards Agreement, a Member cannot extend a measure unless its competent authorities determine through a new investigation that the measure “continues to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting.” Similarly, before the President may extend a safeguard measure under US law, the USITC must conduct a new investigation to determine whether safeguards relief “continues to be necessary to prevent or remedy serious injury and whether there is evidence that the industry is making a positive adjustment to import competition.” 19 U.S.C. § 2254(c)(1), attached hereto as US Exhibit 48. The USITC must publish a notice of its investigation,

prevent serious injury and facilitate industry adjustment; and (2) less trade restrictive than any other possible effective remedy.

108. On the first point, New Zealand simply offers the bald assertion that “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 injury and facilitating adjustment.”⁹¹ The Panel rightly questioned this assumption in Question 17 to the United States. In response, the United States explained that there were ample grounds for concluding (as the three other USITC commissioners did) that the plurality recommendation would have done little to shield the domestic lamb meat industry from serious injury or to facilitate its adjustment to import competition.⁹² Thus, there is no basis for assuming that the import relief that the plurality proposed was adequate.⁹³

109. Moreover, there is nothing in the USITC record to suggest that the plurality considered, much less ruled out, every other alternative remedy that might have prevented serious injury to the domestic lamb industry and assisted in the industry’s adjustment efforts. Thus, there is no assurance that had it

hold a public hearing, give interested parties an opportunity to appear and be heard, and issue a new report. 19 U.S.C. § 2254(c)(2)-(3). The President must then review the report and, if it is affirmative, decide whether to extend the measure. 19 U.S.C. § 2253(e)(1)(B), attached hereto as US Exhibit 48. Given all of the legal and procedural prerequisites for extending a safeguard measure, the likelihood of the United States doing so in this case is conjectural at best.

The US measure has a duration of three years and a day, while the plurality recommended that its proposed remedy remain in effect for four years. In this sense, the US measure is indisputably less restrictive than the USITC plurality recommendation.

To bolster its claim that the US measure is more trade restrictive than the USITC plurality recommendation, New Zealand points to the fact that the US measure establishes higher out-of-quota duty rates and contains an in-quota tariff above the normal bound rate. Neither argument conclusively establishes that the shorter US measure is more trade restrictive than four-year USITC plurality recommendation.

With respect to the out-of-quota tariff, New Zealand takes issue with the United States’ observation that there is no effective difference between the 20 per cent *ad valorem* rate proposed by the plurality and the 40 per cent rate imposed under the US measure. New Zealand argues that out-of-quota imports are more likely with a 20 per cent rate than with a 40 per cent rate. This argument fails to recognize that both tariff rates were designed to be import-preclusive and thus, by definition, were expected to result in no over-quota imports.

New Zealand attacks the in-quota aspect of the US measure on the ground that it will impose costs on lamb imports not contemplated under the plurality recommendation. New Zealand bases this argument on the unsupported and economically dubious assumption that all or most of these duty costs will be borne by New Zealand producers and exporters, rather than by US importers and consumers. Moreover, contrary to New Zealand’s apparent further assumption, duty payments cannot be directly translated into “trade restrictions.” The United States has estimated that the actual trade restrictive effect of its declining in-quota tariffs on lamb imports will be very small. *See* United States’ First Written Submission at ¶¶ 217-219. Nothing in New Zealand’s analysis suggests that this small restraint on imports over three years would be more restrictive than the effect of the plurality’s remedy, which has a duration of four years.

⁹¹ New Zealand’s Response to Panel Question Sixteen at 20.

⁹² *See* US Responses to Questions by the Panel at ¶¶ 111-117.

⁹³ Indeed, there is no presumption in New Zealand’s own safeguard law that the remedy recommendation of its competent authorities are to be adopted, or even accorded any particular weight, in the remedy that the New Zealand Minister of Economic Development applies. *See, e.g.*, Ministry of Commerce, Wellington, *Trade Remedies in New Zealand, A Discussion Paper*, at 19 (1998) (“Following receipt of a recommendation from an Authority, it is up to the Minister of Commerce to determine what action, if any, shall be taken, i.e. an Authority’s recommendations are not binding.”), attached hereto as US Exhibit 49; *Replies to Questions Posed by Canada, the European Community, Korea, and the United States to New Zealand Concerning the Latter’s Notification of Laws and Regulations Under Article 12.6 of the Agreement*, G/SW/175, at 2 (circulated 5 June 1996) (“The decision whether temporary safeguard action should be taken, the nature of any such action and its duration, is at the discretion of the Minister of Commerce.”) (The Ministry of Commerce was renamed the Ministry of Economic Development in February 2000).

imposed the plurality's recommended import relief the United States would have satisfied New Zealand's standard for applying Article 5.1.

110. In the US view, Article 5.1 does not mandate a comparison between the safeguard measure that a Member applies and the vast range of other potential measures that the Member might have selected. Rather, it calls for an examination of whether the measure the Member has chosen to apply is appropriately gauged to the specific injury and causation findings that the competent authorities have made – both as the measure addresses serious injury and industry adjustment efforts. As the United States has demonstrated, the US safeguard measure fully meets this test.

2. Australia's further argument fails to demonstrate that the US measure is being applied beyond "the extent necessary"

111. While Australia properly rejects the view that Members are required to identify the "least trade restrictive" safeguard measure, its complaints regarding the extent of the US safeguard measure otherwise largely track those of New Zealand. However, Australia makes the further argument in response to Question 15 from the Panel that the US measure was more restrictive than necessary because it restricted first-year imports to 1998 levels or below.

112. In Australia's view, since the domestic industry had not yet experienced serious injury at 1998 import levels, there was no reason for the United States to cap imports there. For the same reason, Australia asserts that there could be no justification for an in-quota tariff that might reduce imports to below 1998 levels.

113. At the outset, it is worth observing that even the USITC plurality sought to limit first year imports to 1998 levels. Thus, Australia's criticism of the import cap established by the US measure is equally a condemnation of the USITC plurality recommendation that Australia elsewhere embraces. This criticism reinforces the US view that the compliance with Article 5.1 cannot be measured by reference to the competent authority's recommendation, or any other potential safeguard measure.

114. More pointedly, as the United States explained in its first written submission, three of the six USITC commissioners concluded that the US lamb meat industry would suffer serious injury even if import levels remained at 1998 levels. Commissioners Miller and Hillman stated that:

It is our view that the industry would experience serious injury caused by imports if import levels and prices continue at now-existing levels, even if no further price declines occur.⁹⁴

Commissioner Koplan found, similarly, that a remedy set at existing import levels "would not stave off the threatened serious injury, much less provide the industry with the opportunity to make a positive adjustment to prepare for the import competition."⁹⁵

115. The USITC plurality did not address these arguments or demonstrate how, if it continued to face imports at low prices and record levels, the industry would be in a position to recover its competitiveness. Under these circumstances, the United States had ample grounds for selecting an alternative form of import relief that held out at least some promise of being effective.

⁹⁴ USITC Report at I-40.

⁹⁵ USITC Report at I-49.

VII. THE UNITED STATES PROPERLY EXCLUDED CANADIAN AND MEXICAN IMPORTS FROM ITS SAFEGUARD MEASURE

116. New Zealand and Australia do not contest the fact that participants in free-trade arrangements may exclude from their safeguard measures, consistent with their obligations under the Safeguards Agreement and *GATT 1994*, imports from their free-trade partners.⁹⁶ Instead, the complainants suggest that the United States applied the wrong procedure in excluding Mexican and Canadian imports from its lamb meat tariff-rate quota.

117. New Zealand and Australia claim that the sole procedure under which imports from a free-trade partner may be excluded from a safeguard measure is by excluding them from the competent authority's injury and causation investigation. However, the complainants point to no provision of the Safeguards Agreement that calls for the exclusion of any imports – regardless of source – from the competent authority's investigation.

118. In fact, the opposite is true. Article 4.2(a) requires the competent authorities to examine "all relevant factors" having a bearing on the condition of the industry "including the rate and amount of the increase in imports of the product concerned" and "the share of the domestic market taken by increased imports". Plainly, imports from free-trade partners may have a direct effect on the rate, amount, and market share of increased imports, and thus may have a significant impact on the industry's condition. For that reason, Article 4.2(a) requires that they be included, rather than excluded, from the competent authorities' injury and causation investigation.

119. Australia and New Zealand have not cited any provision of the Safeguards Agreement that creates an exception to the requirement imposed by Article 4.2(a). Moreover, any such exception would have to take account of Article 9.1, which requires Members to exclude imports from developing countries for so long as they have a minor share of the domestic market, both individually and collectively. Presumably, any requirement in the Safeguards Agreement to exclude free-trade imports from the competent authorities' investigation where they are excluded from the ultimate safeguard measure would apply with equal force to imports from these developing countries. But there would be no way for the competent authorities to know during the course of their investigation which developing countries, individually or collectively, would remain (or become) eligible for exclusion from the safeguard remedy over its full lifetime.

⁹⁶ Since Australia and New Zealand agree with the United States that members of free trade agreements are entitled to exclude each others' imports from safeguard measures, the United States will not elaborate in this text its view of why such an exclusion is permissible. Australia and New Zealand both appear to no longer challenge the exclusion of products from Israel. To avoid any implication that the United States has not invoked footnote 1, Article XXIV of *GATT 1994*, and its status as a participant in a free-trade agreement with Canada and Mexico for purposes of making exclusions in this case, the United States appends and makes a part of its argument in this proceeding its discussion of this issue in the context of the ongoing panel proceeding on *Wheat Gluten*. See *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166, Response of the United States to Questions from the Panel and the European Communities, at Question 30 (17 January 2000), attached hereto as US Exhibit 50. The NAFTA is a free-trade area for purposes of Article XXIV of the GATT that was notified as such to the CONTRACTING PARTIES to the GATT 1947 on 1 February 1993 and referred to the Committee on Regional Trade Agreements under the WTO. As the United States has demonstrated in this proceeding, requiring the inclusion of products from Canada and Mexico would prevent the formation of the free-trade area. The following documentation was provided to the Committee:

L/7176	Notification of the Agreement (trade in goods)
L/7176/Add.1	Text of the Agreement
S/C/N/4	Notification of the Agreement (trade in services)
WT/REG4/	Questions and replies and related documents.

120. In sum, nothing in the Safeguards Agreement suggests that its framers sought to mandate the exclusion from the competent authorities' investigation of those imports eventually excluded from a Member's safeguard remedy. The plain language of the Agreement makes clear that the competent authorities must examine all sources of imports in order to make an objective assessment of the industry's condition and the reasons for that condition. Indeed, excluding products originating from certain sources could skew the relative importance of other factors, in particular imports from third countries, in affecting the industry's condition.

121. By contrast, the procedure that the United States employs with regard to imports from its NAFTA partners ensures that neither imports from third countries nor other non-import factors are held responsible for injury attributable to imports from Canada and Mexico. Using this case as an example, the USITC determined increased imports from all sources were threatening to cause serious injury to the domestic lamb meat industry. Having reached an affirmative determination, the USITC then considered whether imports from Canada or Mexico (1) accounted for a substantial share of total imports; and (2) contributed importantly to the serious injury or threat. Since imports from Canada were negligible throughout the period of investigation (reaching a high point of 0.3 per cent of total imports in 1997), and there were no imports from Mexico after 1995, the USITC reached negative determinations on both questions.⁹⁷

122. Thus, Australian or New Zealand can mount no serious claim in this case that their imports were subject to a safeguard measure based on injury attributable to imports from Mexico or Canada.⁹⁸ Moreover, the US legislation prevents such a result in other cases as well, since it contemplates that imports from a NAFTA country will be included in the safeguard remedy whenever they are substantial and a significant factor in the injury or threat of injury the industry has sustained. The legislation further provides that NAFTA imports may be considered collectively in appropriate cases.⁹⁹ This avoids the possibility that NAFTA imports might be excluded from a safeguard measure in the unusual case in which they are individually insignificant in scale and impact but together have an appreciable effect.

123. In sum, nothing in the Safeguards Agreement compelled the United States to exclude NAFTA imports from the investigation of its competent authorities. Indeed, when it included those imports in its investigation the USITC was fulfilling the requirement of Article 4.2(a) to examine all relevant factors having a bearing on the industry's condition. The USITC's examination of the scale and effect of NAFTA imports at the conclusion of its primary investigation and its determination that they were not significant in either respect satisfy any concern that Australian and New Zealand lamb imports were – or could have been – restricted based on the injurious effects of NAFTA imports. In this way, the US procedure fully satisfied the principle of “parallelism” that Australia and New Zealand seek to read into the Safeguards Agreement.

124. Finally, it is worth observing that Members that participate in free-trade areas are subject to the relevant provisions of Article XXIV of *GATT 1994*. Article XXIV:5(b) provides that the creation of a free-trade area must not result in the imposition of higher or more restrictive “duties and other regulations of commerce” on the trade of Members that are not part of the free-trade area than would

⁹⁷ USITC Report at I-27.

⁹⁸ It is worth noting that US law protects against the possibility that imports from excluded free trade agreement partners will surge to fill demand previously filled by third country imports. If the President were to determine that a “surge” in imports of Canadian lamb meat was undermining the effectiveness of the lamb meat safeguard measure, he could include those imports under the TRQ. 19 U.S.C. §3372(c), attached hereto as US Exhibit 51. Canadian imports were negligible throughout the period of investigation, and US law defines the term “surge” as “a significant increase in imports over the trend for a recent representative base period”. 19 U.S.C. §3372(c)(3). Thus, any appreciable increase in imports of Canadian lamb meat could subject those imports to inclusion in the US safeguard measure.

⁹⁹ 19 U.S.C. § 3371(a)(2).

have been the case in the absence of the free-trade agreement. By virtue of footnote 1 of the Safeguards Agreement, 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.

125. In the US view, 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. Article XXIV:5(b) does not mandate any particular procedure for ensuring such a result. The US legislation applicable to the treatment of NAFTA imports for safeguards purposes fully ensures that third party imports will not be penalized for serious injury or threat of serious injury attributable to imports from NAFTA countries. US law accomplishes this objective by requiring the USITC to determine whether NAFTA imports have played an important role in any serious injury or threat of serious injury the USITC found and by limiting the exclusion of NAFTA imports from safeguard measures to situations in which those imports have not made an important contribution.

VIII. CONCLUSION

126. For the foregoing reasons, the United States respectfully submits that its safeguard measure applied to imports of lamb meat satisfies US obligations under Article XIX of *GATT 1994* and the Safeguards Agreement. Australia's and New Zealand's claims to the contrary are without merit and the Panel should reject them.

LIST OF US EXHIBITS

United States – Safeguards Measures on Imports of Lamb Meat from New Zealand and Australia

<u>US Exhibit</u>	<u>Description</u>
43	Report of the International Law Commission at 221
44	Leddy, <i>The Escape Clause</i> , at 136
45	USITC Transcript at 130-31, 217, 258-59
46	Productivity Commission, <i>Pig Meat</i> , at xxi, xxiii, Section 4.6
47	Canadian International Trade Tribunal Act, Secs. 19.01(1), 20
48	19 U.S.C. §§ 2252(b)(1)(B), 2253(e)(1)(B), 2254(c)(1)-(3),
49	Ministry of Commerce, Wellington, <i>Trade Remedies in New Zealand, A Discussion Paper</i> , at 19 (1998)
50	<i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166, Response of the United States to Questions from the Panel and the European Communities, Question 30 (17 January 2000)

ANNEX 3-9

ORAL STATEMENT OF THE UNITED STATES AT THE SECOND MEETING OF THE PANEL

(26 July 2000)

1. On behalf of the United States delegation, I would like to thank the Panel for giving us this second opportunity to appear before you to comment further on the matters at issue in this dispute. In our written submissions and answers to the Panel's questions, the United States has explained in considerable detail why New Zealand and Australia have failed to meet their burden of proof that the conduct of the USITC's investigation and the implementation of the US safeguard measure fail to satisfy US obligations under the Safeguards Agreement and the GATT 1994. For this reason, we will focus today on a few key issues, and not simply reiterate all that we have said before. We will be pleased to receive any questions you may have at the conclusion of our statement.

2. For the convenience of the Panel, our statement today – like our second written submission – will follow the format that the Panel used in setting out its written questions to the United States. Thus, Mr. Gearhart of the USITC will first discuss the issues relating to the USITC's investigation, including unforeseen developments, the USITC's definition of the domestic industry, its threat of serious injury determination, and its causation determination. I will then discuss Australia's and New Zealand's claims regarding the safeguard measure that the United States applied. For brevity, we will refer to Australia and New Zealand together as the "complainants."

3. I will now ask Mr. Gearhart to address the USITC's determination.

1. Unforeseen Developments

4. The Appellate Body has stated that unforeseen developments are not an independent condition for the application of safeguard measures, but rather "circumstances that must be demonstrated as a matter of fact". The Appellate Body's statement suggests that, in demonstrating such circumstances, competent authorities are not required to conduct a separate inquiry or make a separate "unforeseen developments" finding. In other words, the unforeseen developments language of Article XIX addresses circumstances that will normally be demonstrated through the competent authority's injury and causation investigation and determination.

5. Mr. Chairman, the USITC's determination demonstrates the existence of unforeseen developments. New Zealand continues to misread the United States' argument as to what was unforeseen.¹ What was unforeseen by the United States was not just the surge in imports, but also both the significant change in product mix from frozen to fresh, chilled, and the increase in cut size. These changes allowed the increase in imports and resulted in importation of lamb meat products more like, and thus more competitive with, those traditionally produced by US lamb meat producers. Neither New Zealand nor Australia contests that such a shift in product mix from frozen to fresh, chilled occurred, nor does either seriously contest the fact that imported lamb meat cuts increased in size.

6. Contrary to New Zealand's contention², hard evidence before the USITC showed that a change in product mix from frozen to fresh, chilled made the imported product more directly competitive with the domestic product, and the USITC also had hard evidence that the imported product became more comparable in size with the domestic product. While nine of 16 purchasers

¹ See New Zealand's Second Written Submission at ¶ 2.11.

² New Zealand's Second Written Submission at ¶¶ 2.19-2.20.

who responded to the USITC questionnaire reported that frozen and fresh lamb meat are used in the same way, seven of the nine said that quality decreases with freezing and that fresh commands a higher price, while frozen is sold as a “B-class” item. Other purchasers stated that customers prefer fresh, and that grocery stores generally purchase fresh.³

7. Similarly, ten of the 16 responding purchasers said that the various grades, cuts, and sizes were available from more than one source. The USITC Commissioners also examined this issue during its public hearing, and they heard live testimony from an official of a domestic breaker that supported a finding that the size of imported lamb meat cuts was increasing and that imported cuts were becoming more directly competitive with domestic cuts. The Commissioners examined samples of Australian and domestic lamb loins presented at the hearing.⁴

8. New Zealand’s assertion that the USITC pricing data undercut the USITC’s finding that the imported products became more similar to the domestic products misses the point of the pricing data.⁵ The fact that three of the eight products on which the USITC gathered pricing data were identified either as imported or domestic products has nothing to do with product similarity or dissimilarity. The USITC gathered information on specific cuts to make direct price comparisons. These data have nothing to do with whether imported cuts generally were becoming larger.

9. New Zealand’s response that certain lamb meat products from New Zealand, such as racks, have been “commonly” smaller than domestic racks does not mean that all New Zealand *or all imported racks* were smaller, or that the average size of racks exported to the United States from New Zealand and other sources was not increasing, or that the size of New Zealand racks was representative of all US imports of racks. In fact, purchasers told the USITC that Australian cuts tend to be larger in size than New Zealand cuts.⁶ And even New Zealand acknowledges that evidence before the USITC showed that the size of Australian lamb carcasses increased between 1993 and 1997.⁷ In summary, the important point here is not whether New Zealand and Australian cuts were smaller than US cuts, but whether the evidence before the USITC supported its finding that the imported cuts were becoming larger in size and thus more directly competitive with the domestic cuts. The USITC record contained just such evidence.

10. New Zealand makes the unsupported claim that much of the increase in imports of fresh and chilled lamb meat was the result of “new demand” in the US market for New Zealand lamb meat as a result of the decision of a major US restaurant chain and of grocery store “warehouse clubs” to purchase New Zealand lamb meat. New Zealand points to no evidence that such purchases were due solely to any specific quality of the New Zealand product. While the USITC found that imports had found new customers for lamb meat, nothing in the record shows that the US industry could not compete for those customers for lamb meat. Moreover, the USITC also found that previously established domestic customers were increasing their purchases of imported lamb meat.

11. New Zealand’s claim is contrary to the evidence before the USITC with respect to the importance of price, and does not explain the overall surge in imports, from Australia as well as New Zealand. The USITC heard live testimony from an official of a domestic breaker firm who recounted how his firm had lost a major grocery chain account in January 1998 because his company could not match substantially lower prices offered by importers. He said that the grocery chain was able to buy imported loins at \$1.80 to \$2.00 a pound, at less than half his price of \$4.04 to \$4.41 a pound. He said that while his firm kept a few of the grocery chain’s smaller divisions as customers, at

³ USITC Report at II-72.

⁴ Transcript of USITC injury hearing at 20, 73 (Mr. Casper).

⁵ New Zealand’s Second Written Submission at ¶ 2.18.

⁶ USITC Report at II-72.

⁷ New Zealand’s Second Written Submission at ¶ 2.19.

reduced volumes, the major accounts switched entirely to imports because of the price differential.⁸ Moreover, the whole notion of “new demand” raised here by New Zealand is a complete misnomer, as restaurants and grocery stores have always been among the principal purchasers of lamb meat. While New Zealand and Australia may wish the USITC had found otherwise, the USITC’s objective examination is supported by evidence gathered in its investigation.

12. Finally, New Zealand’s argument here that the surge in New Zealand imports supplied “new demand” is inconsistent with arguments made by economist Susan Manning on behalf of Meat and Livestock Australia, Ltd. (“MLA”) at the USITC injury hearing that the surge in imports satisfied a shortfall in domestic supply caused by the exit of domestic lamb growers from the market due to the termination of the US Wool Act support programme.⁹

13. Mr. Chairman, the USITC’s report fully satisfies the requirements of Article XIX with regard to unforeseen developments. The United States explained in its previous submissions that past GATT practice supports the US view that there is no requirement to make a separate finding on this issue. In the time since the United States filed its second written submission, it has reviewed the Article XIX notifications that GATT parties made under the GATT 1947. In 145 notifications, there was no description of “unforeseen developments”. The absence of such descriptions reflects the fact that Article XIX does not require a separate finding.

14. The conditions for imposing safeguard measures set out in Article XIX:1(a) are elaborated and expanded upon in considerable detail in the Safeguards Agreement. Notably, the unforeseen developments language is not only *not* elaborated upon, it is not even mentioned in the Safeguards Agreement. The decision of the drafters not to address unforeseen developments indicates that they did not intend to depart from existing GATT practice on that subject.

15. In *Hatters’ Fur*, the Tariff Commission – the forerunner to the USITC – made a series of factual findings that led it to conclude that increased imports were causing serious injury to the domestic industry. The Commission found that a particular change in hat style, which occurred after the tariff concession was made, had greatly favoured a type of hat in which imports had a comparative advantage. The Tariff Commission did not, however, make a separate finding that this change (or any other change) was an “unforeseen development”. Although Czechoslovakia claimed that the United States should have foreseen the style change, because hat styles were known to change, it did not object that the Tariff Commission had failed to identify which facts constituted “unforeseen developments”. This suggests that there was no expectation that the existence of unforeseen developments needed to be demonstrated as a separate finding.

16. Furthermore, as the United States showed in its previous submissions, the *Hatters’ Fur* working party concluded the United States could not have been expected to anticipate changes in market conditions influencing the sale of felt hats of a scale and duration that would lead to an injurious import surge. Those market changes, the working party concluded, constituted “unforeseen developments” – despite the fact that US negotiators were specifically aware of the propensity for hat fashions to change. The working party’s report suggests that even if a Member has direct knowledge of how a particular marketplace functions it cannot be held to anticipate a change in the market conditions of a type that leads to an injurious import surge.

17. In sum, Article XIX does not require a competent authority to independently find and report on the developments that led to the injurious import surge, or threat of serious injury, and explain why they were “unforeseen”. The USITC’s determination is thus fully consistent with the requirements of Article XIX.

⁸ Transcript of USITC injury hearing at 21-22.

⁹ Transcript of USITC injury hearing at 177-179.

2. Definition of Domestic Industry

18. In their second submissions, New Zealand and Australia continue to misrepresent the USITC's definition of the domestic industry. The USITC's finding in the lamb meat case does not, as New Zealand claims, mean that the domestic industry will include the producers of inputs in every case.¹⁰ Indeed, both the strict requirements of the test employed by the USITC and USITC practice show that this is not the case. The USITC must find that both elements of the test are met – there must be a continuous line of production from the raw to the processed product, and there must be a substantial coincidence of economic interest between the producers of the raw product and the processors. In 70 investigations under the US Trade Act of 1974, the USITC has found such a test to be satisfied in only *three instances* – the other two were in 1976 and 1984. The USITC has not found the test to be satisfied when a significant portion of the raw product was sold in other markets. Contrary to New Zealand's claim¹¹, the USITC in the lamb meat case looked at other possible uses of lambs, and concluded that most sheep and lambs in the United States are meat-type animals kept primarily for the production of lambs for meat.¹² Had the USITC found to the contrary, the outcome would have been different.

19. New Zealand continues to suggest that the Panel in the unadopted report in *Canada – Manufacturing Beef*¹³ suggested that producers of the raw product could be considered to be part of the industry producing the processed product only when common ownership between the producers of the raw and processed products makes it impossible to analyze each process separately. The Panel did not say this, and it is contrary to what Australia has argued and contrary to Australian practice in its most recent safeguard decision.

3. Threat of Serious Injury

20. On the question of threat of serious injury, the complainants' second submissions largely repeat arguments made earlier. New Zealand in particular continues to reject the finding of the panel in *Argentina – Footwear* that the increase in imports must be "sudden" and "recent," but it does so with some new twists. In urging the panel to find that the USITC should have based its finding on the impact of imports over a much longer time period than 1997-September 1998, New Zealand now claims that the threat finding must "reflect [the condition of] the industry as a whole over a representative period".¹⁴ Nothing in the Safeguards Agreement requires anything of the sort, nor does New Zealand even attempt to provide a basis for this claim. Nor does anything in the Safeguards Agreement or the Appellate Body's decision in *Argentina – Footwear* require or even remotely suggest, as New Zealand claims, that an authority must consider a longer period in deciding whether a *threat* of serious injury exists than in deciding whether *present* serious injury exists.¹⁵

21. New Zealand adds a special twist for agricultural industries. It claims in effect that the Safeguards Agreement requires that authorities should view agricultural industries differently from other industries, on the premise that a recent period, such as the 21-month period on which the USITC finding was based, "can be no more than a measurement of a fluctuation".¹⁶ A 21-month period would reflect far more than a "fluctuation." Moreover, the USITC found no evidence of a "lamb cycle" that might affect the length of the relevant period examined, and no party before the USITC alleged that such a cycle existed. Again, nothing in the Safeguards Agreement even remotely suggests a special test for agricultural industries, and New Zealand provides no basis for this claim.

¹⁰ New Zealand's Second Written Submission at ¶ 3.8.

¹¹ New Zealand's Second Written Submission at ¶ 3.7.

¹² USITC Report at I-13, citing for support additional evidence in the report at II-4.

¹³ New Zealand's Second Written Submission at ¶ 3.5.

¹⁴ New Zealand's Second Written Submission at ¶ 4.6.

¹⁵ New Zealand's Second Written Submission at ¶ 4.7.

¹⁶ New Zealand's Second Written Submission at ¶ 4.5.

Moreover, New Zealand's claim here and similar claims made by Australia are inconsistent with the approach that Australia took in its recent safeguard action involving the *Pig and Pigmeat Industries*. As the United States indicated in its Second Submission, the Australian authority in that case based its determination, made in November 1998, on a decline in prices from October 1997, and a decline in the condition of the domestic industry during the first half of 1998.¹⁷ Thus, the decision of the Australian authority was based on developments during a period that was approximately half as long as the period upon which the USITC decision was based. The Safeguards Agreement does not specify a specific period. What the USITC did in making its threat determination was to rely on recent trends, which is precisely what the decision in *Argentina – Footwear* said was required.

23. Complainants' insistence that the USITC should have relied on long-term trends is paradoxical in view of their complaint that the USITC did not adequately find that serious injury is "imminent." As the United States has noted in previous submissions, the term "imminent" is not defined in the Safeguards Agreement. The Agreement does not require the national authority to project a date by which serious injury will occur, or require that it engage in any specific analysis in order to find that a threat exists. As is clear from the USITC's report, the USITC based its finding of threat of serious injury on the surge in imports that occurred in 1997 and interim 1998; the decline in industry indicators that coincided with this surge in imports; the projections of Australian and New Zealand exporters that this surge in exports to the United States would continue through 1999 at an even faster pace; and the conclusion that such increases in import volume would have further negative effects on the domestic industry's prices, shipment volumes, and financial condition in the imminent future.¹⁸

24. Most of the parties' remaining arguments are simply efforts to have the Panel reweigh the evidence. New Zealand's inference, based on a review of indexed USITC data, that packer/breaker operations were doing well in interim 1998 is both of little relevance and incorrect.¹⁹ Packer/breaker operations involve just a subset of processor operations, so they do not reflect overall processor operations. Moreover, as to packer/breakers, the indexed data show operations in interim 1998 that are in very bad shape relative to the period prior to 1997.

25. New Zealand claims the USITC just looked at price gaps between imported and domestic lamb meat.²⁰ New Zealand ignores the fact that the USITC also looked at the decline in lamb meat prices that occurred during the surge in imports. The USITC found that US, Australian, and New Zealand lamb meat prices were in most cases lower for the products surveyed in the second half of 1997 and the first three quarters of 1998, when the surge in imports and decline in domestic industry indicators occurred, than in the comparable quarters in 1996 and the first half of 1997.²¹

26. New Zealand cites no evidence to support its claim that the decline in US lamb meat prices may have been due to a decline in domestic pork prices.²² While New Zealand does not identify the year in which pork prices declined or the amount of the decline, New Zealand's claim completely ignores the impact of surging lamb meat imports in 1997 and interim 1998. Moreover, New Zealand makes no effort to explain why Australian and New Zealand exporters of lamb meat would have accelerated their shipments to the United States at the time domestic lamb meat prices were falling. New Zealand fails to support its claim.

¹⁷ United States Second Written Submission at ¶ 32, note 40.

¹⁸ USITC Report at I-23-24.

¹⁹ New Zealand's Second Written Submission at ¶ 4.23.

²⁰ New Zealand's Second Written Submission at ¶ 4.11.

²¹ USITC Report at I-24.

²² New Zealand's Second Written Submission at ¶ 4.12.

27. New Zealand's claim that the USITC relied on the stabilization of US lamb meat consumption in 1996-1998 as an indication of the domestic industry's health is simply not correct.²³ What the USITC said was that the domestic lamb meat industry had experienced "some recovery" since full termination of the Wool Act payments in 1996.²⁴ The USITC found that imports surged in 1997 and interim 1998 and that this surge resulted in a sharp deterioration of the condition of the domestic industry and caused the threat of serious injury. The USITC thus found a direct link between the surge in imports in 1997 and interim 1998 and the threat of serious injury.

28. There is simply no requirement in the Safeguards Agreement that an authority "determine how prices would develop in the future," as New Zealand claims.²⁵ Prices are not even one of the factors listed in Article 4.2(a) that an authority must evaluate. The USITC found that any further increases in the volume of imports would be likely to put further downward pressure on US prices in the imminent future in the US market.²⁶ The USITC did all that it was required to do, and more. The USITC analysis properly avoided reliance on "allegation, conjecture or remote possibility", which Article 4.1(b) expressly prohibits.

29. Also, contrary to New Zealand's contention²⁷, as the United States indicated in its response to the Panel's written question 9, the USITC made a finding of threat of serious injury for each of the four industry sectors and found that the requisite causal link existed. Thus, as to each sector, the USITC made the findings that would be required if each were an entire industry.

4. Causation

30. I would like to turn now to the issue of causation. As the United States has demonstrated in its written submissions and in its answers to the written questions from the Panel, the USITC's causation determination was consistent with the Safeguards Agreement and the GATT 1994.

31. Mr. Chairman, neither the text of the Safeguards Agreement nor its negotiating history suggest that the drafters intended to mandate a specific degree of causation that Members must find. Nor did the framers impose, or even discuss, a requirement under which Members must determine what quantum of injury should be assigned to each "cause". In the real world, in which no event is truly "isolated", such artificial analysis does not lead to a reliable result.

32. I will turn first to the issue of whether the Safeguards Agreement specifies a particular degree of causation. It is apparent from the negotiating history of the Safeguards Agreement, which the United States set out in its second written submission, that the negotiators held differing views of the degree of causation that it might be appropriate to enshrine in a new Safeguards Agreement. These included "a cause", "a primary cause", "a substantial cause", "an essential cause", and so forth. It is equally clear from the record that the negotiators were not able to reach agreement on any particular level of causation. Consequently, nothing in the Safeguards Agreement dictates a specific level of causation that Members must apply.

33. New Zealand attempts to derive a degree of causation standard from the reference in Article 4.2(b) to "the causal link" between increased imports and serious injury. New Zealand argues that this language establishes that imports must be "the" cause or the "sole" cause of serious injury. But New Zealand's interpretation rewrites history. The debate in the Negotiating Group over the appropriate degree of causation was never resolved.

²³ New Zealand's Second Written Submission at ¶ 4.15.

²⁴ USITC Report at I-24-25.

²⁵ New Zealand's Second Written Submission at ¶ 4.18.

²⁶ USITC Report at I-24.

²⁷ New Zealand's Second Written Submission at ¶ 4.19.

34. That debate contrasted with, and was quite separate from, the discussion in the Negotiating Group regarding the causal link. That discussion concerned the need to provide objective evidence establishing the connection – the link – between increased imports and serious injury or threat. As a result, the first sentence of Article 4.2(b) requires the competent authorities to provide detailed evidence of that connection. It does not address, and was never intended to address, the required degree of causation. Indeed, in the debate over degree of causation no party ever suggested that the appropriate degree should be "the cause" or the "sole cause" of serious injury, much less that the reference to "the causal link" was intended to accomplish such a purpose.

35. New Zealand's reliance on the phrase "the causal link" as establishing a degree of required causation is misplaced. In fact, the reference in the first sentence of Article 4.2(b) to "the causal link" (as opposed to "a" causal link) does not mean that increased imports must be the "sole cause" of serious injury. Rather, as a matter of English grammar, in the expression "the causal link", the word "the" modifies the noun "link", not the adjective "causal". Moreover, the dictionary definition of "link" is "a unifying element: a means of connecting or communicating." Thus, Article 4.2(b) does not address the required degree of causation. Article 4.2(b) simply requires a competent authority to demonstrate, through objective evidence, the connection between the increased imports and the injury it has found.²⁸

36. Read in context, and given its plain meaning, the subject of the first sentence of Article 4.2(b) is the need for objective evidence of causation, not the degree of causation required. The sentence serves to preclude Members from simply assuming that where increased imports and serious injury occur at the same time, the former must have caused the latter.

37. New Zealand and Australia similarly misinterpret the second sentence of Article 4.2(b). They claim that this sentence creates an obligation for Members to consider the effects of imports in isolation – that is, to determine whether, standing alone, they are causing a degree of injury that is "serious". It makes little sense to read Article 4.2(b) as imposing an isolation requirement, however, because Article 4.2(a) requires Members to evaluate "all relevant factors" having a bearing on the situation of the industry. There would be no need to examine every factor responsible for the industry's condition if Article 4.2(b) required Members to isolate the specific injurious effects caused by imports and then decide whether that quantum of injury was "serious". By rendering Article 4.2(a) superfluous, the complainants' reading of the second sentence of Article 4.2(b) violates the principle of effectiveness in treaty interpretation.

38. Moreover, crediting the complainants' "isolation" argument would suggest that the United States and other governments agreed to abandon their traditional approaches to causation and embrace an entirely different paradigm. Under an isolation analysis, there would be no need for a Member to look at the overall condition of the industry or establish a degree of causation attributable to increased imports. Instead, the Member would look solely at the injurious effect of increased imports and determine whether they were "serious."

39. If the Negotiating Group had in fact agreed to impose such a different approach, there surely would be at least some evidence of discussion, debate, and competing textual provisions on this point in the negotiating record. Instead, the record of the Negotiating Group suggests the opposite. The participating governments framed the causation issue in front of the Negotiating Group as one of degree of causation, an approach that is not based on an "isolation" analysis.

40. The second sentence of Article 4.2(b) should be interpreted in light of its plain meaning and in its context. Read in that way, the second sentence simply completes the evidentiary requirement set out in the first sentence. That is, in addition to specifically documenting the connection between increased imports and serious injury or threat, the competent authorities must also examine the other

²⁸ See United States' Responses to Questions from the Panel at ¶¶ 48-49.

factors that may be causing injury to the industry and ensure that increased imports are not blamed for that injury. That, of course, is exactly what the USITC did in its lamb meat investigation.

41. Mr. Chairman, I have two final points on this issue. First, the United States is puzzled that New Zealand criticizes it for turning to the dictionary in seeking to determine the meaning of the term "cause". Under the customary rules of interpretation of public international law, reflected in Article 31 of the *Vienna Convention*, a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." It is well established that reference to dictionary definitions is an appropriate way to determine ordinary meaning.

42. Finally, New Zealand is simply wrong when it claims that the expression "to cause" invariably carries the meaning of being the "sole cause". Plainly there are circumstances in which "to cause" can apply to more than one cause. For example, design defects, operating errors, and substandard construction may all work together "to cause" a dam to collapse. Thus, the verb "to cause" as used in the Safeguards Agreement plainly embraces the concept of more than one cause.

43. Mr. Ross will now discuss Australia's and New Zealand's remaining claims.

44. Mr. Chairman, Members of the Panel, in the remainder of my presentation, I will focus on whether the lamb meat safeguard measure is being applied beyond the extent necessary, in contravention of Article 5.1 of the Safeguards Agreement, and the exclusion from the US measure of imports of lamb meat from Canada, Mexico, and Israel. I will focus primarily on arguments that New Zealand and Australia made in their second written submissions.

5. The US Measure is Commensurate with the Goals of Preventing or Remedyng Serious Injury and Facilitating Adjustment

45. I would first like to discuss New Zealand's and Australia's argument that the lamb meat safeguard measure exceeds the limits prescribed by Article 5.1 for safeguard measures.

46. The Appellate Body stated in *Korea-Dairy* that a safeguard measure must be "commensurate" with the goals of preventing or remedying serious injury and facilitating adjustment. New Zealand and Australia have failed to demonstrate how the lamb meat safeguard measure can reasonably be considered "incommensurate" with the goals that the Appellate Body identified. That is not surprising given that the measure has a duration of just three years, permits imports in the first year at their second highest level ever, and allows imports to exceed surge levels in years two and three.

47. Rather than explain how the safeguard measure is excessive on its own merits, the complainants seek to show that the measure is more restrictive than the USITC plurality's recommended remedy would have been. Thus far, however, the complainants have not pointed to any provision of the Safeguards Agreement requiring a Member to apply the import relief its competent authorities recommend. Indeed, the Agreement does not require competent authorities to provide remedy recommendations in the first place. Nor have the complainants demonstrated that the relief that the USITC plurality recommended was adequate to prevent serious injury from occurring or to facilitate the industry's adjustment.

48. Moreover, both New Zealand and Australia ignore the fact that three of the six USITC commissioners disagreed with the plurality recommendation and suggested remedies that would have placed greater burdens on imports than the remedy that the President ultimately applied. It is not clear why, for purposes of the Safeguards Agreement, the US safeguard measure should be judged by comparison to the plurality's remedy recommendation, but the views of the other three commissioners are to be ignored.

49. New Zealand claims that the United States has placed the Panel on the "horns of a dilemma" by arguing, on one hand, that the Panel cannot engage in a *de novo* review of the USITC's investigation, and on the other hand that the Panel cannot presume that the USITC plurality's recommended remedy was adequate. But New Zealand mischaracterizes the US position. The US position is that the recommendations of the USITC (and it would have to be the recommendations of all six Commissioners, not just the plurality) do not constitute a benchmark for purposes of determining compliance with Article 5.1. Neither New Zealand nor Australia has provided any textual basis or evidence supporting the use of these recommendations as a benchmark.

50. New Zealand and Australia both claim that the burden is on the United States to demonstrate that the USITC plurality's recommended remedy was not adequate.²⁹ This is wrong for at least two reasons. First, as already noted, the USITC remedy recommendations are legally irrelevant under Article 5.1. The measure to be examined is the measure actually applied by the United States, not the measure proposed by the USITC. Second, even if such a comparison *were* appropriate, the burden of proof would be on complainants to demonstrate that the plurality's remedy *was* adequate to prevent serious injury and facilitate adjustment, not on the United States to demonstrate the opposite. Thus far, the complainants have made no effort to do so.

51. In any event, the United States has shown why the USITC plurality's remedy cannot be assumed to be adequate. Six USITC Commissioners – each equally familiar with the facts – examined the record and split three ways on an appropriate remedy. Three Commissioners concluded that the plurality's remedy was insufficient to prevent serious injury and facilitate adjustment. The fact that there was a split of views on an adequate remedy demonstrates that the plurality recommendation should not be presumptively regarded as adequate.³⁰

52. New Zealand has shifted ground in its second written submission by stating that the "least trade restrictive" test it believes is written into Article 5.1 is really a "proportionality" standard. In fact, the two concepts are not the same. Of course, as the United States has already explained, the reference to "necessary" in Article 5.1 refers to the application of a measure, not the measure itself. A "least trade restrictive" test would require a comparison between the measure actually applied and some other "ideal" measure. According to New Zealand, its "proportionality" test would require a "degree of proportionality between ends and means". Even accepting, arguendo, New Zealand's proportionality test, New Zealand has provided no evidence to establish that the application of the US measure is not proportional. In any event, there is no "proportionality" test under Article 5.1. The term "proportional" is never used in Article 5.1, and there is no textual basis for reading it into that article.

53. Mr. Chairman, in its first written submission, and in its responses to the written questions from the Panel, the United States explained why the measure it put in place was an appropriate one.³¹ By contrast, New Zealand and Australia have provided virtually no analysis of the measure. New Zealand has limited itself to comparing the measure to the USITC plurality's recommended remedy. Australia criticizes the measure for reducing first year imports to below the surge level, but ignores the findings of the three USITC Commissioners who concluded that serious injury would occur if imports continued at surge levels.

54. Moreover, both complainants ignore the USITC's unanimous finding that the industry's worsening condition was largely due to falling prices. Given the USITC's findings, it was reasonable for the United States to conclude that if imports continued at 1997 - interim 1998 surge levels and prices, the US lamb meat industry would quickly decline into serious injury. The US measure is

²⁹ New Zealand's Second Written Submission at ¶ 6.8; Australia's Second Written Submission at ¶ 55.

³⁰ See US Responses to Questions from the Panel at ¶¶ 111-117.

³¹ See United States' First Written Submission at ¶¶ 213-224; US Responses to Questions from the Panel at ¶¶ 121-139, 165-170.

designed to address these findings by capping first-year imports at just below surge levels, and by addressing the falling prices.

55. In sum, because New Zealand and Australia have not pointed to any way in which the TRQ is excessive in the manner in which it addresses the USITC's findings for purposes of preventing serious injury and facilitating adjustment, whether in terms of degree, scope, or duration, they have failed to meet their burden of proof to demonstrate that the US measure is inconsistent with Article 5.1.

6. The Exclusion of Imports from Canada, Mexico, and Israel

56. Finally, I would like to address the question of how the United States treated lamb meat imports from Canada, Mexico, and Israel for purposes of the USITC's investigation and the safeguard measure. New Zealand and Australia agree with the United States that parties to a free-trade agreement are entitled to exclude each other's products from safeguard measures. Accordingly, the only remaining claim for the Panel is their challenge to the procedure that the United States used in deciding to exclude products of its free trade partners. However, as footnote 1 to the Safeguards Agreement makes clear, this issue is governed by the GATT 1994, not by the Safeguards Agreement. Therefore, complainants' reliance on Article 2.2 of the Safeguards Agreement is misplaced. That article cannot be read to require any particular procedure for deciding to exclude the products of free trade partners.

57. New Zealand and Australia appear to attach great importance to this issue, which is surprising given that there were no imports of lamb meat from Israel during the period of investigation, no imports from Mexico after 1995, and Canadian imports *peaked* in 1997 at approximately one third of one per cent of total imports that year. By contrast, imports from Australia and New Zealand constituted some 98.3-99.9 per cent of total imports over the period of the investigation. The United States does not believe that it committed any procedural errors in the way it treated imports from the three countries. But even if it did, they plainly could not have affected the outcome of the USITC's investigation and thus the Panel need not address this issue.

58. In essence, Australia's and New Zealand's procedural complaint is that the United States used the wrong approach for excluding imports from its free trade agreement partners from the safeguard measure. In the complainants' view, the USITC should first have excluded those imports from its injury and causation investigation. But the United States does not understand how they reconcile their position with Article 4.2(a), which requires competent authorities to examine "all relevant factors" in making their determinations.

59. New Zealand and Australia say that the US procedures for dealing with imports from its free-trade agreement partners fails to achieve "parallelism". The United States questions whether the Safeguards Agreement sets out a rule of "parallelism" as such. But the United States does not disagree with the notion that a Member must ensure that if imports from its free-trade agreement partners are excluded from a safeguard measure, the affirmative injury determination that its competent authorities have reached was not predicated on injury attributable to increased imports from those sources.

60. The relevant US safeguards procedures accomplish this result. In this case, after making its initial affirmative threat of serious injury determination, the USITC considered whether imports from Canada or Mexico accounted for a substantial share of total imports and contributed importantly to the serious injury or threat. Since imports from Canada never amounted to more than 0.3 per cent of total imports and there were no imports from Mexico after 1995, the USITC reached negative determinations on both questions. It also considered whether, and to what extent, any of its findings or recommendations applied to imports from Israel, and determined that they did not, because there were no imports from Israel during the period of the investigation. Thus, Australia and New Zealand

can mount no serious claim in this case that their imports were subject to a safeguard measure based on injury attributable to increased imports from Mexico, Canada, or Israel.

7. Conclusion

61. Mr. Chairman, I have a few final points to make today. A principal objective of the Uruguay Round was to negotiate a workable safeguards agreement. Ultimately, those negotiations were successful. Members agreed that grey-area measures would be prohibited, but they also agreed that if they followed the rules set out in the Safeguards Agreement, Members would have a right to take short-term steps to provide their industries with a modicum of relief from injurious import surges.

62. In this proceeding, New Zealand and Australia have sought to convince the Panel that the framers of the Safeguards Agreement mandated a series of radically new standards and requirements that are not embodied in Article XIX. These include a new "isolation" requirement for injury causation, an impossibly burdensome "least trade restrictive" test for safeguard measures, and a new safeguard "justification" requirement. None of these purported obligations appears in the plain language of the Safeguards Agreement.

63. By attempting to convince the Panel to read their new standards into the agreement, and by seeking to shift the burden of proof in this proceeding to the United States, New Zealand and Australia are urging the Panel in effect to deny Members the right to impose safeguard measures under the terms set forth in the Safeguards Agreement and Article XIX. We urge the Panel to reject the approach that the complainants are proposing in this case. Instead Article XIX and the Safeguards Agreement should be given effect based on their plain meaning, their context, and the object and purpose they serve, which, we'd recall, includes an important trade liberalization component, by giving Members the assurance they need to be able to accept tariff cuts.

64. This concludes our presentation. As we noted at the outset, we will be pleased to receive any questions you may have.

ANNEX 4-1

WRITTEN SUBMISSION OF CANADA

(19 May 2000)

I. INTRODUCTION

1. Canada is a third party in these proceedings and is appreciative of the opportunity to provide its views to the Panel on certain matters arising in the dispute.
2. The dispute concerns a safeguard measure imposed by the United States in the form of a tariff quota on imports of fresh, chilled, and frozen lamb meat effective as of 22 July 1999.¹
3. The dispute was initiated by the requests for consultations submitted by New Zealand² on 16 July 1999, and Australia³ on 23 July 1999, in respect of the safeguard measure imposed by the United States on imports of lamb meat. Such consultations with the United States were held in Geneva on 26 August 1999, but no mutually satisfactory solution was reached.
4. On 14 October 1999, New Zealand and Australia requested the establishment of a panel.⁴ Pursuant to these requests, the Dispute Settlement Body (DSB) established a single Panel on 19 November 1999, with the standard terms of reference.⁵ The Panel was constituted on 21 March 2000.
5. Canada, Australia (in respect of New Zealand's complaint), the European Communities (EC), Iceland, Japan and New Zealand (in respect of Australia's complaint) reserved their rights to participate as third parties pursuant to Article 10.3 of the DSU.
6. Canada has a substantial interest in the matter, particularly with respect to the Complaining Parties' claims regarding the exclusion of Canada from the application of the safeguard measure imposed by the United States.
7. Canada has had an opportunity to review those portions of the First Submission of the United States pertaining to this particular issue, and is fully supportive of the points made by the United States.
8. Canada maintains that the United States International Trade Commission (USITC) findings and recommendations regarding imports of lamb meat from Canada, as well as the subsequent US decision to exempt Canada from the safeguard measure on lamb meat, are consistent with US obligations under the WTO agreements, in particular Article 2 of the *Agreement on Safeguards*.

¹ Proclamation 7208 of 7 July 1999 – To Facilitate Positive Adjustment to Competition from Imports of Lamb Meat, amended by 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, submitted as US Exhibit 2.

² WT/DS177/1.

³ WT/DS178/1 and Corr.1.

⁴ WT/DS177/4; WT/DS178/5 and Corr.1.

⁵ WT/DS177/5; WT/DS178/6.

Canada further maintains that the Complaining Parties' claim to the contrary is unfounded and as such should be rejected by the Panel.

II. EXEMPTION OF CANADA FROM THE US SAFEGUARD MEASURE ON LAMB MEAT

9. Pursuant to the obligations of the United States under the *North American Free Trade Agreement* (NAFTA), Canada was exempted from the safeguard measure imposed by the United States after the USITC found that imports of lamb meat from Canada and Mexico did not individually account for a substantial share of the total imports of lamb meat and were not contributing importantly to the threat of serious injury.⁶ Article 802 of the NAFTA provides that "any [NAFTA] Party taking an emergency action under Article XIX or any such agreement shall exclude imports of a good from each other Party from the action unless:

- (a) imports from a [NAFTA] Party, considered individually, account for a substantial share of total imports; and
- (b) imports from a [NAFTA] Party, considered individually, or in exceptional circumstances imports from Parties considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports."⁷

Thus, unless affirmative findings on both conditions are made, NAFTA Parties must be exempted from a safeguard measure taken by another NAFTA Party. Article 802 of the NAFTA was incorporated into US law through Sections 311 and 312 of the NAFTA Implementation Act.⁸

10. The USITR found that imports from Canada and Mexico during the period of investigation were negligible. Indeed, the USITC explicitly stated:

Imports from Canada accounted for less than 1 per cent of total lamb meat imports in each year of the period of investigation. At their highest level of the period of investigation, 209,000 pounds, in 1997, imports from Canada accounted for only 0.3 per cent of total US lamb meat imports.⁹

Therefore, the USITC concluded that imports from Canada did not account for a substantial share of the total imports of lamb meat and were not contributing importantly to the threat of serious injury caused by imports, and recommended that the President exclude Canada (and Mexico¹⁰) from any relief action. The definitive safeguard measure imposed by the United States in the form of tariff-rate quota on imports of fresh, chilled, or frozen lamb meat, effective as of 22 July 1999, excluded imports of lamb meat from Canada, as well as imports from certain other countries.¹¹

⁶ Proclamation 7208 of 7 July 1999, amended by Proclamation 7214 of 30 July 1999, submitted as US Exhibit 2; USITC Report, Investigation No. TA-201-68, Publication 3176, April 1999, submitted as US Exhibit 1, pp. I-3/5 and I-26/27.

⁷ NAFTA, Art. 802. The full text is reproduced in Annex 1.

⁸ 19 U.S.C. 3371, 3372 (Supp. 1993).

⁹ USITC Report, submitted as US Exhibit 1, pp. I-27 and II-18, n. 73.

¹⁰ USITC Report, submitted as US Exhibit 1, pp. I-27 and II-18, n. 73; the USITC investigation noted that imports of lamb meat from Mexico accounted for less than 1 per cent of total imports in the year during the period of investigation for which the data was available (1995); the USITC therefore found that imports of lamb meat from Mexico did not account for a substantial share of the total imports of lamb meat and were not contributing importantly to the threat of serious injury and recommended that the President exclude Mexico from any relief action.

¹¹ Proclamation 7208 of 7 July 1999, amended by Proclamation 7214 of 30 July 1999, submitted as US Exhibit 2.

III. ARGUMENT

11. The Complaining Parties raise legal claims under both the GATT 1994 and the *Agreement on Safeguards* regarding the US decision to exclude imports from Canada from the application of the safeguard measure on lamb meat. The Complaining Parties assert that, by doing so, the United States has failed to apply the safeguard measure to all imports irrespective of source as required by Article 2.2 of the *Agreement on Safeguards*. New Zealand adds that this failure contravenes also the basic “most favoured nation” obligation of Article I of the GATT 1994.¹² Australia further claims that the inclusion of imports from Canada, Mexico, and Israel in the injury determination was inconsistent with Article 4 of the *Agreement on Safeguards*.¹³

12. Neither Australia nor New Zealand can be suggesting that the *Agreement on Safeguards* or the GATT 1994 precludes members of a free trade area from excluding each other’s imports from the application of their safeguard measures. This is consistent with the provisions of the *Australia New Zealand Closer Economic Relations Agreement* (ANZCERTA), which prohibit Australia and New Zealand from taking safeguard actions in regard to goods covered by ANZCERTA. This is also consistent with the provisions of the *Agreement on Safeguards*, which leave open the possibility that members of an FTA may exclude other members from the application of a safeguard measure. We wish to underscore that the Complaining Parties cannot be challenging this possibility since they are themselves bound by it.¹⁴

13. The interpretation of any particular article of a WTO Agreement cannot be conducted in isolation. It is a well-established principle that the WTO Agreements form a single undertaking. Therefore, all WTO obligations are cumulative and Members must comply with all of them simultaneously.¹⁵

14. The text of the *Agreement on Safeguards* itself indicates that its provisions, and its Article 2.2 in particular, are not to be considered in isolation from Articles XIX and XXIV of GATT 1994. Footnote 1 to Article 2.1 of the Agreement states, *inter alia*, that “Nothing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.”¹⁶ The negotiators of the *Agreement on Safeguards* clearly recognized that there was a special relationship between Articles XIX and XXIV:8 of GATT 1994 and that the *Agreement on Safeguards* was to be interpreted consistently with that relationship as it stood. Thus the *Agreement on Safeguards*, read in conjunction with the other relevant WTO provisions, leaves open the

¹² New Zealand First Submission, para. 1.8, 6.1(V) and 7.112-7.114.

¹³ Australia First Submission, para. 11 and 259-265.

¹⁴ The Appellate Body, faced with a similar situation, stated that, “as the issue is not raised in this appeal, we make no ruling on whether, as a general principle, a member of a customs union can exclude other members of that customs union from the application of a safeguard measure”; *Argentina - Safeguard Measures on Imports of Footwear (Argentina – Footwear)*, Report of the Appellate Body, WT/DS121/AB/R, adopted on 12 January 2000, para. 114.

¹⁵ *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Appellate Body, WT/DS98/AB/R, 14 December 1999, para. 74; *Argentina – Footwear*, Report of the Appellate Body, para. 76-98. This finding of the Appellate Body is of course consistent with the fundamental rule of treaty interpretation as set out in Article 31(1) of the *Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1969, 1155 U.N.T.S. 331.

¹⁶ We note that the Appellate Body in *Argentina - Footwear*, para. 106-108, commented that the footnote only applies where customs unions take action, not the Member State. A plain reading of the text indicates that these comments would not apply to the last sentence of the Footnote, the language of which clearly suggests a general application to all provisions of the *Agreement on Safeguards*, with no exception. In any event, the Appellate Body’s reasoning in para. 84-95 in *Argentina – Footwear* would confirm that the *Agreement on Safeguards* does not change or overrule the established meaning of Article XIX of GATT 1994, including its relationship with to Article XXIV:8.

possibility that, as the United States has done in this case pursuant to Article 802 of the NAFTA, members of an FTA may exclude other members from the application of a safeguard measure.

15. Both Complaining Parties rely on a specific passage from the recent decision of the Appellate Body in *Argentina - Safeguard Measures on Imports of Footwear*¹⁷ (*Argentina - Footwear*) to sustain their claim that the United States has failed to apply the safeguard measure to all imports irrespective of source as required by Article 2.2 of the *Agreement on Safeguards*.

16. Canada's view is that the facts in the *Argentina - Footwear* case are fundamentally different from those under consideration here.¹⁸ In *Argentina - Footwear*, MERCOSUR members were excluded from the safeguard action despite the fact that they were the source of more than half of the imports used to determine the injury. The Appellate Body decision in the *Argentina - Footwear* case concluded that:

“In applying safeguard measures on the basis of *this investigation in this case*, Argentina was also required under Article 2.2 to apply those measures to imports from all sources, including those from other MERCOSUR states. On the basis of this reasoning, and on the facts of this case, 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. Therefore, we conclude that Argentina's investigation, in this case, cannot serve as a basis for excluding imports from other MERCOSUR member States from the application of the safeguard measures.”¹⁹ (*emphasis added*)

17. “This investigation in this case” refers to the fact that Argentina had investigated and found injury from all sources, including and in particular, MERCOSUR sources. Argentina did not conduct any separate analysis with respect to its MERCOSUR partners. Therefore, under Article 2.2 of the *Agreement on Safeguards*, Argentina had to apply its safeguard measure to injury from those sources. In contrast, in the present case, the United States found, on the basis of its investigations, that Canadian imports were negligible and, therefore, did not account for the threat of serious injury. Accordingly, it is fully consistent with Article 2.2 of the *Agreement on Safeguards*, interpreted in accordance with Footnote 1 and the decision in *Argentina - Footwear*, for the United States to exclude Canadian imports from the application of its safeguard measure on lamb meat.

IV. CONCLUSION

18. Accordingly, Canada respectfully submits that the USITC findings and recommendations regarding imports of lamb meat from Canada, as well as the subsequent US decision to exempt Canada from the safeguard measure on lamb meat, are fully consistent with the WTO obligations of the United States.

¹⁷ *Argentina - Footwear*, Report of the Appellate Body, para. 113-114.

¹⁸ MERCOSUR imports of footwear in Argentina accounted in 1991 for only 1.90 million pairs of 8.86 million total imports (i.e. 21.4 per cent) and in 1995, for roughly 1/4 of the total imports, i.e. 5.83 of 19.84 million pairs; in 1996, MERCOSUR supplied the largest percentage (55.7 per cent) of total imports of 13.47 million pairs, i.e. 7.5. million pairs (as opposed to 5.97 million pairs from third countries); *Argentina - Footwear*, Report of the Panel, WT/DS121/R, adopted on 12 January 2000, as modified by the Report of the Appellate Body, footnote 474.

¹⁹ *Argentina - Footwear*, Report of the Appellate Body, para. 113.

ANNEX 1

FULL TEXT OF ARTICLE 802 OF THE NAFTA

Article 802: Global Actions

1. Each Party retains its rights and obligations under Article XIX of the GATT or any safeguard agreement pursuant thereto except those regarding compensation or retaliation and exclusion from an action to the extent that such rights or obligations are inconsistent with this Article. Any Party taking an emergency action under Article XIX or any such agreement shall exclude imports of a good from each other Party from the action unless:

- (a) imports from a Party, considered individually, account for a substantial share of total imports; and
- (b) imports from a Party, considered individually, or in exceptional circumstances imports from Parties considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports.

2. In determining whether:

- (a) imports from a Party, considered individually, account for a substantial share of total imports, those imports normally shall not be considered to account for a substantial share of total imports if that Party is not among the top five suppliers of the good subject to the proceeding, measured in terms of import share during the most recent three-year period; and
- (b) imports from a Party or Parties contribute importantly to the serious injury, or threat thereof, the competent investigating authority shall consider such factors as the change in the import share of each Party, and the level and change in the level of imports of each Party. In this regard, imports from a Party normally shall not be deemed to contribute importantly to serious injury, or the threat thereof, if the growth rate of imports from a Party during the period in which the injurious surge in imports occurred is appreciably lower than the growth rate of total imports from all sources over the same period.

3. A Party taking such action, from which a good from another Party or Parties is initially excluded pursuant to paragraph 1, shall have the right subsequently to include that good from the other Party or Parties in the action in the event that the competent investigating authority determines that a surge in imports of such good from the other Party or Parties undermines the effectiveness of the action.

4. A Party shall, without delay, deliver written notice to the other Parties of the institution of a proceeding that may result in emergency action under paragraph 1 or 3.

5. No Party may impose restrictions on a good in an action under paragraph 1 or 3:

- (a) without delivery of prior written notice to the Commission, and without adequate opportunity for consultation with the Party or Parties against whose good the action is proposed to be taken, as far in advance of taking the action as practicable; and

- (b) that would have the effect of reducing imports of such good from a Party below the trend of imports of the good from that Party over a recent representative base period with allowance for reasonable growth.

6. The Party taking an action pursuant to this Article shall provide to the Party or Parties against whose good the action is taken mutually agreed trade liberalizing compensation in the form of concessions having substantially equivalent trade effects or equivalent to the value of the additional duties expected to result from the action. If the Parties concerned are unable to agree on compensation, the Party against whose good the action is taken may take action having trade effects substantially equivalent to the action taken under paragraph 1 or 3.

ANNEX 4-2

WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

(19 May 2000)

SECTION I – INTRODUCTION

1. The European Communities (hereafter “the EC”) welcomes this opportunity to present its views in the proceeding brought by Australia and New Zealand over the consistency with Articles I, II and XIX of the GATT 1994 and with Articles 2, 3, 4, 5, 11 and 12 of the *Agreement on Safeguards* with regard to the definitive safeguard measure imposed by the United States (hereafter “the US”) on imports of lamb meat.

2. The EC has decided to intervene as third party in the present case because of its systemic interest in the correct interpretation of provisions of the GATT 1994 and the *Agreement on Safeguards*, as well as in the correct application of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereafter “DSU”). Many of the issues in dispute relate to questions of fact on which the EC is not in a position to comment. Accordingly, the EC will limit its submission to a number of issues of legal interpretation which it considers to be of particular interest.

3. As a general matter, it is the view of the EC that the safeguard mechanism should only be relied upon in exceptional circumstances and thus in *emergency* situations only, as the title of Article XIX GATT 1994 already sets out clearly. In the Appellate Body’s words, «Article XIX is clearly, and in every way, an extraordinary remedy». ¹ It should only be invoked when all of the strict requirements which are set out in WTO law have been fulfilled, in particular because the reliance on the safeguard mechanism interferes with the fair conduct of trade performed by competitive exporters. It is against this general background that the EC intends to make certain comments regarding the present case. The EC therefore concurs with the statement in New Zealand’s First Written Submission, at paragraph 7.19 that "the safeguard provisions be interpreted strictly".

4. With regard to the appropriate standard of review, the EC considers that the role of the Panel is not to engage itself in a *de novo* exercise. Instead, what the EC expects from the Panel is that it make an objective assessment of the matter in accordance with Article 11 DSU.² In line with the Appellate Body’s recent interpretation of this provision, this would mean that the Panel’s review should be limited to an objective assessment of whether the USITC had considered all relevant facts in its possession or which it should have obtained in accordance with Article 4 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*), including an examination of each factor listed in Article 4.2(a), of whether the published report on the investigation contained adequate explanation of how the facts supported the determination made, and consequently of whether the

¹ Report by the Appellate Body on *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 14 December 1999, at paragraph 93 (hereinafter also *Argentina – Footwear*); Report by the Appellate Body on *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, 14 December 1999 at paragraph 86 (hereinafter also *Korea – Dairy Products*).

² Report by the Appellate Body on *EC Measures Concerning Meat and Meat Products (Hormones)*, AB-1997-4, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, at paragraph 117.

determination made was consistent with the US's obligations under the *Agreement on Safeguards* and the GATT 1994.³

5. Section II addresses the requests for preliminary rulings by the parties. Section III considers some of the claims submitted by Australia and New Zealand.

SECTION II -- REQUESTS FOR PRELIMINARY RULINGS

The Article 6.2 DSU standard for requests for the establishment of a panel

6. In its letter dated 5 May 2000 the US has requested the Panel to issue a preliminary ruling with regard to the requests for the establishment of a Panel by Australia and New Zealand, because these requests were in its view "insufficient as a matter of law" to satisfy the requirement of Article 6.2 DSU, given that the complaining parties failed to provide any indication of the legal basis for their claims. In particular, the US objects to the fact that neither Australia nor New Zealand in its request provides "any other information that would in itself further clarify exactly which of the obligations in [Articles 2, 3 and 4 of the *Agreement on Safeguards*]⁴] is alleged to be infringed."⁵

7. Article 6.2 DSU sets the standards for the request for the establishment of a panel. It provides, in the relevant part, that:

"The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

8. In *Korea - Dairy Products*,⁶ the Appellate Body has recently refined its previous findings on the exact requirements of Article 6.2 DSU. In *EC - Bananas*, in fact, it had held that it was sufficient for the complainants "to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements".⁷ On that occasion the Appellate Body had also specified that the panel request needs to be "sufficiently precise" for two reasons: because it forms the basis for the terms of reference of the panel, and because "it informs the defending party and the third parties of the legal basis of the complaint".⁸

³ Report by the Appellate Body on *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 14 December 1999, at paragraph 121. Report by the Panel on *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, 21 June 1999, at paragraph 7.30 (hereinafter *Korea – Dairy Products*).

⁴ The US does not assert substantial prejudice to the US with respect to the claims of the complainants under Articles I, II and XIX of the GATT 1994 and Articles 5, 11 and 12 of the *Agreement on Safeguards*, as it was possible for the US to discern those subprovisions that would be implicated on the basis of the context of this proceeding (see US letter dated 5 May, at page 3, paragraph 6). Therefore, the EC's comments above relate only to the three provisions of the *Agreement on Safeguards* to which the US referred to (i.e. Articles 2, 3 and 4).

⁵ Letter by US dated 5 May 2000, at page 2, paragraph 1.

⁶ Report by the Appellate Body on *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, 14 December 1999.

⁷ Report by the Appellate Body on *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, AB-1997-3, WT/DS27/AB/R, 9 September 1997, at paragraph 141 (hereinafter *EC - Bananas*).

⁸ Id., at paragraph 142.

9. Revisiting the same issue in *Korea - Dairy Products*, the Appellate Body has clarified that the identification of the treaty provisions alleged to be violated is “always necessary” and constitutes a “minimum prerequisite” to present the legal basis of the complaint. If this might, in some cases, be enough to meet the standard of Article 6.2 DSU, in other cases, for instance when an article contains more than one distinct obligation, the mere listing of articles of an agreement is likely to be not sufficient to inform the defending party and any third parties of the legal basis of the complaint.⁹ In *Korea - Dairy Products*, these considerations led the Appellate Body to find that, although the articles listed contained each several distinct obligations and the request of the panel by the complainant should have been more detailed, the defendant had failed to demonstrate that the mere listing of the articles alleged to have been violated had prejudiced its ability to defend itself.

10. In their requests for the establishment of this Panel, both New Zealand and Australia have merely listed the relevant articles claimed to have been violated by the US, without taking into account the fact that each of the articles listed, in particular Articles 2, 3 and 4 of the *Agreement on Safeguards*, are all composed of many paragraphs, each of them setting out distinct obligations.

11. As it could only rely on the panel establishment requests, the EC has not been able to know the exact legal basis of Australia’s and New Zealand’s claims under Articles 2, 3 and 4 until it received their First Written Submissions. This has impaired the EC’s ability to exercise its procedural rights in this proceeding to the fullest extent.

12. The EC has had by definition no knowledge of the developments prior to the request for the establishment of the panel, in particular the conduct of the consultations between the main parties to the dispute, and of other specific circumstances of this case that suggest that the United States was informed of the exact legal basis of the complaint in keeping with Article 6.2 DSU. Those circumstances, therefore, cannot have improved at all the possibility for the EC to effectively protect its rights as third party. Given the Appellate Body’s finding in *EC - Bananas* that the objective of panel requests is to inform both the defending party *and third parties*,¹⁰ it is clear that that objective needs to be fulfilled for the benefit of *all participants* in dispute settlement proceedings.

Finally, with regard to the exact time when the US should have raised the issue, the EC notes that rule 13 of the working procedures for the Panel sets out that “[a] party shall submit any requests for preliminary rulings not later than in its first submission to the Panel.” Therefore, the US has been given the opportunity to submit preliminary rulings up until and including the day that it had to submit its First Written Submission. The EC notes that the US submitted its request before that date, i.e. on 5 May 2000.

Having submitted the above legal considerations with respect to Article 6.2 DSU, the EC leaves it to the Panel to come to an appropriate conclusion for the present case.

Exclusion of US Statute from Panel Terms of Reference

12. In Section B of its letter dated 5 May 2000 the US raises another issue on which it requests the Panel to rule as a preliminary matter. In particular, the US requests that the Panel rule that “the consistency of the US Statute with US obligations under the *Agreement on Safeguards* is not within the Panel’s terms of reference and is thus outside the scope of this dispute”.¹¹

13. Article 6.2 of the DSU requires identification of the measure alleged to violate the WTO. This requirement is concerned with *claims*. The Appellate Body has recalled how this obligation applies

⁹ Report by the Appellate Body on *Korea - Dairy Products*, at paragraphs 114 ff.

¹⁰ Report by the Appellate Body on *EC - Bananas*, at paragraph 141.

¹¹ Letter by US dated 5 May 2000, at page 2.

not only to individual implementing measures but also to normative measures.¹² Neither in New Zealand's nor in Australia's request for the establishment of the Panel does the EC read a claim made in respect of the US Safeguard Statute *as such*. Instead, both complainants limit their claims to the specific safeguard measure imposed on imports of lamb meat. Therefore, the EC agrees with the United States' view¹³ that the WTO-consistency of the US Safeguard Statute is not within the Panel's terms of reference. The EC submits however that this in no way prevents a complainant from referring to the text of the US Statute constituting the legal basis of the challenged measure in order to support a claim with respect to the latter. In the present case, therefore, the application of the "substantial cause" test by the USITC falls within the Panel's terms of reference, even though the US Safeguard Statute is not mentioned in the request for the establishment of the Panel.

14. New Zealand and Australia seem to agree with the EC on this matter. New Zealand in its reaction to the letter by the US dated 5 May 2000 first states that it "requests no finding from the Panel on the consistency of the United States' statute with the Safeguard Agreement."¹⁴ However, New Zealand considers that "the issue of consistency of the substantial cause test used by the USITC with the Safeguard Agreement falls squarely within the Panel's terms of reference."¹⁵ Australia too makes clear that it "is not asking the Panel to make a finding that the US legislation itself is inconsistent with the USA's obligations under the Safeguard Agreement, GATT 1994 and WTO Article XVI:4."¹⁶ Like New Zealand, Australia asks the Panel to find that *this measure* is inconsistent with the requirements of the Safeguard Agreement and GATT 1994 Articles II and XIX.

Business Confidential Information

15. Some of the data on which the USITC findings are based have been omitted from the public report which is available for scrutiny. In certain parts of the report where facts are discussed which may be relevant for determining whether a WTO consistent safeguard measure is taken (or not) 'stars' replace actual figures and data, making the USITC's findings -- which are based on these secret data -- unverifiable for the parties and third parties in this dispute as well as for the Panel.

16. Australia has asked the Panel to give a preliminary ruling on whether the US should produce certain confidential information omitted from the USITC Report.¹⁷ Australia argues that if the US is not prepared to provide such information, then the Panel should draw adverse inferences from the unwillingness of the US to co-operate in the provision of information. New Zealand, although not requesting the Panel to make a preliminary ruling, argues that "a Member cannot rely on undisclosed information to show that it is complying with its obligations under the Safeguard Agreement or under GATT 1994."¹⁸

17. The EC submits that a Member should, as a matter of legal principle, not be allowed to rely on undisclosed facts as a basis for taking a safeguard measure if those facts cannot be reviewed by the parties, third parties and a Panel within a dispute settlement procedure. The EC agrees with New Zealand's comment that Article 3.2 *Agreement on Safeguards* does not absolve a Member from disclosing information in the course of proceedings under the DSU when a safeguard measure that it

¹² Panel Report, *European Communities - Customs Classification of Certain Computer Equipment*, WT/DS62/R, WT/DS67/R, WT/DS68/R, 5 February 1998, at paragraph 65.

¹³ US' request for preliminary ruling, 5 May 2000, at paragraph 17.

¹⁴ New Zealand's reaction dated 17 May 2000, at paragraph 47.

¹⁵ Id., at paragraph 53.

¹⁶ Australia's reaction dated 17 May 2000, at paragraph 49.

¹⁷ Australia's First Written Submission, at paragraphs 15-18.

¹⁸ New Zealand's First Written Submission, at paragraphs 7.22 - 7.25.

has imposed is challenged by another Member.¹⁹ The US authorities are required to provide "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined" (Article 4.2(c) *Agreement on Safeguards*) and the United States cannot escape this multilateral obligation by referring to domestic law requirements.

18. The EC considers that a Panel is free, if it is convinced that the DSU rule on confidentiality is insufficient in the present case, to adopt Supplemental Working Procedures -- including on the basis of reasonable proposals made by the parties to this dispute. The EC considers that the adoption of such procedures, if needed, could be a means of balancing the US concerns relative to confidential information with the need to respect due process and the principle of equality of arms. The EC submits that if such Supplemental Working Procedures are not adopted by the Panel in the present case, the Panel should proceed with its examination on the basis of the record as it stands, which has the logical consequence that facts or other information which is not disclosed should be considered as "not examined" by domestic authorities.

19. Finally, the EC notes that the US has requested the aid of New Zealand and Australia in obtaining consent from the producers which have provided confidential information to the USITC.²⁰ Even if the complaining parties were to accept this request by the US, it is clear that they cannot subsequently be held responsible or otherwise be put in a more disadvantageous position if the consent of the relevant producers is not given.

SECTION III -- LEGAL CLAIMS AND ARGUMENTS

The US has not demonstrated "unforeseen developments"

20. The EC submits that it fully supports the reasoning set out by the Appellate Body in *Argentina - Footwear and Korea - Dairy Products* with regard to the "unforeseen developments" requirement contained in Article XIX:1(a) GATT 1994. As the Appellate Body stated, "the developments which led to [lamb meat] being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been 'unexpected'."²¹ Also, according to the Appellate Body "the first clause [in Article XIX:1(a) of the GATT 1994] 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."²²

21. Therefore, the USITC was under an obligation to *demonstrate* in its investigation 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...".²³ It is the view of the EC that such a *demonstration* requires a verifiable description, *i.e.* a determination in the record of the investigation, stating clearly which "unforeseen developments" had caused ("led to" in the words of the Appellate Body) an increase in imports of lamb meat, which in turn caused the

¹⁹ Id., at paragraph 7.23.

²⁰ US' request for preliminary ruling, 5 May 2000, paragraph 23.

²¹ Report by the Appellate Body on *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 14 December 1999, at paragraph 91; Report by the Appellate Body on *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, AB-1999-9, WT/DS98/AB/R, 14 December 1999, at paragraph 84.

²² Report by the Appellate Body on *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, AB-1999-9, WT/DS98/AB/R, 14 December 1999, at paragraph 85; Report by the Appellate Body on *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 14 December 1999, at paragraph 92 [emphasis added].

²³ Report by the Appellate Body on *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 14 December 1999, at paragraph 98 [emphasis added].

(alleged) threat of serious injury. The Appellate Body's finding makes clear that such a demonstration can not be made *ex post facto*, for example in a written submission in the framework of a dispute settlement procedure. In addition, Article 3.1 *Agreement on Safeguards* requires the competent authorities to set out in their report 'their findings and reasoned conclusions reached on all pertinent issues of fact and law'. The EC has found no specific reference in the USITC Report of a determination setting out which "unforeseen developments" caused the surge in imports of lamb meat.

22. Even if the Panel were to come to the conclusion that the USITC Report did contain such a determination, the developments cited by the US do not, in the EC's view, support such a determination: the US in its First Written Submission essentially points to an increase in imports in a different mix in the later period as compared to the beginning period,²⁴ resulting in a higher market share for importers. The EC submits that a surge in lamb meat imports (in whatever mix) cannot be the cause of an increase in lamb meat imports. The US authorities cannot comply with their obligations under Article XIX GATT 1994 by referring to the nature of the increased imports themselves. To conclude otherwise would lead to a circular reasoning.

23. The complaining parties have put forward arguments as to developments that took place that could have been foreseen in 1995, such as a long-term decline in domestic lamb production and the elimination of the subsidies under the Wool Act. As a Third Party to the present dispute the EC does not need to take a position on whether *these* developments could be regarded as "unforeseen" or "unexpected".

The US has incorrectly determined its "domestic industry"

24. The EC submits that the textual structure of Articles 2.1 and 4.1(c) of the *Agreement on Safeguards* makes clear that the relevant domestic industry is determined solely by the imported product at issue. Thus, in order to confirm which industry can be included in the injury analysis, the basic starting point is to determine the relevant "product" which is imported in increased quantities. The second step is to analyse, on the basis of this product, which industry produces either "like" products or "directly competitive" products. The text of the above-mentioned articles should be read strictly (as has been argued earlier by the EC) in the sense that *only those* producers can be considered as constituting the "domestic industry" if they produce either "like" or "directly competitive" products. Thus, if a producer does not produce either of those, it can *by definition* not be considered relevant for the "domestic industry".

25. In the present case, imports of New Zealand and Australian lamb meat have increased during the period of investigation. Therefore, the relevant question is what US "domestic industry" produces a product which is "like" or "directly competitive" with imported lamb meat. The USITC found that the "domestic product 'like' the imported lamb meat is domestically produced lamb meat."²⁵ However, when turning to examine the live-lamb industry, the USITC did not continue by determining whether that industry also produced "like" or "directly competitive products" but instead applied a test not found in the *Agreement on Safeguards*. It examined whether (1) there is a continuous line of production from the raw to the processed product, and (2) there is a substantial coincidence of economic interest between the growers and the processors.

26. The EC is unable to find such a test in the *Agreement on Safeguards* and considers that the wide interpretation of Article 4.1(c) as suggested by the US in paragraph 69 of its First Written Submission is not in line with the strict wording of the Agreement, which simply refers to 'the producers as a whole of the like or directly competitive products'. Therefore, the test to apply is whether a producer

²⁴ Between 1995 and 1997 imports of fresh or chilled lamb meat increased 101 per cent while imports of frozen lamb increased by 11 per cent. See paragraph 56 of the US First Written Submission.

²⁵ USITC Report, at I-12.

produces either a 'like' product or a 'directly competitive product'. The EC cannot but conclude that the USITC in its Report did not conduct this analysis in respect of the live-lamb industry.

The standard to be set for "threat of serious injury" should be high

27. The EC will not comment on the highly factual arguments which are put forward by the parties in the present dispute with respect to the USITC finding of "threat of injury" and the underlying analysis. However, the EC would like to use the opportunity presented by this Third Party Submission to make a general comment with regard to the standard that the Panel will set with respect to this issue.

28. The EC submits that, since a safeguard measure is an extraordinary measure which negatively interferes with the fair trade conducted by competitive exporters, any interpretation given by the Panel of the term "threat of serious injury" should reflect the highest standard. As the Appellate Body stated in *Argentina - Footwear*: "In perceiving and applying this object and purpose to the interpretation of this provision of the *WTO Agreement*, it is essential to keep in mind that a safeguard action is a "fair" trade remedy. The application of a safeguard measure does not depend upon "unfair" trade actions, as is the case with anti-dumping or countervailing measures. Thus, the import restrictions that are imposed on products of exporting Members when a safeguard action is taken must be seen, as we have said, as extraordinary. And, when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account."²⁶

29. The EC requests the Panel to consider that the standard which it will set in the present case will strongly influence the interpretation that future Panels will give to the notion of 'threat of serious injury', which is defined in the *Agreement on Safeguards* as 'serious injury that is clearly imminent'. The EC urges the Panel to decide on this matter in light of the above-mentioned statements by the Appellate Body.

USITC has incorrectly applied the "causation" test

30. The EC will limit its comments regarding causation to a concern it has with respect to the application by the USITC of Article 4.2(b) *Agreement on Safeguards*, which sets out requirements regarding causality. This provision reads as follows:

"The determination referred to in subparagraph (a) 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.

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."

31. In the present case the USITC has proceeded as follows: it has first determined that increased imports are "an important cause of the threat of serious injury" and second, it has determined whether increased imports are "a cause that is equal to or greater than any other cause". The EC is concerned that these determinations are not sufficient to show that the high standard set by Article 4.2(b) is met.

32. This provision requires that the threat of serious injury which the safeguard measure is to remedy is caused by increased imports *in isolation*. Although other causes may aggravate the threat of serious injury, if those other causes are subtracted, increased imports *by themselves* must still be shown to cause a threat of serious injury. Article 5.1 *Agreement on Safeguards* imposes that the

²⁶ Report by the Appellate Body on *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 14 December 1999, at paragraph 94.

safeguard measure is confined to prevent or remedy the serious injury caused by imports, to the exclusion of other factors contributing to the injury.

33. Indeed, in case of concurring causes of injury, the USITC is prevented from investigating the only important issue, *i.e.* whether increased imports are in isolation the cause of threat of serious injury. The USITC however investigates a different issue, *i.e.* whether there is a single cause "more important" than increased imports.

34. If increased imports are no more than a "substantial cause" of the threat of serious injury, even if more important than any other cause, there is at least a possibility that the threshold level of "causation" as required by the *Agreement on Safeguards* is not met. The legislative history cited by the US in its First Written Submission²⁷ does not eliminate the EC's concern, since an "important" cause of injury could still fall short of the threshold that increased imports *by themselves* cause serious injury or the threat thereof. Accordingly, the EC supports the argument set out by New Zealand²⁸ that the US has applied a *less stringent test* irrespective of whether, in the present case, the end result might be that no actual violation of Article 4.2(b) *Agreement on Safeguards* is found, an issue on which the EC does not take a position here.

The correct interpretation of the term "Necessary" in Article 5.1

35. The main parties to this dispute disagree with respect to the meaning of the term "necessary" in the first sentence of Article 5.1 *Agreement on Safeguards*. Article 5.1 provides that: "A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment."²⁹ The EC submits that from the wording of this provision it is clear that it is the *application* of the measure -- not the measure as such -- which should be kept within the limits of what is "necessary" to prevent or remedy serious injury and to facilitate adjustment.

36. The EC notes that the term "necessary" is used elsewhere in the WTO Agreement -- notably in provisions derogating from the liberalization principle embodied therein. Article XIX itself embodies virtually identical language and authorises safeguard measures "to the extent and for such time as may be necessary to prevent or remedy serious injury". Furthermore, Article XX of GATT 1994 allows measures to be taken if e.g. "(a) necessary to protect public morals", "(b) necessary to protect human, animal or plant life or health".

37. The EC submits that the purpose of the "necessity" requirement is to avoid that safeguard measures, which are recognized as "limitative and deprivational in character or tenor and impact upon Member Countries and their rights and privileges and upon private persons and their acts"³⁰ be abused. In the light of that characterisation, in *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, the Appellate Body drew the conclusion that an importing Member should not be allowed "an enhanced ability to restrict the entry into its territory of goods in the exportation of which no unfair trade such as dumping or fraud or deception of origin is alleged or proven"³¹ by taking safeguard action beyond the strict limits laid down in the relevant WTO provisions, if that action would result in "excluding more goods from the territory of the importing Member."³²

²⁷ US First Written Submission, at paragraph 121.

²⁸ New Zealand's First Written Submission, at paragraph 7.73.

²⁹ Emphasis added.

³⁰ See Appellate Body Report in *United States - Restriction on Imports of Cotton and Man-Made Fibre Underwear*, 10 February 1997, WT/DS24/AB/R, p. 9 (emphasis added).

³¹ Id. (emphasis added).

³² Id. (emphasis added).

38. The Appellate Body set out in *Korea - Dairy Products* that a Member must apply a measure which in its totality is "not more restrictive than necessary."³³ Therefore, if the measure that was applied were to surpass the threshold level of what was necessary, the Member would violate Article 5.1 *Agreement on Safeguards*. In other words, if there were a measure available which would be less restrictive and would at the same time accomplish the goal of preventing or remedying serious injury, then that measure should be applied. This, in fact, is nothing more and nothing less than a "least trade restrictive test", which the EC has no difficulty in reading in the text of the first sentence of Article 5.1 *Agreement on Safeguards*.

39. An important question with respect to the "necessity" test in Article 5.1 is whether the US should have justified, explained or otherwise demonstrated that the measure it applied "is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment."³⁴ The complainants make the argument that the US was under such obligation as a result of Article 3.1 *Agreement on Safeguards*, which sets out that "[t]he competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law".

40. The EC considers that, although nothing prevents the competent authorities from doing so in their investigation report, the last sentence in Article 3.1 does not oblige these authorities to publish in that report information explaining how the measure applied falls within the requirements set out in the first sentence of Article 5.1. The title of Article 3.1, as well as its content, concern solely the investigation, not the measure itself nor its application. Furthermore, as the Appellate Body made clear in *Korea - Dairy Products*, the first sentence of Article 5.1 does not impose an obligation to present a "clear justification" of compliance with it in the framework of that provision. The Appellate Body stated "we reverse the Panel's broad finding [...] 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."³⁵

41. How then, are Members (or a Panel in the framework of a dispute settlement procedure) able to verify on what grounds the Member taking the safeguard measure has based itself in order to comply with the "necessity" test? The EC considers that relevant elements to that effect could usefully be contained in the notification document submitted to the Committee on Safeguards in the framework of Article 12.2 *Agreement on Safeguards*. This provision requires the Member which proposes to apply a safeguard measure to provide the Committee (and thus all WTO Members) with 'all pertinent information', which includes -- but is not limited to -- information regarding the proposed measure, the proposed date of introduction, expected duration and timetable for progressive liberalization, so as to allow WTO Members to verify whether the proposed measure is in compliance with the *Agreement on Safeguards*. As the Panel in *Korea - Dairy Products* stated with respect to the object and purpose of Article 12:

"... the notification serves essentially a transparency and information purpose. In ensuring transparency, Article 12 allows Members through the Committee on Safeguards to review the measures. Another purpose of the notification of the finding of serious injury and of the proposed measure is to inform Members of the circumstances of the case and the conclusions of the investigation together with the importing country's particular intentions. This allows any interested Member to

³³ Report by the Appellate Body on *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, AB-1999-8, WT/DS98/AB/R, 14 December 1999, at paragraph 103.

³⁴ Report by the Appellate Body on *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, AB-1999-8, WT/DS98/AB/R, 14 December 1999, at paragraph 96.

³⁵ Id., at paragraph 103.

decide whether to request consultations with the importing country which may lead to modification of the proposed measure(s) and/or compensation."³⁶

42. Therefore, the content of the Article 12.2 notification should allow Members to review the measure and *all* pertinent information regarding its application, which can certainly include information enabling Members to review whether the "necessity" requirement contained in Article 5.1 has been complied with. During subsequent consultations, which take place *before* the measure is applied, the information set out by the Member proposing to apply the measure can be further discussed, including with regard to why the Member considers it is "commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment" and thus considers it complies with the first sentence of Article 5.1. As recognized by the Appellate Body in *Korea - Dairy Products*, "[p]roviding [all pertinent information] to the Committee on Safeguards does not place an excessive burden on a Member proposing to apply a safeguard measure as such information is, or should be, readily available to it."³⁷

Inappropriate exclusion of certain countries from the scope of the measure

43. The Appellate Body in its Report on *Argentina-Footwear*³⁸ concluded 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."

44. The EC submits that the *principle of parallelism* as set out by the Appellate Body in the *Footwear* case should apply to the present case as well. The USITC investigation found that serious injury was threatened by imports from *all* sources, including imports from countries with which the US had concluded free trade areas, including Canada, Mexico and Israel. The US then imposed its safeguard measure only on non-FTA countries, thus excluding Canada, Mexico and Israel.

45. The EC submits that, as a consequence of the above-mentioned reasoning of the Appellate Body, the US could either have found a threat of serious injury based on *all* imports or, in the alternative, exclude imports from those countries with which the US has constituted a free trade area from the scope of the investigation and find a threat based on the imports from all other countries. If a causal link is established, then the issue of the application of the safeguard measure consistent with the *principle of parallelism* is relevant³⁹. Under the first option, the safeguard measure will have to be applied also vis-à-vis the products originating from the other members of the free trade area. Under the second option, the products originating from the other members of the free trade area will not be subject to the measure.

46. The EC considers that a determination of threat of serious injury caused by imports from all sources, followed by an exclusion of certain countries from the safeguard measure based on the importance of their individual contribution has no basis in the *Agreement on Safeguards*. The only exception in this respect is with regard to developing country members, as set out in Article 9.1. No similar exception however can be found for countries which are members of a free trade area. The EC

³⁶ Report by the Panel on *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, 21 June 1999, at paragraph 7.126.

³⁷ Id., at paragraph 111.

³⁸ Report by the Appellate Body on *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 14 December 1999, at paragraph 114.

³⁹ See, confirming this approach, Report by the Appellate Body on *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 14 December 1999, at paragraph 111 ff.

submits that the Panel has no reason to take a different decision in the present case than the Appellate Body took in the *Argentina - Footwear* case.

US misinterprets the obligation contained in Article 8.1 *Agreement on Safeguards*

47. The US claims in its First Written Submission that "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."⁴⁰ The EC disagrees with such narrow reading of this provision. The obligation to provide an opportunity for prior consultations is contained in Article 12.3, which requires a Member proposing to apply a safeguard measure "to provide adequate opportunity for prior consultations ...". Article 8.1 obliges ("shall") a Member to endeavour to maintain a substantially equivalent level of concessions and other obligations [...] to exporting Members which would be affected by such a measure."

48. The EC submits that the term "endeavour" must have some meaning -- a meaning which goes further than the pure procedural requirement of offering consultations, which is already contained in Article 12.3. The New Shorter Oxford English Dictionary⁴¹ explains this term as "to exert oneself", "try, make an effort for a specified object, attempt strenuously", underlining that a Member is required in good faith to make an effort to maintain a substantially equivalent level of concessions and other obligations [...] to exporting Members which would be affected by such a measure. The EC considers that such an effort should be more than merely offering consultations, and thus should constitute a clear indication (which entails at least an initial offer) of how the Member proposing to take the measure would suggest to maintain a substantially equivalent level of concessions and other obligations [...] to exporting Members which would be affected by such a measure."

49. Finally, the EC does not consider that this interpretation of the requirement contained in Article 8.1 would, as the US suggests, in any way "encourage Members to find methods outside of the Safeguard Agreement to protect their injured domestic industries."⁴² Indeed, if their industries were seriously injured or were facing a threat of being seriously injured, an initial offer of how the Member proposing to take the measure would suggest to maintain a substantially equivalent level of concessions and other obligations to exporting Members which would be affected by such a measure would rather *strengthen* the multilateral support for the safeguard mechanism.

⁴⁰ US First Written Submission, at paragraph 262.

⁴¹ New Shorter Oxford English Dictionary (1993), at page 816.

⁴² US' First Written Submission, at paragraph 266.

ANNEX 4-3

ORAL STATEMENT OF CANADA

(25 May 2000)

INTRODUCTION

The Government of Canada appreciates this opportunity to provide its views to the Panel on certain issues arising in this dispute. Canada reserved its right to participate as third party in these proceedings because of its substantial interest in the matter, particularly with respect to the claim of the Complaining Parties regarding the exclusion of Canada from the application of the safeguard measure on lamb meat imposed by the United States.

We are fully supportive of the position of the United States on this particular issue. We maintain that the United States International Trade Commission (USITC) findings and recommendations regarding imports of lamb meat from Canada, as well as the subsequent US decision to exempt Canada from the safeguard measure on lamb meat, are consistent with US obligations under the WTO agreements, in particular Article 2 of the *Agreement on Safeguards*. We further maintain that the Complaining Parties' claim to the contrary is unfounded and as such should be rejected by the Panel.

ARGUMENT

The Complaining Parties raise legal claims under both GATT 1994 and the *Agreement on Safeguards* regarding the US decision to exclude imports from Canada from the application of the safeguard measure on lamb meat. The Complaining Parties assert that, by so doing, the United States breached its obligations under Article 2 of the *Agreement on Safeguards*. In addition, Australia claims a breach of Article 4 of the *Agreement on Safeguards* while New Zealand further alleges a breach of Article I of the GATT 1994.

Canada was exempted from the safeguard measure imposed by the United States, after the USITC found that imports of lamb meat from Canada and Mexico did not individually account for a substantial share of the total imports of lamb meat and were not contributing importantly to the threat of serious injury. This was done in accordance with US obligations under the *North American Free Trade Agreement* (NAFTA), more particularly Article 802.

For the reasons explained fully in our written submission, Canada asserts that neither the *Agreement on Safeguards* nor the GATT 1994 precludes members of a free trade area from excluding each other's imports from the application of their safeguard measures. We doubt that the Complaining Parties would dispute this assertion, given that such an exclusion is consistent with the provisions of the *Australia New Zealand Closer Economic Relations Agreement*.

To sustain their claim that the United States failed to apply its safeguard measure to all imports irrespective of source as required by Article 2.2 of the *Agreement on Safeguards*, Canada notes that the Complaining Parties rely on a specific passage from the recent decision of the Appellate Body in *Argentina - Safeguard Measures on Imports of Footwear (Argentina – Footwear)*.¹

¹ Report of the Appellate Body on *Argentina - Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted on 12 January 2000, at paragraphs 113-114.

As set out clearly in our written submission, Canada's view is that the facts in the *Argentina - Footwear* case are fundamentally different from those under consideration here. Allow us to take this opportunity to highlight the key differences.

In *Argentina - Footwear*, Argentina had investigated and found injury from all sources, including and in particular, MERCOSUR sources. However, Argentina did not conduct a separate analysis with respect to its MERCOSUR partners. As a result, pursuant to Article 2.2 of the *Agreement on Safeguards*, the Appellate Body found that, "on the basis of this investigation in this case"², Argentina had to apply its safeguard measure to imports from all sources, including those from MERCOSUR. In contrast, in the present case, the United States found, on the basis of a separate analysis, that Canadian imports were negligible and, therefore, did not account for the threat of serious injury. Accordingly, Canada submits that it is fully consistent with Article 2.2 of the *Agreement on Safeguards*, interpreted in light of Article XXIV of the GATT 1994 and the decision in *Argentina - Footwear*, for the United States to exclude Canadian imports from the application of its safeguard measure on lamb meat.

Finally, we noted that the EC, in its third party submission, asserts that the *principle of parallelism* - a legal test proposed by the EC in another dispute - should apply to the present case. The EC maintains that the Appellate Body confirmed this so called *principle* in its *Argentina - Footwear* Report. However, it is clear that the Appellate Body's legal conclusions regarding this issue are directly linked to the particular facts of the *Argentina - Footwear* case, and therefore cannot be the basis of such confirmation.

CONCLUSION

Accordingly, we respectfully submit to the Panel that the USITC findings and recommendations regarding imports of lamb meat from Canada, as well as the subsequent US decision to exempt Canada from the safeguard measure on lamb meat, are fully consistent with the WTO obligations of the United States.

² Report of the Appellate Body on *Argentina - Footwear*, *supra*, at paragraph 112.

ANNEX 4-4

ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

(25 May 2000)

Mr. Chairman, distinguished Members of the Panel,

Thank you for providing the European Communities [EC] with a chance to present its views in this proceeding today.

1. This case provides an opportunity to draw the appropriate consequences from the Appellate Body's broad statement that

"[I]t is essential to keep in mind that a safeguard action is a "fair" trade remedy. The application of a safeguard measure does not depend upon "unfair" trade actions, as is the case with anti-dumping or countervailing measures. Thus, the import restrictions that are imposed on products of exporting Members when a safeguard action is taken must be seen (...) as *extraordinary*. And, *when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account.*"¹

2. This case raises several systemic issues relating to the interpretation of the Agreement on Safeguards as well as of the WTO Agreement's annexes at large. The EC has addressed the most important ones its Third Party Submission and refers the Panel to its argumentation therein. The EC further regrets that, after having its deadline for commenting on the 80 page US First Written Submission curtailed from 7 to 4 days given the additional unexpected and extremely late change in the Panel's schedule, it is not in a position to elaborate further before you today.

3. There is, however, one aspect on which the EC would like to comment today, in view of Canada's Third Party Submission. In its submission Canada first argues that

"the *Agreement on Safeguards*, read in conjunction with the other relevant WTO provisions, leaves open the possibility that, as the United States has done in this case pursuant to Article 802 of the NAFTA, members of an FTA may exclude other members from the application of a safeguard measure."²

The "other relevant WTO provisions" to which Canada refers are Articles XIX and XXIV:8 of GATT 1994.

4. Canada further argues that the facts in *Argentina – Footwear* were different from those at issue in this dispute.³

5. The EC strongly disagrees with both points. The EC would like to recall that in *Argentina - Footwear* the Appellate Body found that

¹ Report by the Appellate Body on *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 14 December 1999, at paragraph 76 (emphasis added).

² Canada's First Written Submission, paragraph 14.

³ Canada's First Written Submission, paragraph 17.

“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.”⁴

6. The EC submits that the *principle of parallelism* as set out by the Appellate Body in the *Footwear* case stands and applies in this case too, irrespective of the question as to the relationship between the Agreement on Safeguards and GATT Articles XIX and XXIV. In making the above finding the Appellate Body also made clear that the issue of the relationship between the Agreement on Safeguards and GATT 1994 is a separate one which it considered was not necessary to address in that case. To recall, the Appellate Body found that

“we also are not persuaded that an analysis of Article XXIV of the GATT 1994 was relevant to the specific issue that was before the Panel. This issue, as the Panel itself observed, is whether Argentina, *after including imports from all sources in its investigation of “increased imports”* of footwear products into its territory and the consequent effects of such imports on its domestic footwear industry, *was justified in excluding other MERCOSUR member States from the application of the safeguard measures.*”⁵

7. Contrary to Canada’s assertion the facts of this case are strikingly similar to the ones at issue in *Argentina – Footwear*, on the basis of which the Appellate Body ruled. In fact, the USITC investigation was based on imports from *all* sources,⁶ including imports from countries with which the US had concluded free trade agreements, like Canada, Mexico and Israel. The US then imposed its safeguard measure only on non-FTA countries, thus excluding Canada, Mexico and Israel.

8. Canada suggests that this case is different from the one reviewed in *Argentina – Footwear* because the USITC made a separate analysis with respect to its FTA partners, and notably “found, on the basis of the investigations, that Canadian imports were *negligible* and, *therefore*, did not account for the threat of serious injury.”⁷

9. Whether imports from FTA partners accounted for a larger or a smaller share of total imports is not a relevant fact which can distinguish this case from the factual and the legal arguments set forth in *Argentina – Footwear*.

10. In the first place, the Argentine authorities did not exclude imports from MERCOSUR from the safeguard measure on the basis of their relative importance, they did not even weigh that factor to make their decision. They simply spared MERCOSUR imports from the measure after including imports from all sources in their investigation of “increased imports”.

11. Likewise, the USITC investigated imports from all sources and then excluded FTA partners imports from its measure. If imports from FTA countries were considered not to threaten serious injury, it was only because the USITC applied the WTO-inconsistent “substantial cause” test, on which the EC has already commented in its Third Party Submission.

⁴ Report by the Appellate Body on *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 14 December 1999, at paragraph 114 (emphasis added).

⁵ Report by the Appellate Body on *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 14 December 1999, at paragraph 109 (emphasis added).

⁶ See USITC Report, at page I-15 (last paragraph) and USITC Report, Table 7, at page II-21. The figures on which the ‘increased imports’ finding on page 15 is based are the ‘total US imports’ in Table 7.

⁷ Canada’s First Written Submission, paragraph 17 (emphasis added).

12. In any event, even if imports from MERCOSUR had been more than “negligible”, this fact was given no relevance by the Appellate Body in its finding.

13. The only relevant factor is whether the investigating authority concluded that the requirements for the imposition of a measure are met by investigating and taking into account the effect of *inter alia* imports from countries with which it has a FTA.

14. In view of the foregoing, Canada’s arguments can in no way support the USITC’s omission of imports from FTA partners from the scope of its measure. Accordingly, the EC confirms the position expressed in its Third Party Submission and submits that the US measure is not consistent with WTO law.

15. Mr. Chairman, distinguished Members of the Panel, this concludes the EC’s intervention. The EC will be happy to reply in writing to any further questions that may be addressed to it.

Thank you for your attention.

ANNEX 5-1

(WT/DS177/4)

UNITED STATES – SAFEGUARD MEASURE ON IMPORTS OF FRESH, CHILLED OR FROZEN LAMB FROM NEW ZEALAND

Request for the Establishment of a Panel by New Zealand

The following communication, dated 14 October 1999, from the Permanent Mission of New Zealand to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

My authorities have asked me to submit the following request on behalf of New Zealand for consideration at the next meeting of the Dispute Settlement Body.

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” by the President of the United States of America, published in the Federal Register Vol. 64, No. 131, pp. 37389 to 37392 on 9 July 1999 and the Federal Register Vol. 64, No. 132, pp. 37393 to 37394 on 12 July 1999 respectively, the United States of America imposed a definitive safeguard measure in the form of a tariff-rate quota on imports of fresh, chilled, or frozen lamb meat⁸ effective as of 22 July 1999.⁹

New Zealand considers that this measure is inconsistent with the obligations of the United States of America under the following provisions:

- (i) Articles 2, 3, 4, 5, 11 and 12 of the Agreement on Safeguards; and
- (ii) Articles I, II and XIX of the GATT 1994.

In a communication dated 16 July 1999 (as circulated in WT/DS177/1), the Government of New Zealand requested consultations with the Government of the United States of America pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 14 of the Agreement on Safeguards and Article XXII:1 of the GATT 1994 with regard to the safeguard measure imposed by the United States of America on imports of lamb meat. Consultations were held on 26 August 1999, but did not result in a resolution of the dispute.

Accordingly, New Zealand requests the establishment of a panel pursuant to Article 6 of the DSU and Article 14 of the Agreement on Safeguards to examine the measure in question, with the standard terms of reference as set out in Article 7 of the DSU.

⁸ As 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 Harmonised Tariff Schedule of the United States.

⁹ Some of this information has also been contained in the United States Article 12.1(c) Notification to the Committee on Safeguards (G/SG/N/10/USA/3, G/SG/N/10/USA/3/Suppl.1, G/SG/N/11/USA/3 and G/SG/N/11/USA/3/Suppl.1).

WT/DS177/R

WT/DS178/R

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As indicated above, New Zealand asks that this request for the establishment of a panel be considered at the next meeting of the Dispute Settlement Body scheduled for 27 October 1999.

ANNEX 5-2

(WT/DS178/5)

UNITED STATES – SAFEGUARD MEASURE ON IMPORTS OF LAMB MEAT FROM AUSTRALIA

Request for the Establishment of a Panel by Australia

The following communication, dated 14 October 1999, from the Permanent Mission of Australia, to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

My authorities have instructed me to request the establishment of a panel pursuant to Article XXIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), Articles 4 and 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and Article 14 of the Agreement on Safeguards, with regard to the definitive safeguard measure imposed by the United States of America (USA) on imports of lamb meat.¹⁰ ¹¹

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" by the President of the United States of America, published in the Federal Register Vol. 64, No. 131, pp. 37389-37392 on 9 July 1999 and the Federal Register Vol. 64, No. 132, pp. 37393-37394 on 12 July 1999 respectively, the United States of America introduced a definitive safeguard measure in the form of a tariff-rate quota on imports of lamb meat effective as of 22 July 1999.¹²

On 23 July 1999 Australia requested consultations with the USA with a view to reaching a mutually satisfactory solution. The request was circulated in Document WT/DS178/1 (and Corr.1) dated 29 July 1999. Such consultations, which were held on 26 August 1999 in Geneva, did not lead to a satisfactory resolution of the matter.

Australia considers that the measure, and associated actions and decisions taken by the USA, are inconsistent with the obligations of the USA under the Agreement on Safeguards and GATT 1994, in particular:

- (b) Articles 2, 3, 4, 5, 6, 11, and 12 of the Agreement on Safeguards, and
- (c) Articles I, II, and XIX of GATT 1994.

¹⁰ G/SG/N/10/USA/3-G/SG/N/11/USA/3, and G/SG/N/10/USA/3/Suppl.1-G/SG/N/11/USA/3/Suppl.1.

¹¹ Covering fresh, chilled, or frozen 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.

¹² Subsequently modified by the "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.

Australia requests that the panel to examine the matter be established with the standard terms of reference.

Australia asks that this request be placed on the agenda for the meeting of the Dispute Settlement Body to be held on 27 October 1999.
